STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nanci Norris-Pryzdia,

Petitioner,

14IWCC0319

vs. NO: 11 WC 07569

The DeLong Co., 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 medical expenses, prospective medical care, temporary total disability benefits, and penalties under Section 19(l) of the Act, 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 agrees with the Arbitrator's factual summary and ultimate findings and awards; however, the Commission supplements the Decision in order to specifically address when entitlement to the penalty award began.

The Commission notes that during his September 19, 2012 evidence deposition, Respondent's Section 12 examiner, Dr. Kevin Tu, initially opined that Petitioner's need for total knee replacement surgery "was because of the degenerative changes in her medial compartment. So if we divide the knee up into three compartments, the anterio is the front of the knee where the patellofemoral compartment is. It's essentially underneath the knee cap. The medial compartment is with the inner portion of the knees, touch each other, and then the latter portion is the outside portion of the knee, and the weightbearing area of the knee is the medial, or weightbearing areas are the medial and lateral parts of the knee joint. And I felt that she, when she fell, she did aggravate the arthritis in front of her knees at the anterior compartment, but the reason why she needed the knee replacements was because of the progression of the arthritic changes in her medial compartment, and that thought progression, or those changes that progressed were just a natural history for the pre-existing degenerative changes in her knee."

(RX1-pgs.7-8) However, on cross-examination, Dr. Tu acknowledged that the August 17, 2009 fall could possibly be a factor in Petitioner's need for total knee replacement surgery. (RX1-pgs.30-31) At that point, Respondent was on notice Dr. Tu's original causation opinion regarding Petitioner's need for total knee replacement surgery had changed and linked Petitioner's need for the total knee replacement surgery to the August 17, 2009 fall.

Section 19(l) of the Act states, in pertinent part, that if an employer or its insurance carrier "fail, neglect, refuse, or unreasonably delay" the payment of benefits under Sections 8(a) and 8(b) "without good and just cause," then the claimant shall be entitled to additional compensation in the sum of $30 per day "***for each day that the benefits*** under Section 8(a) or Section 8(b) ***have been so withheld or refused***, not to exceed $10,000." 820 ILCS 305/19(l) (2007) (emphasis added). The court in *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶20, explained that the standard for determining whether an employer has good and just cause for a delay in payment is the reasonableness of the delay. The Commission finds that Respondent's continued denial of the requested total knee replacement surgery based on Dr. Tu's original causation opinion and decision to ignore Dr. Tu's acknowledgement of the link between Petitioner's need for total knee replacement surgery and the work accident unreasonable. Respondent did not provide a good and just reason for its continued denial of the surgery once Dr. Tu acknowledged the link between Petitioner's need for additional surgery and the August 17, 2009 fall. Furthermore, the Commission finds that while Dr. Tu made this acknowledgement during his September 19, 2012 evidence deposition, Respondent has withheld authorization for the total knee replacement surgery since it was first ordered by Dr. Robert Daley on March 24, 2011. (PX5)

Section 19(l) plainly states that a penalty of $30 a day shall be assessed for "each day that the benefits...have been withheld or refused." 820 ILCS 305/19(l) (2007). Respondent started refusing authorization for the total knee replacement surgery on March 24, 2011. The Commission finds that Respondent refused and withheld the required treatment from March 24, 2011 through July 23, 2013 (date of hearing), totaling 853 days. (853 x $30=$25,590.00) However, Section 19(l) only allows penalties under this section up to $10,000.00. Therefore, the Commission finds that Petitioner is entitled to penalties under Section 19(l) totaling $10,000.00.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 29, 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 $446.36 per week for a period of 45-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,497.36 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties of $10,000.00, as provided in Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and provide for prospective and ancillary medical care as prescribed by Dr. Robert Daley.

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 $30,400.00. 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: MAY 0 1 2014
MJB/ell
o-04/08/14
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0319

NORRIS-PRYZDIA, NANCI Case# **11WC007569**

Employee/Petitioner

THE DELONG CO INC

Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0140 CORTI ALEKSY & CASTANEDA PC
RICHARD E ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

0332 LIVINGSTONE MUELLER ET AL
D SCOTT MURPHY
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] 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

NANCI NORRIS-PRYZDIA
Employee/Petitioner

v.

THE DELONG CO. INC.
Employer/Respondent

Case # **11** WC **07569**

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 **George Andros**, Arbitrator of the Commission, in the city of **New Lenox**, on **July 23, 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 [ ] TTD
L. [ ] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Prospective medical treatment**

FINDINGS

On **8/17/2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $34,816.08; the average weekly wage was $669.54.

On the date of accident, Petitioner was 45 years of age, ***single*** with 0 dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $1,530.37 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $1,530.37.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $446.36/week for 45 $^4/_7$ weeks, commencing 3/9/2010 to 3/21/2010 and 5/4/2010 to 5/16/2010 and 11/2/2011 to 8/20/2012, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $1,497.36, as provided in Section 8(a) of the Act.

Respondent shall pay to Petitioner penalties of $0, as provided in Section 16 of the Act; $0, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

Respondent shall authorize and provide for prospective & ancillary medical care as prescribed by Robert Daley, M.D.

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

August 14th, 2013
Date

AUG 29 2013

STATEMENT OF FACTS 11 WC 07569

Petitioner, Nanci Norris-Pryzdia, was employed by Respondent, The DeLong Company, as a grain weigher and tester. Her duties included weighing the incoming trucks loaded with grain, using a joystick to remove samples of the grain from each load, testing the samples, then carrying the tested materials to the dock in five-gallon containers.

The parties stipulated that Claimant sustained an accidental injury on August 17, 2009: as Petitioner approached the staircase leading to the employee entrance, she saw that the lower steps were covered in water because of prior rain; therefore, Ms. Norris-Pryzdia had to try to jump over the water area to reach the first dry step. As she jumped, she tripped over a piece of exposed metal extending from the stair. Claimant landed directly on both knees then fell backwards, injuring both knees, her neck and her back. Approximately a week later, she was evaluated by her family physician, Dr. Manoogian, who detailed the history of injury and complaints of injuries to both knees as well as headaches. Following his examination, the doctor referred her to an orthopedic specialist, Dr. Robert Atkenson.

The initial consultation with Dr. Atkenson took place on August 27, 2009. The notes from that visit reflect a history of injury consistent with Petitioner's testimony regarding the stipulated accident. Examination showed profound bilateral patellofemoral crepitation, grinding test was four plus bilaterally, superficial partial thickness abrasion was present, as well as prepatellar effusion. X-rays were performed and Dr. Atkenson determined that Claimant should attend physical therapy and start taking Glucosamine. In the interim, she could continue to work.

Therapy was commenced at ATI on August 31, 2009 and continued for several weeks. Claimant then followed up with Dr. Atkenson on September 28, 2009. She reported that the therapy was not helping and her bilateral anterior and posterior knee pain persisted. The doctor recommended Supartz injections but maintained her full duty work status. Thereafter the doctor performed a series of five Supartz injections, one per week starting on October 1, 2009 and ending with the fifth injection on October 29, 2009. When Petitioner returned to see Dr. Atkenson on November 19, 2009, she reported that her pain persisted. The doctor advised her to use Voltaren gel, commence a weight reduction program and to follow up with him.

At the December 21, 2009 appointment, when Ms. Norris-Pryzdia advised that she still had consistent pain, Dr. Atkenson concluded that an arthroscopic procedure of the left knee would be appropriate. Prior to the commencement of that surgical intervention, Claimant was sent by Respondent to Dr. Kevin Tu for a section 12 exam examination which occurred on January 28, 2010. In his report of that date the doctor determined that the work injury of August 17 aggravated a preexisting condition and that it may also have caused a new chondral injury to the patellofemoral joint compartment which he concluded was responsible for her current symptoms. He noted that she had failed conservative treatment and determined that a left knee arthroscopy with chondroplasty of the patellofemoral joint compartment would be reasonable. He opined that her prognosis was guarded but she should receive the surgical intervention.

On March 9, 2010, Ms. Norris-Pryzdia underwent an arthroscopy of the left knee with extensive debridement. The postoperative diagnosis was osteoarthritis, patellofemoral and medial compartment arthritis with contusion of the left knee. Petitioner followed up with Dr. Atkenson a week later. On exam, the doctor noted an absence of crepitation but a small amount of effusion; he ordered a course of physical therapy and released her to return to work as of March 22, 2010.

Claimant returned to her pre-injury job on March 22, 2010, and attended the recommended therapy at ATI which ended on April 12, 2010. On that date she saw Dr. Atkenson in follow up and he determined that the progress made on the left knee was acceptable; with respect to her right knee, she had prominent crepitation and the doctor concluded that arthroscopic repair was necessary. Claimant continued working then underwent the right knee arthroscopy on May 4, 2010, with the doctor performing extensive debridement and abrasion of arthroplasty in areas of exposed subchondral bone. One week later, she returned to see the physician for postoperative suture removal. Dr. Atkenson determined that she had progressed enough to return to work while undergoing physical therapy. This therapy commenced on May 11, 2010 and continued through July 1, 2010. Claimant returned to work on May 17, 2010.

Ms. Norris-Pryzdia saw Dr. Manoogian on December 10, 2010 in order to get a prescription for pain medication. As she was still in pain, the doctor directed that she seek a second opinion. As such, Claimant consulted with Dr. Robert Daley from Hinsdale Orthopaedics on February 10, 2011. The notes from that visit include a consistent history of injury, and reflect that she had had prior discomfort occasionally in her knees, but she had never experienced anything as severe as she was experiencing at that juncture. After an exam, he discerned that Ms. Norris-Pryzdia might be a candidate for a patellofemoral replacement or total knee replacement, but he wanted to review her operative photos from the prior arthroscopies before making a definitive treatment plan. Dr. Daley concluded that her current condition of ill-being was related to the fall at work. Also, since she continued to complain of neck and back pain, he referred her to his colleague in the same practice, Dr. Marie Kirincic.

Dr. Kirincic's involvement commenced on February 18, 2011. Claimant described her current condition of ill-being as it related to her back and neck both prior to the stipulated injury as well as the post-injury discomfort which she attributed to her limping. The doctor reviewed the MRIs and noted degenerative arthritis of the lumbosacral spine most pronounced at L4-5, with small to moderate left paracentral L5-S1 disc herniation with absence of significant central spinal stenosis. X-rays were taken of the cervical spine which showed loss of cervical lordosis, slight cervicothoracolumbar curvature. The lumbar spine showed degenerative changes, especially at L4 through S1 with facet arthropathy distally but no marked spondylolisthesis. Dr. Kirincic's diagnosis was diffused myofascial pain, altered gait due to knee surgery, degenerative disc disease at L4 through S1 and a small left L5-S1 herniated disc as well as possible fibromyalgia. The doctor directed that Petitioner obtain a rheumatoid blood panel, prescribed Cymbalta, Mobic and a TENS unit, and ordered physical therapy as well as trigger point injections. Claimant was given a trigger point injection in the bilateral piriformis and gluteals that day.

Thereafter, Petitioner returned to see Dr. Daley but was interviewed by his physician assistant, Nathan Hawkins. The operative video was reviewed and the conclusion was that she should undergo an MRI, but she did not appear to be a candidate for a patellofemoral replacement.

On March 11, 2011, Ms. Norris-Pryzdia underwent an MRI of the right knee; it revealed severe patellofemoral chondromalacia involving both patellar facets and the medial and lateral femoral trochlea to a lesser degree with subtle subchondral osseous reaction, moderate lateral tibial plateau fissuring without significant osseous reaction, mild medial femoral condylar chondral fissuring, but no ligament tears were noted.

Claimant saw Dr. Daley to review the MRI on March 24, 2011. The doctor's diagnosis was severe bilateral knee chondral damage following a work injury with continued pain and discomfort. It was his opinion that she needed total knee replacement.

On May 12, 2011, Petitioner attended a second §12 examination with Dr. Kevin Tu. In his report, the doctor notes that Claimant continued to have persistent pain in both her knees. The doctor's examination indicated that she presented with mild patellar femoral irritability with patellofemoral crepitation present in the left. In the right knee there was medial joint line tenderness and lateral joint line tenderness without effusion. He then went on to review all of the medical records. The doctor concluded that there was an aggravation of the preexisting patellofemoral arthritis but she was at maximum medical improvement and the need for the bilateral total knee arthroplasties was secondary to the natural progression of the degenerative changes in her medial compartment. He did add, however, that a fall to the anterior aspect of the knee could aggravate arthritic changes in the patellofemoral condyle compartment, but felt it was unlikely to aggravate preexisting degenerative changes in the weight bearing zones of the medial femoral condyle.

Following this visit with Dr. Tu, Ms. Norris-Pryzdia returned to see Dr. Daley. The doctor reiterated that she had failed conservative treatment and needed total knee replacement. He indicated he would attempt to obtain approval from workers' compensation and directed that she remain off work. Thereafter, Petitioner followed up with Dr. Daley from time to time and he continued to maintain his surgical recommendation as well as her off work status. The depositions of Dr. Daley as well as Dr. Tu were offered into evidence by the respective parties and studied and taken into consideration in this Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WITH REGARD TO THE ISSUE OF WHETHER THE PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Supreme Court has determined that even though a workers' compensation claimant may have a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193 (2003). A chain of events showing a prior condition of good health, followed by a sudden change after a work injury, can establish causation. Illinois Power Co. v. Industrial Commission, 176 Ill.App.3d 317 (4th Dist. 1988). "The rationale justifying the use of the 'chain of events' analysis to demonstrate the existence of an injury would also support its use to demonstrate an aggravation of a preexisting injury." Price v. Industrial Commission, 278 Ill.App.3d 848,854 (4th Dist. 1996). Having reviewed the medical records and deposition testimony, as well as Ms. Norris-Pryzdia's very credible and forthright testimony regarding her persistent symptoms, the Arbitrator concludes that the nature of the accident as stipulated to by the parties, as well as the preponderance of the medical evidence including the records of Dr. Atkenson and Dr. Daley, as well as Dr. Daley's testimony on deposition and the deposition of Dr. Tu, establish a direct causal connection between Petitioner's undisputed accident and her current condition of ill-being which Dr. Daley has concluded requires ongoing medical treatment.

Thus, the Arbitrator based upon the totality of the evidence finds by a preponderance of that evidence the accident in the case at bar is causally connected as a matter of fact and as a matter of law to her current condition of ill being as alleged herein.

WITH REGARD TO THE ISSUE OF WHETHER THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY AND WHETHER THOSE CHARGES HAVE BEEN PAID, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner commenced treatment with Dr. Atkenson for her knee injuries shortly after the date of injury and those medical expenses apparently have been borne by Respondent.

The Arbitrator has determined that the medical expenses contained in Petitioner's exhibit for the treatment rendered by Dr. Manoogian on August 25, 2009 as well as the treatment provided by Dr. Daley from February 10, 2011 through December 28, 2012 are reasonable and necessary under section 8 as a matter of fact and as a matter of law.

The balances are shown by the exhibit offered by Petitioner total $1,497.36. The Arbitrator finds as a matter of fact and matter of law they are reasonable, necessary and related thus hereby orders the above amount to be paid to the Petitioner and his attorney.

WITH REGARD TO WHAT PERIODS OF TEMPORARY BENEFITS ARE IN DISPUTE AND ARE APPROPRIATE TO BE AWARDED, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner sustained lost time and received benefits commencing on March 9, 2010 through March 21, 2010 and then a second period of May 4, 2010 through May 16, 2010. These periods correspond to the periods of lost time following the surgical interventions of Dr. Atkenson when he performed the arthroscopic procedures, first on the left knee and then the right knee. Respondent has acknowledged liability for and paid TTD benefits for these periods.

What is disputed is the lost time as of November 2, 2011, when Dr. Daley determined that she should remain off work pending surgical intervention for a total knee replacement. Ms. Norris-Pryzdia remained off work pursuant to Dr. Daley's directive until August 20, 2012, when she began a very sedentary job at the NICL Lab, where she worked for several months and then obtained a new position at her current employment, The Adventist Lab.

Having concluded that Petitioner's condition of ill-being remains causally connected to her undisputed accident and she requires the surgical intervention recommended by Dr. Daley, the Arbitrator concludes that Petitioner was temporarily totally disabled under the orders of Dr. Daley from November 2, 2011 through August 20, 2012. The medical records of Dr. Daley and his position that Claimant should not return to work remained the same up to his last visit with Petitioner, however Petitioner testified that she returned to work because she had been receiving no benefits.

Therefore, based upon the totality of the evidence and in particular, adoption of the opinions of Dr. Daley, the Arbitrator concludes as a matter of fact and of law that Petitioner in the case at bar is entitled to temporary total disability benefits from November 2, 2011 through August 20, 2012, a period of 41 $^{6}/_{7}$ weeks.

WITH REGARD TO THE ISSUE OF WHETHER PENALTIES OR FEES SHOULD BE IMPOSED UPON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Tu's testimony demonstrates that Dr. Tu did not have any real concerns about the treatment as directed by Dr. Daley; to wit: his report in fact acknowledged that the undisputed accident resulted in an aggravation. Respondent nonetheless failed to provide the authorization for the necessary treatment and refused to pay Temporary Total Disability benefits.

He who delays payment of workers' compensation benefits bears the burden of excusing the delay when a penalty for unreasonable and vexatious delay in payment is sought (City of Chicago v. Industrial Commission, 63 Ill.2d 99 (1976)), yet there was no evidence offered on behalf of Respondent as to why it failed to pay this compensation.

The Arbitrator finds as a matter of fact and of law that Respondent failed to establish good or just cause for its refusal to pay. See, McMahan v. Industrial Commission, 183 Ill.2d 499, 515 (1998) ("The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment 'without good and just cause.' If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.")

Therefore, the Arbitrator finds as a matter of fact and of law under section 19 that Petitioner is entitled to $30.00 per day for each day that she has not received this temporary total disability benefit. The Arbitrator concludes that failure to pay these benefits commencing on November 2, 2011 up to the date of hearing results in the maximum penalty payable in the amount of $10,000.00.

WITH REGARD TO THE ISSUE OF PENALTIES UNDER SECTION 19(k) AND ATTORNEY'S FEES PURSUANT TO SECTION 16, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

The Arbitrator is cognizant of the fact that the Appellate and Supreme Courts have determined that there is an elevated standard for the imposition of Section 19(k) penalties and attorney's fees under Section 16. Although the testimony of Dr. Tu seems to remove any doubt that Petitioner's condition of ill-being requires the surgical intervention as outlined by Dr. Daley and that it certainly is related to the accident event as testified to, the Arbitrator is reluctant to impose this more severe sanction on Respondent.

Therefore, as a matter of fact and as a conclusion of law penalties pursuant to Section 19(k) and attorney's fees pursuant to Section 16 are denied.

WITH REGARD TO THE ISSUE OF PROSPECTIVE MEDICAL, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator adopts the testimony of Dr. Daley, as well as his medical records, the diagnostic studies that have been performed, and his surgical recommendation as, by reasonable inference, acquiesced to by Dr. Tu, and the fact that Ms. Norris-Pryzdia suffers significant difficulties which will simply worsen in the absence of proceeding with the surgery, the Arbitrator finds as a matter of fact and as a matter of law Respondent shall authorize and pay for the prospective medical treatment plus ancillary care and maintenance recommended by Dr. Daley in his evidence deposition.

Therefore, the Arbitrator finds as a matter of fact and a conclusion of law that Respondent shall authorize and pay for treatment that Petitioner undergoes at the hands of Dr. Daley or any additional physician that she may be referred to by Dr. Daley. In addition thereto, her benefits and rights under both Section 8(a) and Section 8(b) shall commence upon the time that the doctor determines that she is unable to continue in her current work activity.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daiszenia J. Allotey (Williams),
Petitioner,

vs. NO: 06 WC 40169

14IWCC0320

Central Illinois Community Blood Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 8, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 0 1 2014

Daniel R. Donohoo

o-04/22/14
drd/wj
68

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALLOTEY (WILLIAMS) DAISZENIA J
Employee/Petitioner

Case# **06WC040169**
08WC033076

CENTRAL ILLINOIS COMMUNITY BLOOD CENTER
Employer/Respondent

14IWCC0320

On 3/8/2013, 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 0.12% 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:

0834 KANOSKI & ASSOCIATES
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
P O BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daiszenia J. Allotey (Williams)
Employee/Petitioner

v.

Central Illinois Community Blood Center
Employer/Respondent

Case # 06 WC 40169

Consolidated cases: 08 WC 33076

14IWCC0320

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 **Springfield**, on January 11, 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 **March 21, 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 **$27,310.40**; the average weekly wage was **$525.20**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **one** dependent child.

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

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

Respondent shall be given a credit for any medical bills it may have paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

Respondent shall be given a credit of **$5,652.42** 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, for a total credit of **$5,652.42.**

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $350.13/week for 15 1/7weeks, commencing 3/28/05 through 07/11/05, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services incurred by Petitioner with regard to her low back and mid-back complaints and treatment through July 11, 2005. Petitioner is not awarded any bills incurred by her in connection with the visit to Urgent Care on June 14, 2005. Respondent shall receive credit for any amounts paid by Respondent's sponsored health insurance and hold Petitioner harmless from any claims for reimbursement from said insurance as set forth in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $315.12/week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Nancy Lindsay
Signature of Arbitrator

3.5.13
Date

MAR 0 2013

This is one of two cases that were consolidated for purposes of arbitration; however, the parties requested that separate decisions be issued.

The Arbitrator finds:

Petitioner testified that on March 21, 2005, she was working as a phlebotomist for Respondent. Petitioner testified that she was assisting a patient into a recliner. In doing so Petitioner was bearing the greater part of her weight and felt a pop in her back. Petitioner testified that she experienced the onset of low and upper back and neck pain at that time. Petitioner testified she was seen by Dr. Bansal that same day.

According to Dr. Bansal's records of March 21, 2005, Petitioner was transferring a donor to a recliner chair when she felt a pull in her right lower lumbar region. Petitioner's complaints included pain when bending forward and lifting. Petitioner denied any radiating leg pain, numbness, or tingling. Dr. Bansal noted palpable right lumbar tenderness and pain with motion of her back. Straight leg raise testing was negative bilaterally. Deep tendon reflexes were 2+ for Achilles and patellar. Dr. Bansal diagnosed Petitioner with a lumbar strain and prescribed medication and work restrictions of no lifting over 20 pounds. Petitioner was told to return on March 25, 2005. (PX 6, p. 1; RX 1)

As instructed, Petitioner returned on March 25, 2005, reporting no improvement in her symptoms. Petitioner also reported considerable low back pain with some radiation of pain down her left leg to her knee. Bending forward or sitting for any period of time was still aggravating Petitioner's pain. Dr. Bansal again noted palpable lumbar tenderness and pain with motion. He continued her medications and her 20 pound lifting restriction but added that she should avoid frequent bending, squatting or kneeling and that she was to sit, stand or walk as tolerated. Petitioner was to return on April 5, 2005. (PX 6, p. 2; RX 1)

Petitioner testified that she provided these restrictions to her employer but no work was offered within those restrictions, and she began receiving worker's compensation benefits. Petitioner testified that she also began therapy at Progressive Wellness at Dr. Bansal's direction on March 28, 2005. (PX 6, p. 8)

When initially evaluated at Progressive Wellness Center on the 28th Petitioner provided a history of transferring a blood donor from a wheelchair to another chair when she twisted her low back and heard and felt a popping sensation. Petitioner's chief complaint was increased pain bilaterally in her low back with radiating symptoms into her right thigh. Petitioner denied any numbness or tingling but reported increasing difficulty with her ability to sleep and sit. Petitioner was currently sleeping on her side and only able to sit for an hour at a time. Petitioner reported full function prior to her accident. With regard to her job as a phlebotomist, Petitioner reported she engaged in moderate lifting. Petitioner was to be seen three times at which time additional recommendations from her treating physician would be elicited. (PX 6, pp. 9-10; RX 2)

Petitioner returned to Dr. Bansal on April 5, 2005, reporting she was doing better but still having pain from her lower back to mid back region. Petitioner also reported that she could sit and stand for longer periods of time and denied radiating pain, numbness, or tingling at this time. She continued to have palpable lumbar tenderness on examination and pain with movement. Dr. Bansal continued her

restrictions and medications. Dr. Bansal's diagnosis remained the same. Petitioner was to return on April 18, 2005. (PX 6, p. 3; RX 1)

Dr. Bansal re-examined Petitioner on April 18, 2005, with Petitioner reporting that overall she was improving, though she had localized pain at the L1/2 area on the left which seemed to tighten up and made it uncomfortable to sit or stand for long periods of time. Petitioner denied radiating pain down her legs or numbness or tingling. Petitioner's diagnosis remained the same. Dr. Bansal recommended trigger point injections over Petitioner's left latissimus dorsi area and they were performed during the visit. He modified her lifting restriction to 25 pounds but continued the rest of her restrictions. (PX 6, p. 4; RX 1)

Petitioner returned again to Dr. Bansal on April 29, 2005, as instructed, reporting continued low back pain that was radiating. She had not improved and was having difficulty sitting or standing. She had palpable thoracolumbar tenderness into her mid back and pain with movement of the back. Dr. Bansal recommended that she obtain a lumbar MRI and continued her work restrictions. (PX 6, p. 5; RX 2)

A lumbar MRI was performed on May 3, 2005, which showed moderately severe spinal stenosis at L4/5 secondary to a central subligamentous disc herniation as well as facet arthropathy, and a mild concentric disc bulging at L5/S1. (PX 6, p. 6)

After the MRI, Petitioner returned to see Dr. Bansal on May 6, 2005, reporting continued low back pain and pain radiating in to her right leg to the knee. She reported that it was uncomfortable to sit and stand for any period. Dr. Bansal noted palpable tenderness on examination and pain with movement of the back. Dr. Bansal's diagnosis was changed to an L5/X1 disc bulge. Due to her continued symptoms, Dr. Bansal referred Petitioner to Dr. Smucker. Dr. Bansal continued her work restrictions. (PX 6, p. 7; RX 1)

Throughout the foregoing time period Petitioner continued to participate in physical therapy at Progressive Wellness Center. When noted, Petitioner's effort was described as maximum and her compliance as full. (PX 6, pp. 80 – 96) Petitioner attended physical therapy on the following dates: March 28; March 30; March 31; April 4; April 6; April 7; April 11; April 13; April 14; April 18; April 20; April 22, April 25; April 27; and April 29, 2005. The only "Patient Daily Note" which contains any reference to Petitioner's neck or shoulder region is the one dated April 27, 2005, in which Petitioner reported that her neck and shoulder region and mid-back were sore from the new exercises. Overall Petitioner reported her low back was feeling fine. (PX 6, pp. 80-96)

Petitioner was initially examined by Dr. Smucker on May 9, 2005, reporting a history of injury while assisting in the transfer of a donor and feeling her back pop at that time. (PX 5, p. 51) Petitioner reported seeing Dr. Bansal that very day and noting a "re-exacerbation" of her symptoms four days later at which time she was rechecked and given work restrictions which could not be accommodated. Petitioner described her treatment with Dr. Bansal and noted that her symptoms had eased somewhat with therapy but her low back pain radiating into her thighs persisted. She reported that she had pain and tingling not only through her low back but also up through her thoracic back to her neck, shoulders and arms. She reported that the low back symptoms were the worst. Petitioner reported that sitting would exacerbate her symptoms the most, but that bending and standing were also uncomfortable. On examination, Dr. Smucker noted some tenderness throughout the thoracolumbar para-midline region bilaterally. He reviewed the MRI and diagnosed Petitioner with lumbar degenerative disc disease with large subligamentous L4/5 disc herniation and resultant stenosis at that level, low back and thigh pain secondary to those findings and thoracolumbar complaints probably related to those findings, combined with soft tissue/myofascial pain. Dr. Smucker prescribed medication and an epidural steroid injection in

Petitioner's lumbar spine. He placed her on restrictions of no lifting over 25 pounds, sit/stand option and avoiding twisting or bending at the waist. He also directed Petitioner to resume therapy. (PX 5, pp. 51-53)

Petitioner underwent an epidural steroid injection at the L5 level on May 27, 2005, as well as continuing therapy at Progressive Wellness. (PX 5, pp. 44-49; PX 6, pp. 68-79)

Petitioner followed up with Dr. Smucker on June 1, 2005. Petitioner had stopped taking the Skelaxin and Mobic because she developed hoarseness and a sore throat. The lumbar epidural injection had resolved most of the pain radiating down into her legs; although, she still experienced fleeting radiating pain on occasion. Petitioner's low back pain was better but still ongoing, as was her thoracic pain. On examination, Petitioner had a negative neural tension sign on the right, equivocal on the left. There was no tenderness in palpating her low back but there was tenderness when palpating the thoracic back region on the left side. Dr. Smucker recommended a second injection, ongoing therapy, and continued work restrictions. (PX 5, p. 45)

Petitioner underwent a second injection on June 1, 2005. (PX 5)

Petitioner testified that the upper back, neck and arm pain that she described to Dr. Smucker had been present since the date of her accident, though Dr. Bansal had focused his treatment entirely on her low back, which had initially been a greater source of pain.

Petitioner presented to Springfield Clinic's Prompt Care on June 14, 2005 complaining of some neck swelling which started earlier in the evening. Petitioner described the location of the swelling as just above the collarbone in the area of her sternocleidomastoid area. She denied any pain. Petitioner reported that her muscles felt like they were straining as though she was holding something heavy. Petitioner denied any difficulty swallowing or breathing. She denied any radiating arm pain, numbness or weakness. Petitioner did report being treated for an ongoing back problem over the last three months and that she was currently undergoing physical therapy. Physical examination of Petitioner's neck revealed normal range of motion of her cervical spine without any pain. The attending doctor noted no edema, redness, swelling, or signs of infection. Petitioner displayed normal range of motion of her cervical spine without any pain. (RX 3) Cervical x-rays revealed no fracture, dislocation, or other acute anomaly. There was evidence of mild degenerative cervical spondylosis particarly at the C5-6 level with vertebral interspace narrowing and uncovertebral hypertrophy. (RX 3, p. 6) Dr. Campbell's assessment was swelling to the anterior neck, "not really appreciated on my exam." Petitioner was advised to continue her other medications and use ice a couple of times per day to help with the swelling. She should follow up with her doctor if no better or return to Prompt Care, as needed. (RX 3)

Petitioner presented to physical therapy on June 15, 2005, reporting that she had to go to Urgent Care on the 14th due to sharp pain in her neck in between her shoulder blades. Petitioner also reported a major increase in swelling in her neck/shoulder region. Petitioner was instructed to call her doctor immediately. Petitioner tolerated her treatment well without increased complaints of pain. No traction or new exercises were added due to her neck symptoms. (PX 6, p. 69)

Petitioner returned to Dr. Smucker's office on June 17, 2005, in a visit described as "urgent." Petitioner was complaining of swelling and pain in her neck, shoulder girdle, and extending into the bilateral upper extremities with radiating parasthesia. She reported that her low back and leg symptoms had quieted down some. Though Dr. Smucker did not observe swelling he indicated that a therapist had called and

reported seeing swelling. He noted that cervicothoracic complaints had been present to various degrees since the reported injury and that her current symptoms suggested myofascial pain. Dr. Smucker noted that Petitioner's cervicothoracic complaints had been present to various degrees since the reported injury. The current intense pain Petitioner described was suggestive of cervicothoracic myofascial pain. He recommended an EMG/NCV to check for radiculopathy or neuropathy. He continued Petitioner's work restrictions, noting that Respondent had been unable to accommodate them so far. (PX 5, pp. 42-43)

Petitioner presented to physical therapy later in the day on the 17th. According to the daily note, Petitioner had just been seen by Dr. Smucker and was to undergo a test on her neck. Petitioner reported she had to leave early that day because she had an appointment scheduled with her primary care physician. Petitioner reported soreness n her low back. Petitioner did not complete all of her exercises due to her need to leave early. (PX 6, p. 68)

Petitioner underwent another therapy session on June 20, 2005. She described her low back pain as 1-2/10 and her upper back/shoulder pain as 4/10. Petitioner was still waiting for authorization to proceed with the EMG testing recommended by Dr. Smucker. (PX 6, p. 67)

Petitioner was seen at the Memorial Medical Center emergency room on June 21, 2005, reporting a history of a back injury on March 21, 2005. Petitioner had been evaluated by her family physician and Dr. Smucker and was initially started on Skelaxin and Mobic but was feeling "strange" and five days ago was switched to phenoprofen and amitryptiline. Petitioner reported persistent pain over her shoulder blades unrelieved by any medication. Petitioner described pain in her back and up to her neck, with swelling in her neck and pain across her shoulders and radiating into her left arm. (PX 7, pp. 7, 10) Petitioner was prescribed Decadron and Tramadol for pain. (PX 7, p. 8)

Petitioner testified at the Arbitration hearing that this was the same pain she had been experiencing since her work accident, though it had become more intense without any new accident or injury.

Petitioner underwent physical therapy from June 24, 2005 through July 7, 2005. During this time Petitioner repeatedly reported that the swelling she was experiencing in her neck was due to the steroids she had been taking. (PX 6, pp. 64, 62) As of July 7, 2005, the therapist noted that Petitioner was reporting 85% improvement in her low back pain overall. Petitioner continued to note severe pain in her upper back into her left upper extremity with numbness and tingling; however, she was improving. Petitioner was discharged to a home program for her back. The doctor was asked to advise if anything more was to be done for Petitioner's neck. (PX 6, pp. 58-59; PX 5, p. 39)

Petitioner testified that she was sent to Dr. Orth in Chicago by the worker's compensation insurance carrier for an examination on July 11, 2005. Petitioner testified that her TTD benefits ended as a result of that examination when Dr. Orth released her to work without restrictions. Petitioner testified that she did not return to work as Dr. Smucker still had prescribed work restrictions which her employer would not honor. Petitioner testified that her employer terminated her shortly after Dr. Orth's release.

In his report, Dr. Orth opined that Petitioner was at maximum medical improvement as a result of her low back injury but that she also needed additional work-up for her suprascapular complaints that were beyond his area of expertise. During his physical examination of Petitioner he did note swelling in the suprascapular area but he did not believe it was causally related to her 2003 work accident due to the lack of cervical complaints noted in her records early on. (RX 4, dep. ex.)

Petitioner returned to see Dr. Smucker on July 27, 2005, at which time the doctor noted that the EMG/NCV study had been denied by the insurance carrier. He further noted that the insurance company had obtained an IME that indicated that Petitioner could return to full duty work. Petitioner continued to complain of cervical and upper thoracic pain with pain and paresthesia radiation into the upper extremities, left greater than right. Examination revealed a diminished biceps reflex on the left. Dr. Smucker's impression was lumbar degenerative disc disease with lower extremity symptoms improved with two epidural steroid injections and cervicothoracic complaints with upper extremity paresthesia and diminished left biceps reflex, suggesting a C5 or C6 radiculopathy. He continued to recommend the EMG/NCV as well as a cervical MRI. He provided work restrictions of no lifting over 25 pounds and no overhead work. He also recommended physical therapy 3 times per week. (PX 5, p. 38)

Petitioner underwent a Physical Therapy Initial Evaluation on August 2, 2005. According to the history, Petitioner reported a March 21, 2005 accident when she was transferring a patient from one wheelchair to another and she felt a pop and severe pain in her low back. She was treated with physical therapy and her low back pain was steadily improving. The history then states,

> However, she reports that on 6/15, while standing, she noted a sharp pain in between her shoulders [sic] blades extending up into the back of her neck. She states that later her neck and shoulders became very swollen, leading her to seek treatment at Prompt Care.
> (PX 5, p. 34)

Petitioner reported that her neck pain had continued to worsen while her low back pain had improved. Petitioner's primary complaint was mid-back and neck pain extending up into the back of her head and throughout both arms. Petitioner also reported "stinging at right arm" and "tingling and burning" at her left hand, along with giving away. Petitioner's lower extremity pain had resolved but some low back pain spasms continued. Petitioner's cervical movements were described as "guarded." No edema or ecchymosis was visualized. Petitioner was to be seen two to three times per week for 3 -4 weeks, initially. (PX 5, p. 34-36)

An MRI of Petitioner's cervical spine was obtained on August 6, 2005, showing degenerative disc and endplate osteophytic changes on the right at C3/4 and C5/6 with right greater than left foraminal narrowing at those levels. An MRI of Petitioner's thoracic spine showed minimal bulges present in the mid thoracic spine at T2/3, 3/4 and 4/5 with no cord impingement. The radiologist concluded that the scan was "essentially unremarkable". (PX 5, pp. 29-30) Petitioner underwent EMG/NCV testing by Dr. Smucker on August 19, 2005 that showed a mild C6 radiculopathy and no evidence of any peripheral neuropathies. (PX 5, pp. 24-28)

Petitioner's Progress Note from Progressive Wellness Center dated August 24, 2005 stated Petitioner had given maximum effort and full compliance during the reporting period. Petitioner was not responding well to physical therapy at that time as Petitioner was noting increased pain in her cervical spine and low back which she rated a 6-7/10. Despite attempts with distraction and myofascial techniques, Petitioner was unable to tolerate the therapy. She was noted to be performing a pain-free exercise program. (PX 5, p. 23)

Petitioner returned to Dr. Smucker on August 26, 2005. He noted that Petitioner continued to complain of cervical and thoracic pain and pressure as well as paresthesia into both upper extremities. He noted she had work restrictions but had been terminated from her job. On physical examination, Dr. Smucker noted a decreased left biceps reflex. He noted that the cervical MRI had shown disc-osteophyte complexes at C3/4 and C5/6. He continued her work restrictions and recommended cervical epidural steroid injections. Petitioner was not taking any medications. (PX 5, p. 21)

Petitioner had a left C7/T1 epidural steroid injection on September 12, 2005. (PX 5, p. 19)

Petitioner's September 23, 2005 Progress Note from physical therapy indicated Petitioner was noting temporary improvement in her neck pain as a result of physical therapy. "Very minimal objective" improvement in cervical range of motion was noted. Petitioner was scheduled for another injection in the upcoming week. (PX 5, p. 18))

Dr. Smucker re-examined Petitioner on October 7, 2005. Dr. Smucker noted that Petitioner had experienced no improvement with the first injection so the second planned injection was cancelled. He further noted she had been set up for an appointment to see Dr. VanFleet. Physical therapy was to be continued. She was placed back on Tizanidine, which helps her sleep at night. Petitioner's ongoing complaints included pain in her neck and trapezius areas and into both arms to the fingers, especially the index and middle fingers of the hands. He noted that her symptoms were initially on the left side and were now on both sides. His impression was cervical radiculopathy and cervical degenerative disc disease with osteophyte complexes as noted and some flattening of the cord. Petitioner's work restrictions were continued but her physical therapy sessions were decreased. (PX 5, p. 17)

As of October 6, 2005, Petitioner was reporting significant temporary relief of pain with her physical therapy treatments. However, with any increased activity level, her pain would return. Petitioner had progressed in her therapy, however. (PX 5, p. 14)

Dr. Timothy VanFleet examined Petitioner at Dr. Smucker's request on October 19, 2005. In connection with the examination, Petitioner completed a "Spine Sheet." Petitioner's primary problem was listed as pain and swelling in the cervical area and periodic low back pain. Petitioner stated that her first episode of pain began on March 21, 2005 as a result of an injury/accident. She listed "March 21, 2005" as the date of accident and identified her "Back" as the part of the body she injured. Petitioner denied any prior back or neck trouble. Petitioner described the accident as follows:

> 3-21-05 I was working at Central IL Comm. Bld Cntr.
> Donor had bad reaction. I helped transfer donor from
> w/c to recliner. I lifted upper body during transfer,
> back popped very hard. Pain started in my lower back
> radiated down left leg. Also had pain in upper back.
> Pain increased in upper back 6.15.05."
> (PX 5, p. 4)

Petitioner further stated that her most recent episode had started on June 15, 2005 and she went to the emergency room. Petitioner provided additional information concerning the nature of her pain, its location on a pain drawing, and its severity (7/10). (PX 5, pp. 4-7)

When examined by Dr. VanFleet, Petitioner's complaints included difficulty with neck pain and bilateral radiating arm pain. Petitioner had evidence of multilevel cervical degenerative disc disease without any evidence of focal neurologic compression. He did not feel she was a surgical candidate at the present time as he didn't believe her symptoms would respond well to an operation. He emphasized the importance of continued non-operative care with a structured physical therapy program. Petitioner provided a consistent history of her initial accident with a pop in her back and pain in her back and leg as well as neck pain. She reported that her symptoms in her back and leg were intermittent and of lesser concern. These had responded well to injections. She described pain and swelling in her interscapular area and paresthesias in her upper extremities. Dr. Van Fleet felt that Petitioner was suffering from multilevel degenerative disc disease but did not feel that she was a surgical candidate. He recommended that she continue with active stretching and exercise. (PX 5, pp. 11–13)

Petitioner saw Dr. Smucker on the same date. He noted Dr. Van Fleet's conclusions. Petitioner reported to him that she had been terminated from her job and she was planning to return to Peoria, Illinois and seek work there. Dr. Smucker released Petitioner to full duty, full-time work, and stated "I feel that we have done everything that I know to do to try and help and therefore, I consider her to have achieved maximum medical improvement." She was to continue Tizanidine at bedtime. (PX 5, p. 10)

Petitioner telephoned the physical therapist on October 20, 2005, to notify Progressive that she was cancelling the remainder of her appointments as she was moving out of town and had been released by her doctor. (PX 6, p. 27)

Petitioner testified that she continued to experience pain in her low back, upper back and neck after her release by Dr. VanFleet. Petitioner changed jobs on November 22, 2005, going to work for the American Red Cross in Peoria, Illinois. Petitioner testified that this job involved attending blood drives and moving equipment associated with those drives.

Petitioner testified that on or about August 15, 2006, while attending a blood drive in Galesburg, Illinois, she was moving a piece of heavy equipment that was on wheels up a ramp onto a lift of a truck. As the equipment was being moved it started to roll and she reached out and grabbed it and pulled it back onto the truck's platform, resulting in a sudden increase in her lower and upper back and neck pain. Petitioner testified that she filled out paperwork with the American Red Cross to report this incident as a workers' compensation case. Petitioner testified that she had consulted with an attorney about this incident and had completed paperwork to be sure that proper notice was given within the 45 day statutory period.

Petitioner filed her Application for Adjustment of Claim against Respondent on September 15, 2006. Petitioner claimed she was transferring a patient on March 21, 2005 when she injured her back and neck. (AX 2)

Petitioner underwent no medical treatment between October 19, 2005 and September 21, 2006.

On September 21, 2006, Petitioner presented to Dr. Richard Kube at the Midwest Orthopedic Center in Peoria, complaining of upper back and neck pain. (PX 1, p. 310) Petitioner testified that this was the earliest appointment that she was able to obtain after her August 15, 2006 accident. Petitioner completed a New Patient Intake Form at the time of the visit. She gave an onset date of March 21, 2005. There is no mention of an accident on August 15, 2006 (RX 3) According to the records Petitioner had been having some problems with upper back and neck pain for about a year and that the problems began

when she was moving a patient at her former job with Respondent. Petitioner reported she was now working for the Red Cross and continuing to have some problems. Petitioner expressed concern that she might lose her job. "This is a litigious issue work comp claim from previous." At this time Petitioner was working as phlebotomist for the American Red Cross. Petitioner was noted to be married, but living alone. On examination, Dr. Kube noted that Petitioner walked with an antalgic gait, but did not have signs of myelopathy. He noted that she had pain in her back with a right-sided Spurling's maneuver. He noted that she had some point tenderness in her upper thoracic spine at mid line. X-rays on that date showed diffuse degenerative change in her thoracic and cervical spine. She showed some cervical spondylosis at C3/4 and C5/6. He recommended physical therapy and an MRI and noted that steroid injections may be required. An MRI was taken on September 25, 2006, and showed multi-level degenerative changes in Petitioner's cervical spine, worse at the C3/4 and C5/6 levels. (PX 1, pp. 306-307) It was noted that there was moderate proximal right neuroforaminal stenosis at C3/4, and moderate to severe right neuroforaminal stenosis at C5/6. (PX 1)

Petitioner underwent an initial physical therapy evaluation at the Midwest Orthopedic Center on September 26, 2006. Petitioner's presenting diagnoses included cervicalgia, joint stiffness in the neck, and muscle weakness. She reported that her recent problem had started while at work as a phlebotomist when she was pushing something heavy and heard a pop in her low back. She reported that pain was now radiating into her upper back and neck and that the problem had been aggravated by her new job as phlebotomist for the Red Cross pushing and lifting heavy objects. Petitioner wished to get the pain under control and avoid surgery. Petitioner was tearful during the evaluation, worried about losing her job, undergoing a divorce, and living with her granddaughter who she took care of. Petitioner sated "she noticed the pain started at the same the major life changes of the move and the separation from her husband took place." Her doctor tried to medicate her for depression but she declined noting she could not tolerate the medication due to her sensitivity to medicine. (PX 1, pp. 303-304)

Petitioner returned to Dr. Kube on October 16, 2006, who noted the MRI results. He recommended another round of steroid injections to see if that would help alleviate her nerve pain, and also recommended an EMG to localize the source of her pain. (PX 1, p. 299)

An EMG was done on October 24, 2006 by Dr. Yibing Li finding bilateral mild carpal tunnel syndrome and bilateral ulnar neuropathy at the wrists. (PX 1, pp. 293-297) He noted that there were some findings suggesting early or mild cervical radiculopathy bilaterally at C5/6 and C6/7 but the findings were not definitive.

At the request of Dr. Kube, Petitioner was seen by Dr. Demaceo Howard on October 26, 2006. Dr. Howard recorded a history of "persistent pain following a work-related injury in which her low back was involved." Petitioner had been treated with both lumbar epidural steroid injection and cervical injections. Petitioner reported improvement with the injections in her low back but not her neck. He noted that she has continued gainful employment without any significant interruption and noted that the recent EMG findings that did not explain her ongoing pain. Dr. Howard performed a physical examination. He concluded that Petitioner was suffering from non-radicular neck pain with evidence of disc degeneration and facet arthropathy and bone spur complex. He felt that she was suffering from possible facet arthropathy or discogenic neck pain. He planned to proceed with a medial branch block. (PX 1, pp. 290-291)

Petitioner underwent medial branch blocks at the C3,4 and 5 levels on December 7, 2006 on the right and on December 15, 2006 on the left at the Methodist Medical Center. (PX 4, pp. 9, 38) Petitioner returned to Dr. Howard on January 3, 2007, reporting that her neck pain was about 50% better, but still present. (PX 1, p. 260) Dr. Howard recommended conservative treatment with Ultram and Skelaxin and directed Petitioner to follow up on an as-needed basis.

Petitioner returned to Dr. Kube on January 18, 2007, reporting continued pain in her neck and shoulders. (PX 1, p. 248) She also reported some occasional pain in her right upper extremity. She denied any really significant relief from the injections in her neck. Based upon her MRI and EMG findings, Dr. Kube stated that he did not think that there was a surgical intervention that would relieve her symptoms at that point, and released her from care to return as needed.

Petitioner testified that she continued working and continued to experience the same pain in her neck that she had experienced since her initial accident. Petitioner underwent no treatment between January 18, 2007 and September 21, 2007.

On September 21, 2007, Petitioner was examined by Dr. John Mahoney due to complaints of right wrist pain that had been present for the past 6 to 8 weeks. (PX 1, pp. 240-241) As part of the examination Petitioner completed a Medical History Questionnaire (PX 1, pp. 244 – 245) In that Questionnaire, Petitioner listed her chief complaint as pain in her right wrist and thumb which had started six weeks earlier. Petitioner listed her employer as the American Red Cross. She denied having injured herself on the job.

Dr. Mahoney noted that Petitioner had previously been seen by Dr. Kube for complaints of neck pain that "seems to be a different problem." Her biggest problem was reportedly radial-sided wrist and thumb pain. (PX 1, p. 240) Dr. Mahoney believed Petitioner had right De Quervain's tenosynovitis and he recommended a steroid injection which Petitioner underwent that same day. Petitioner followed up with the doctor on October 19, 2007 at which time Petitioner reported the injection had helped a lot but she was not completely cured. Petitioner denied any numbness or tingling in her hand. (PX 1, p. 239) Petitioner testified that she pursued treatment through Dr. Mahoney for treatment of her hands, which is the subject of another claim not now before the Arbitrator.

Petitioner returned to see Dr. Mahoney on January 15, 2008. At that time he diagnosed Petitioner with recurrent right wrist DeQuervain's tenosynovitis and bilateral carpal tunnel syndrome with superimposed cervical radiculopathy. (PX 1, pp. 236-237) Dr. Mahoney injected the first dorsal compartment of Petitioner's right wrist and the carpal tunnel of Petitioner's left wrist. Dr. Mahoney also referred Petitioner to Dr. Mulconrey to assist him in determining how much of her symptoms were coming from her neck versus how much was coming from the median nerve compression in her carpal tunnel.

When Petitioner returned to Dr. Mahoney on January 29, 2008, she reported that the DeQuervain's injection had helped a little but that the carpal tunnel injection to the left wrist had not helped much. She still complained of tingling in her median nerve digits bilaterally. She also reported some pain radiating down from her neck into her shoulders as well. He opined that's he may benefit from surgery on her DeQuervain's, and that she may be suffering from a double crush effect with both her neck and carpal tunnel compressions contributing to the numbness and tingling in her fingers. She was to see Dr. Mulconrey in the next couple of weeks. (PX 1, p. 235)

Petitioner eventually saw Dr. Mulconrey on February 11, 2008, over one year after her visit with Dr. Mahoney. (PX 1, pp. 232-233) His history noted that she had been involved in a work accident in June of 2005 with recurrent problems since that time. She reported axial neck pain rated at 4.2/10 and upper extremity pain at 6/10. Her pain was worse in her right arm than her left. She reported pain in her bilateral trapezial region, right shoulder, upper arm and both hands. Raising her arm would worsen her pain. She also reported weakness in her right hand and intermittent paresthesia in the lateral three digits bilaterally. She reported occasional headaches that were moderate but frequent. On examination, he noted decreased sensation in her bilateral lateral forearms, and decreased strength on the right in her biceps, triceps, wrist flexors and extensors when compared to the left. X-rays showed bilateral uncinate spurring at C5/6, mild degenerative disc disease at C3/4 and mild uncinate spurring on the left at C6/7. Dr. Mulconrey diagnosed multilevel cervical spondylosis, degenerative disc disease and bilateral upper extremity radiculopathy. He opined that Petitioner had foraminal stenosis with radicular symptoms that was causing her decreased sensation and strength. He ordered an MRI of her cervical spine which was done on February 14, 2008 and showed multilevel spondylosis C3 through C6 with uncinate spurring and disc bulging, and borderline central stenosis at all three levels. (PX 1, p. 215) Foraminal narrowing was also present, worse at C5/6 and C3/4. There was also a left paramedian protrusion at C6/7.

Petitioner returned to Dr. Mulconrey on March 21, 2008. (PX 1, p. 213) He reviewed the MRI results and recommended an anterior cervical decompression and fusion. He noted that she had experienced some relief with the previous injections by Dr. Howard. (PX 1, p. 212) He felt that the pain that Petitioner was experiencing in the right hand was related to problems at C5/6. Dr. Mulconrey saw Petitioner back for a pre-operative review of the procedure on May 7, 2008, (PX 1, p. 200) and then proceeded with surgery on May 27, 2008 at OSF St Francis consisting of an anterior cervical decompression and fusion at C5/6. (PX 2, pp. 6-7)

Petitioner followed up with Dr. Mulconrey on June 16, 2008, reporting some difficulty swallowing after surgery that was improving. (PX 1, p. 196) Dr. Mulconrey noted that she was to remain off work and directed her to start physical therapy. Petitioner returned on July 23, 2008, and was noted to be doing well overall, but was still complaining of interscapular pain which Dr. Mulconrey expected to improve as her fusion solidified. (PX 1, p. 194) She also complained of continued intermittent upper extremity radiculopathy, and complained that she was having occasional problems with her voice. Dr. Mulconrey noted that her problems with her voice could be related to her cervical surgery, but that he anticipated they would improve. Petitioner returned to Dr. Mulconrey again on August 27, 2008, reporting improvement in her interscapular pain, but complained of swelling on the left anterior portion of her neck in the supraclavicular area. (PX 1, p. 103) She also reported improvement in her voice and Dr. Mulconrey noted that a laryngoscopy had been done by an ENT and found no evidence of vocal cord paralysis. (See PX 3, pp. 81-86) She was given a 25 pound lifting restriction and advised to return in three months. However, Petitioner testified that, at her urging, the Dr. Mulconrey released her without restrictions at that time so that she could return to work.

Petitioner returned to Dr. Mulconrey on November 19, 2008, overall doing well, but reporting a recent increase in her mid-scapular pain. (PX 1, p. 100) Her upper extremity radiculopathy had nearly resolved. X-rays indicated that instrumentation was in appropriate position, but that the superior portion of the graft was not yet completely healed. Dr. Mulconrey continued her Neurontin and directed her to return for a one-year follow-up. Petitioner returned on May 20, 2009, reporting that she was doing well overall but was having intermittent pain in her cervical spine. (PX 1, p. 92) X-rays showed proper positioning but there was some question as to whether the upper end plate had completely fused. Dr.

Mulconrey prescribed Flexeril, a Medrol dose pack as well as Naprosyn. He noted that she was having considerable lumbar based symptoms that might require therapy.

Petitioner filed an Application for Adjustment of Claim against the American Red Cross on July 28, 2008 (case # 08 WC 33076) Petitioner alleged she injured her neck on August 15, 2006 while "pushing." (AX 4)

Petitioner underwent no treatment between November 19, 2008 and April 25, 2011.

Petitioner returned again to Dr. Mulconrey on April 25, 2011, three years following her cervical fusion. (PX 1, p. 49) Petitioner reported that she continued to suffer axial neck spasms but no significant upper extremity pain or symptoms. Petitioner did, however, describe significant low back pain, with symptoms in her lumbar spine and bilateral buttocks. Petitioner reported having difficulty at work and a recent incident where she had bent over and had difficulty straightening back up. On examination, Petitioner had some limitation in lumbar extension and a mildly positive straight leg raising test. Dr. Mulconrey diagnosed spondylolisthesis by x-ray examination, spinal stenosis and lumbar spondylosis. He prescribed physical therapy, injections by Dr. Sureka and Neurontin and Naprosyn. (PX 1, p. 49)

Petitioner saw Dr. Sureka on the following day, April 26, 2011, reporting a six year history of low back and right leg pain. (PX 1, pp. 46-47) She reported that the pain traveled along the right anterior thigh and was worse with walking or bending. Dr. Sureka diagnosed possible lumbar radicular pain with low back and leg pain and recommended an MRI of her lumbar spine and physical therapy. Records show that Petitioner began a course of physical therapy on April 29, 2011. (PX 1, pp. 43-44) The MRI performed on May 2, 2011, showed anterolisthesis at L4/5 with moderate central canal stenosis in combination with facet arthropathy and ligamentum flavum hypertrophy. It also showed a broad based disc protrusion at L3/4 with moderate neural foraminal narrowing and impingement of the exiting nerve at L3. (PX 1, pp. 63-64)

Petitioner returned to Dr. Sureka on May 4, 2011, reporting that her buttock and leg pain had improved but her low back pain remained the same, and was exacerbated by bending or prolonged walking. (PX 1, p. 41) After reviewing the MRI, Dr. Sureka recommended a course of right L4 transforaminal epidural steroid injections, Gabapentin and continued therapy. Petitioner did undergo epidural steroid injections on June 1, 2011 (Left L5), June 8, 2011 (Right L4) and June 22, 2011 (Left L5). (PX 1, pp. 65-68) Petitioner returned to Dr. Sureka on July 13, 2011, reporting that the third epidural steroid injection did not give significant relief. (PX 1, p. 13) She reported cramping pain in her leg and continued low back pain. She reported that bending, standing and walking tended to worsen her pain. Dr. Sureka recommended a bone scan and use of Cyclogenzaprine three times daily for symptom relief. (PX 1, p. 13) A bone scan was done on July 18, 2011, but did not reveal significant abnormalities other than "mild facet osteoarthritic osteoblastic activity in the lower lumbar region at L3 to S1". (PX 1, p. 75) Dr. Sureka's office recommended referral to a surgeon (PX 1, p. 11) but the suggestion was not pursued at that time as Petitioner was beginning a new job. (PX 1, p. 10)

Petitioner offered the evidence deposition of Dr. Daniel Mulconrey, an orthopedic spine surgeon taken on March 29, 2010. Dr. Mulconrey testified that since he saw Petitioner some time after her accidents had occurred he had difficulty relating specific findings on the MRIs to her work accidents, as they could be either acute or chronic changes. (PX 10, pp. 16-17) However, he testified that a tugging or pulling type of injury can aggravate these conditions in the cervical spine. (PX 10, p. 18) He testified that such conditions could be aggravated by accidents without significant changes on the MRI. (PX 10, p. 19) He also testified that findings as he had found on the MRIs could be present without symptoms. (PX 10, p.

20) He testified that if a patient with such changes is symptom free and then develops symptoms in connection with a work accident, those accidents would be considered contributing causes for her need for surgery. (PX 10, p. 21) He testified that based upon a hypothetical question describing both work accidents, it would be difficult, if not impossible, to separate the two and give an opinion as to the relative contribution of each accident to her condition. (PX 10, p. 21) Dr. Mulconrey acknowledged having given Petitioner off work slips dated June 16, 2008 and July 23, 2008, the latter keeping her off work until her next appointment in 4 or 5 weeks. (PX 10, p. 23, Pet Depo Ex. 2 and 3).

On cross-examination by counsel for the American Red Cross, Dr. Mulconrey testified that Petitioner's complaints and pain diagram that Petitioner provided initially to Dr. Van Fleet on October 16, 2005, could be consistent with the findings that he observed on the MRI in 2008. (PX 10, p. 28) He also testified that the pain diagram that Petitioner completed for Dr. Kube when Petitioner saw him on September 21, 2006, could be consistent with the condition for which the he performed surgery on May 27, 2008, though the pain diagram was different than the one completed for Dr. Van Fleet. (PX 10, p. 29) Dr. Mulconrey testified that the findings on the MRI dated September 25, 2006 could be present absent any traumatic event. (PX 10, p. 32) He testified that he could not determine the age of the findings without seeing pervious MRI studies, though the finding of a right paracentral disc protrusion could possibly be an acute finding. (PX 10, p.33) Based upon a review of records presented to him by the attorney for American Red Cross, Dr. Mulconrey testified that the symptoms that Petitioner described to him appeared to relate to the March 2005 incident. (PX 10, p. 39) Based upon those records, he opined that the surgery that he performed could have been required absent any other inciting factor beyond that initial incident in March 2005. (PX 10, pp. 39-40) Dr. Mulconrey testified under cross-examination by Central Illinois Blood Bank's attorney that comparing the MRI that he had performed in 2008 and the report of the MRI done in 2006 it appeared that the findings were similar. (PX 10, p. 50)

Respondent offered the deposition of Dr. Michael Orth who examined Petitioner pursuant to Section 12 of the Illinois Workers Compensation Act on July 8, 2005. Dr. Orth claimed in his report and deposition testimony that Petitioner indicated to him that her neck pain began on June 15, 2005. (See RX 4, p. 7) He opined that Petitioner had suffered an acute lumbosacral strain at the time of her first work injury that was superimposed upon a pre-existing degenerative arthritis with spinal stenosis at L4/5. (RX 4, p. 9) Dr. Ortho opined that her low back condition had reached maximum medical improvement by the time of his examination. (RX 4, p. 10) Dr. Orth testified that Petitioner had a normal examination regarding her cervical region though she had an unidentified condition in her supraclavicular area. (RX 4, p. 10-11) Dr. Orth stated that Petitioner had some tenderness in the paraspinal muscle mass, the trapezius and upper half of the thoracic paraspinal musculature. (RX 4, p. 13) Dr. Orth opined that the complaints that Petitioner had in her cervical area and supraclavicular area were not related to her work accident in March of 2005. (RX 4, p. 14) Dr. Orth admitted on cross-examination that if he accepted the history to Dr. Smucker of cervical and thoracic complaints since the reported injury, he would have to relate those complaints to the accident. (RX 4, pp. 16-17) He also acknowledged that the type of accident that she described in lifting a patient would be consistent with an injury that would cause such cervical complaints. (RX 4, p. 17) He also acknowledged that his findings of cervical paraspinal muscle mass tenderness were consistent with a problem in the cervical spine. (RX 4, p. 17) Dr. Orth testified that his current practice is limited to doing independent medical evaluations and that he had retired from clinical practice in December 2004. (RX 4, p. 18) He testified that his examinations are nearly 100% at the request of respondents. (RX 4, p. 19) Dr. Orth testified that when he was in active orthopedic practice, he did not do neck surgery. (RX 4, p. 19) Upon further cross-examination, Dr. Orth acknowledged that Petitioner was off work at the time of his examination and he did not release her to return to work. (RX

4, p. 26) He acknowledged that Petitioner had complaints of numbness in her hands and tingling sensations that could be an abnormality associated with one of the cervical nerve roots. (RX 4, pp. 23-24)

Respondent American Red Cross offered the deposition of Dr. Marshall Matz taken on May 26, 2010. Dr. Matz testified that Petitioner had reported to him that she injured her back on August 15, 2006, near the end of her work day as a phlebotomist, she was loading a piece of equipment onto a vehicle when the equipment started to roll backwards and she attempted to stop it and injured her back. (RX 7, p. 7-8) He stated that he asked Petitioner whether she had any prior treatment to her back or spine and she denied any similar conditions or complaints in the past. (RX 7, p. 8) Dr. Matz testified that medical records contradicted this statement, showing "a variety of spinal complaints and specifically complaints involving her neck and limbs" going back to early 2005. (RX 7, p. 8) He confirmed that an injury date of May 21, 2005 contained in his report may be a typographical error. (RX 7, p. 8-9) Dr. Matz testified that records of Dr. Bansal dated April 29, 2005 and of the Orthopedic Center of Illinois dated May 9, 2005 show spinal complaints. (RX 7, pp. 9-10) He testified that complaints reflected in the office note of June 17, 2005, from the Orthopedic Center of Illinois were consistent with cervical radiculopathy preceding her accident at American Red Cross. (RX 7, p. 10) Dr. Matz testified that complaints at the Orthopedic Center of Illinois on July 27, 2005, of radiating paresthesia and diminished biceps reflex would be consistent with some nerve root irritation of the C5/6 level pre-dating Petitioner's accident at American Red Cross. Dr. Matz noted that a history in a physical therapy note of August 2, 2005, of the onset of pain between the shoulder blades on June 15, 2005 that extended to her neck followed by swelling in the neck and shoulder could refer to referred pain from the neck. (RX 7, p. 12) Dr. Matz testified that decreased cervical range of motion and strength, with stinging pain in the right arm and tingling down the left described in that note could be consistent with cervical radiculitis. (RX 7, p. 12) Dr. Matz testified that complaints of pain in the neck, trapezius and both arms noted in an Orthopedic Center of Illinois note of October 7, 2005 show further pre-existing symptoms. (R X 7, p. 13) In reviewing findings on a cervical MRI of August 6, 2005, Dr. Matz testified that the findings on C3/4 to the right were an incidental finding, but that findings at C5/6 with left foraminal narrowing could be the source of Petitioner's neck and arm complaints. (RX 7, pp. 13-14) Dr. Matz testified that findings on an EMG of August 19, 2005 demonstrated a C6 radiculopathy that pre-existed her accident at American Red Cross, and was consistent with her prior reference to a diminished reflex. (RX 7, p. 14) Dr. Matz testified that the Orthopedic Center of Illinois note of August 26, 2005, showing complaints of cervical and thoracic pain and pressure and paresthesia in the bilateral upper extremities were further evidence of a pre-existing chronic condition. (RX 7, pp. 14-15) Dr. Matz noted that the initial treatment note of Dr. Kube on September 21, 2006, after Petitioner's accident of August 15, 2006, referred to neck and upper back pain that had been present for about a year and started while moving a patient at a former job, and did not refer to any new accident. (RX 7, p. 15-16) He reviewed the intake note for that appointment, noting that it referred to an accident date of March 21, 2005 and that her complaints had been going on for a year. (RX 7, pp. 16-17) Dr. Matz testified that he reviewed the film of the MRI of September 25, 2006, and testified that there was no significant change from the prior film and that he did not feel that it showed any acute findings. (RX 7, p. 17) Dr. Matz also testified that he had reviewed a record of Dr. Howard dated October 26, 2006, and noted that there was no history of an August 15, 2006 occurrence. (RX 7, p. 19) Dr. Matz was also directed to the office note of Dr. Mulconrey of February 11, 2008, and noted that the history referring to an accident in June 2005, referred to long standing issues long pre-dating August 2006. (RX 7, p. 19) He confirmed that her complaints at that time were similar to those voiced in 2005. (RX 7, p. 19) Dr. Matz's attention was also directed to the history form completed at the time of the February 11, 2008 visit with Dr. Mulconrey referring to neck pain and that had been present since June 2005, and testified that this was also consistent with long standing pre-existing complaints. (RX 7, p. 20) Dr. Matz testified that the radiology findings of the MRI taken on February 14, 2008, were similar to the

MRI findings in 2005 and testified that there were no acute findings on that scan that would be attributed to the incident of August 25, 2006. (RX 7, pp. 20-21) Dr. Matz testified that in his opinion there was no causal connection between Petitioner's work-related accident of August 15, 2006, and her treatment starting with Dr. Kube on September 21, 2006 and subsequent surgical intervention on May 27, 2008. (RX 7, p. 24)

On cross-examination, Dr. Matz confirmed that the degenerative conditions as found in Petitioner's spine can be aggravated by incidents of lifting or pulling heavy objects as she described, where a history relates no prior symptoms and a sudden onset of symptoms related to the incident. (RX 7, p. 30) Dr. Matz acknowledged that some patients with such MRI findings would not have symptoms and that surgery would be performed only associated with symptoms that affect the patient's quality of life. (RX 7, pp. 31-32) Dr. Matz testified that he has not done surgeries for five years and that currently 30 percent of his practice is related to performing medical-legal examinations. (RX 7, pp. 33-34) He testified that he does a couple of exams per month for Respondent's counsel's firm. (RX 7, pp. 34-35)

Petitioner also offered the evidence deposition of Dr. Paul Smucker taken on March 3, 2011. Dr. Smucker testified that when he initially saw Petitioner on May 9, 2005, she was reporting pain, not only in her low back, but also pain and tingling radiating up the thoracic back and into the neck, shoulder and arms. (PX 9, p. 6) Her primary complaint at the initial visit was of the pain in her low and mid back. (PX 9, p. 6) Following examination, Dr. Smucker diagnosed lumbar degenerative disc disease with a large broad based midline L4/5 disc herniation causing stenosis. He felt that the low back and thigh pain was related to that herniation. He also felt she had some soft tissue or muscle pain. (PX 9, p. 8) Dr. Smucker recommended use of Mobic and Skelaxin, and suggested an epidural steroid injection series. (PX 9, pp. 8-9) Dr. Smucker placed Petitioner on a 25 pound lifting restriction and recommended that she avoid twisting or bending at the waist. (PX 9, p. 9) Petitioner had the first epidural steroid injection and saw Dr. Smucker on June 1 and Dr. Smucker's impression at that time was that she had lumbar degenerative disc disease and a disk herniation at L4/5 that was somewhat improved by the initial injection. (PX 9, p. 10) Petitioner had a second injection on June 6, 2005 and then returned to Dr. Smucker earlier than scheduled on June 17, 2005, reporting pain and swelling in her neck, shoulder girdle and arms with radiating numbness and tingling. She reported improvement in her low back and legs after the two epidural steroid injections. (PX 9, p. 11) Dr. Smucker noted that the cervicothoracic complaints had been present to varying degrees since the reported injury. He noted she had intense pain coming on intermittently on either side which he felt was consistent with myofascial pain, but ordered an upper extremity EMG to check for radiculopathy or neuropathy. (PX 9, pp. 12-13) When seen on July 27, 2005, Petitioner showed a diminished biceps reflex on the left side though other neurological testing was normal. (PX 9, pp. 13-14) Dr. Smucker felt that the diminished biceps reflex could be consistent with a radiculopathy. (PX 9, p. 14) Dr. Smucker again recommended an EMG as well as a cervical MRI. (PX 9, p. 14) An MRI was done on August 6, 2005, that showed osteophytic change and degenerative disk changes on the right at C3/4 and C5/6 with right greater than left neuroforamina narrowing at both levels. (PX 9, p. 15) An EMG was done on August 19, 2005, that showed a mild left C6 radiculopathy. (PX 9, p. 15) Dr. Smucker testified that the EMG findings were consistent with the clinical finding of diminished reflex and stenosis at C5/6 shown on the MRI. Petitioner returned to Dr. Smucker on August 26, 2005, with continuing complaints, and Dr. Smucker recommended continued work restrictions, therapy and a cervical epidural steroid injection. (PX 9, pp. 16-17) The epidural injection on October 7, 2005, provided no improvement and an appointment was set with Dr. VanFleet, with continued physical therapy. (PX 9, pp. 14-15) Petitioner was complaining of pain in her neck and in the muscles between her shoulder blades and radiating in to her arms and fingers. Her symptoms were on both sides rather than primarily on the left. (PX 9, pp. 18-19) Petitioner returned to Dr. Smucker on October 19, 2005

after having seen Dr. VanFleet that day. Dr. VanFleet had not felt that she required operative intervention at that time. Dr. Smucker's diagnostic impression remained the same, being cervical radiculopathy and degenerative disc disease. (PX 9, p. 20) As Petitioner was not considered an operative candidate, Dr. Smucker felt that he had done all he could do and released Petitioner at maximum medical improvement and to return to work. (PX 9, pp. 20-21)

Dr. Smucker opined that Petitioner's low back complaints were causally related to her first work-related accident. (PX 9, p. 21) Dr. Smucker also opined that the cervical complaints that he treated were causally related to her work accident. (PX 9, p. 22) Dr. Smucker acknowledged that he reviewed records of Petitioner's subsequent treatment that he detailed in his report attached as Exhibit 2 of his deposition, and included Petitioner's subsequent cervical fusion at C5/6. (PX 9, pp. 22-23) Based on those records and his knowledge of Petitioner's initial treatment, Dr. Smucker opined that Petitioner's cervical fusion was causally related to her March 2005 accident. (PX 9, p. 23) Dr. Smucker acknowledged that the subsequent diagnoses of Petitioner's cervical conditions as well as her complaints were consistent with what he had diagnosed. (PX 9, p. 24) On cross-examination, Dr. Smucker acknowledged that on June 17, 2005 Petitioner appeared seeking treatment for her neck and upper back, but volunteered that she had complained of her neck, shoulder girdles and upper extremities on the first day he saw her, though the degree of complaint was greater at the subsequent visit. (PX 9, pp. 32-33) He testified that throughout his treatment Petitioner had "consistently any time we reviewed the question of how did this all begin, each time she indicated that all of the above symptoms, the low back, the neck, the upper back and all that stuff began with this incident of a pulling in her back the day she was transferring someone" referring to the incident of March 21, 2005. (PX 9, pp. 33-34) Addressing his release of Petitioner without restrictions, Dr. Smucker commented, "I would also point out that this individual was leaving the community, and I have no doubt that I would have confided in her and asked her if she wanted me to give her any restrictions because we were at the end of the road and she was moving to a new community and she was hoping to find work there. And both she and I would have known that her going to a new community and having work restrictions could have made it very difficult for her to find a job." (PX 9, p. 38) Dr. Smucker reviewed the initial treatment records from Dr. Bansal and Progressive Wellness and acknowledged that they contained no reference to complaints of the neck. (PX 9, pp. 29-30) However, Dr. Smucker testified later that Petitioner and her doctors may have been focused on her then primary complaint of low back pain, just as Dr. Smucker had focused on the complaint primarily in his first visit with Petitioner, though he did note her complaints in her neck and upper extremities. (PX 9, pp. 42-45) Dr. Smucker testified that the notes that he reviewed from Dr. Bansal did not change his opinion on causation, and that he had noted that there were other medical issues that Dr. Bansal did not refer to, which would suggest the low back complaints were being focused upon to the exclusion of other present issues. (PX 9, pp. 47-48)

Petitioner testified that she continues to experience spasms and pain in her neck and low back. Petitioner testified that she no longer performs many of her household duties and that her children have taken over many of them due to her pain. Petitioner testified that she currently works as a phlebotomist for Central Illinois Cancer Care which involves only drawing blood and does not involve the lifting and moving of equipment that she was required to do previously. Petitioner testified that she avoids activities involving bending or lifting over 10 pounds. She no longer drives long distances as this exacerbates her low back and neck pain. She limits climbing stairs. Petitioner testified that she takes over-the-counter-pain medication daily for her pain.

The Arbitrator concludes:

Causal Connection.

As a result of her undisputed accident of March 21, 2005, Petitioner sustained a low back and mid-thoracic back injury. Petitioner's cervical complaints are not causally connected to her work accident.

With regard to her low and mid-back complaints, Petitioner sustained a sprain/strain which resolved by July 11, 2005, when she was examined by Dr. Orth. By her July 27, 2005 appointment with Dr. Smucker, Petitioner's treatment was focused on her neck and not her low back. Thereafter, Petitioner had no further treatment to her low back until after her alleged accident of August 15, 2006 (which is the subject of companion case number 08 WC 33076). The Arbitrator is aware that Petitioner reported periodic low back pain and complaints when examined by Dr. VanFleet on October 19, 2005; however, Dr. VanFleet recommended no treatment and primarily focused his concerns and examination on her cervical complaints. That same day, Dr. Smucker essentially released her from care and thereafter Petitioner underwent no further treatment for almost one year. The medical records through October 19, 2005 suggest that Petitioner's low and mid-back complaints plateaued by July of 2005 and any periodic complaints of back pain thereafter are more properly addressed when looking at the issue of permanency.

With regard to Petitioner's cervical complaints, the Arbitrator has concluded that Petitioner did not injure her neck at the time of her accident. This conclusion is based upon a lack of corroboration for Petitioner's testimony. Petitioner relies upon her testimony and that of Dr. Smucker to establish causation for her cervical complaints – most notably, Dr. Smucker's belief that Petitioner had cervical complaints from the time of the accident onward. Dr. Smucker relied on Petitioner's history as provided to him to support this belief; however, he never actually reviewed Dr. Bansal's medical records until late in his deposition. Even then, his opinion concerning them was speculative. If the parties wished to know what Dr. Bansal knew about Petitioner's condition when he treated her, Dr. Bansal should have been deposed. He could have clarified whether she had any true neck complaints and/or whether she was focused initially on her back complaints rather than her alleged neck complaints. As it stands, Dr. Bansal did not document any neck/shoulder complaints while he treated Petitioner. Similarly, no such complaints are noted in the initial physical therapy records. The first mention of any neck/shoulder complaints is found in the physical therapy Patient Daily Note dated April 27, 2005. However, even then, Petitioner did not attribute her complaints to the accident; rather, she attributed them to new exercises she was performing.[1] No such complaints were noted at the time of Petitioner's next visit on April 29, 2005. While Petitioner did present to Dr. Smucker on May 9, 2005 with some additional complaints besides low back pain, Dr. Smucker described it as "pain and tingling radiating not only through her lower back, but also up through the thoracic back to the neck, shoulders and arms." Petitioner's primary symptoms were of the low back, however. While Petitioner reported pain radiating up into her upper back and shoulder blades when attending physical therapy on May 12, 2005, by the time of her next appointment with Dr. Smucker on June 1, 2005, no neck or shoulder complaints were noted. Similarly, Petitioner continued with physical therapy after May 12, 2005, and, again, there was no specific mention

[1] Petitioner did not testify to any neck complaints she associated with physical therapy.

of neck or shoulder complaints during this time until June 15, 2005, when Petitioner reports having gone to Urgent Care the day before because of sharp neck pain. (PX 6, pp. 69-79) Petitioner herself did not introduce the records of Urgent Care into evidence at arbitration; Respondent did. These records reflect a new onset of complaints. It is after this visit to Urgent Care that Dr. Smucker documents, for the first time, a diagnosis of cervicothoracic complaints. Petitioner, however, never brought her visit to Urgent Care on June 14, 2005 to Dr. Smucker's attention. The Arbitrator also notes that if Petitioner did, in fact, experience neck pain at the time of her accident why didn't she mention that when seen at Urgent Care on June 14, 2005? The Arbitrator's determination is also based upon significant gaps in treatment and Petitioner's denial to Dr. Matz of any problems before August 15, 2006 which undermines her credibility. The Arbitrator was not persuaded by Petitioner's history as provided in the Intake Form to Dr. Kube dated September 21, 2006. On the one hand, it was not accurate (completely failing to mention the alleged August 15, 2006 accident with the American Red Cross, if indeed it occurred). Furthermore, that history was provided only days after Petitioner filed her Application for Adjustment of Claim in this matter and after undergoing no treatment in almost one year. Petitioner's motivation and credibility are both called into question by these events and history.

Temporary Total Disability.

Based upon Petitioner's testimony and the medical records and depositions submitted into evidence, and in light of the finding on causation above, the Arbitrator finds that Petitioner was temporarily and totally disabled from March 28, 2005 through July 11, 2005, a period of 15 1/7weeks.

Medical Expenses.

In light of the Arbitrator's causation determination, Petitioner is awarded those medical expenses incurred by her in connection with her low back and mid-back complaints and treatment through July 11, 2005. Petitioner is not awarded any bills incurred in connection with the visit to Urgent Care on June 14, 2005. Respondent shall receive credit for any amounts shown to have been paid by Respondent's employer's sponsored health insurance, subject to Respondent's obligation to hold Petitioner harmless from any claims for reimbursement from said insurance as set forth in Section 8(j) of the Act.

Nature and extent.

As a result of her work related accident, Petitioner sustained a low back and mid-back injury, amounting to strains. Petitioner underwent physical therapy, two epidural steroid injections, restricted duty, and the use of pain medications. Medical records suggest periodic activity-related flare-ups or exacerbations of pain. The Arbitrator awards permanent partial disability of 5% of a person-as-a-whole.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daiszenia J. Allotey (Williams),
Petitioner,

vs. NO: 08 WC 33076

14IWCC0321

American Red Cross,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 8, 2013 is hereby affirmed and adopted.

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

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

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

DATED: MAY 0 1 2014

Daniel R. Donohoo

o-04/22/14
drd/wj
68

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALLOTEY (WILLIAMS) DAISZENIA J
Employee/Petitioner

Case# **08WC033076**
06WC040169

AMERICAN RED CROSS
Employer/Respondent

14IWCC0321

On 3/8/2013, 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 0.12% 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:

0834 KANOSKI & ASSOCIATES
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JOHN A MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Daiszenia J. Allotey (Williams)
Employee/Petitioner

v.

American Red Cross
Employer/Respondent

Case # 08 WC 33076

Consolidated cases: 06 WC 40169

14IWCC0321

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 **Springfield**, on January 11, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 15, 2006**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned **$20, 800.00**; the average weekly wage was **$400.00**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **one** dependent child.

Petitioner was temporarily totally disabled from **May 27, 2008** through **August 24, 2008**, a period of **12 6/7** weeks.

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** in TTD, **$0** in TPD, **$0** in maintenance, **$0** in non-occupational indemnity disability benefits, and **$3,191.62** in other benefits for which credit may be allowed under Section 8(j) of the Act, for a total credit of **$3,191.62**.

The parties agree that Respondent may have paid medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on August 15, 2006 that arose out of and in the course of her employment with Respondent, that timely notice of her alleged accident was provided to Respondent, or that her current condition of ill-being in her low back is causally connected to her alleged accident of August 15, 2006. Petitioner's claim for compensation is denied. No benefits are awarded.

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.

Nancy Lindsay
Signature of Arbitrator

3.5.13
Date

MAR 8 – 2013

This is one of two cases that were consolidated for purposes of arbitration; however, the parties requested that separate decisions be issued.

The Arbitrator finds:

Pre-Accident Events and Treatment

Petitioner testified that on March 21, 2005 she was working as a phlebotomist for the Central Illinois Community Blood Center. Petitioner testified that she was assisting a patient into a recliner. In doing so Petitioner was bearing the greater part of her weight and felt a pop in her back. [1] Petitioner testified that she experienced the onset of low and upper back and neck pain at that time. Petitioner testified she completed some paperwork and was seen by "their doctor," Dr. Bansal, that same day.

According to Dr. Bansal's records of March 21, 2005, Petitioner was transferring a donor to a recliner chair when she felt a pull in her right lower lumbar region. Petitioner's complaints included pain when bending forward and lifting. Petitioner denied any radiating leg pain, numbness, or tingling. Dr. Bansal noted palpable right lumbar tenderness and pain with motion of her back. Straight leg raise testing was negative bilaterally. Deep tendon reflexes were 2+ for Achilles and patellar. Dr. Bansal diagnosed Petitioner with a lumbar strain and prescribed medication and work restrictions of no lifting over 20 pounds. Petitioner was told to return to see him on March 25, 2005. (PX 6, p. 1; RX 1)

As instructed, Petitioner returned on March 25, 2005, reporting no improvement in her symptoms. Petitioner also reported considerable low back pain with some radiation of pain down her left leg to her knee. Bending forward or sitting for any period of time was still aggravating Petitioner's pain. Dr. Bansal again noted palpable lumbar tenderness and pain with motion. He continued her medications and her 20 pound lifting restriction but added that she should avoid frequent bending, squatting or kneeling and that she was to sit, stand or walk as tolerated. Petitioner was to return on April 5, 2005. (PX 6, p. 2; RX 1)

Petitioner testified that she provided these restrictions to the Blood Center but no work was offered to her within those restrictions, and she began receiving worker's compensation benefits. Petitioner testified that she also began therapy at Progressive Wellness at Dr. Bansal's direction on March 28, 2005. (PX 6, p. 8)

When initially evaluated at Progressive Wellness Center on the 28th Petitioner provided a history of transferring a blood donor from a wheelchair to another chair when Petitioner twisted her low back and heard and felt a popping sensation. . Petitioner's chief complaint was increased pain bilaterally in her low back with radiating symptoms into her right thigh. Petitioner denied any numbness or tingling but reported increasing difficulty with her ability to sleep and sit. Petitioner was currently sleeping on her side and only able to sit for an hour at a time. Petitioner reported full function prior to her accident. With regard to her job as a phlebotomist, Petitioner reported she engaged in moderate lifting. Petitioner was to be seen three times at which time additional recommendations from her treating physician would be elicited. (PX 6, pp. 9-10; RX 2)

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[1] This accident is the subject of claim 06 WC 40169 (Daiszenia J. Allotey (Williams) v, Central Illinois Blood Center)

Petitioner returned to Dr. Bansal on April 5, 2005, reporting she was doing better but still having pain from her lower back to mid-back region. Petitioner also reported that she could sit and stand for longer periods of time and denied radiating pain, numbness, or tingling at this time. She continued to have palpable lumbar tenderness on examination and pain with movement. Dr. Bansal continued her restrictions and medications. Dr. Bansal's diagnosis remained the same. Petitioner was to return on April 18, 2005. (PX 6, p. 3; RX 1)

Dr. Bansal re-examined Petitioner on April 18, 2005, with Petitioner reporting that overall she was improving, though she had localized pain at the L1/2 area on the left which seemed to tighten up and made it uncomfortable to sit or stand for long periods of time. Petitioner denied radiating pain down her legs or numbness or tingling. Petitioner's diagnosis remained the same. Dr. Bansal recommended trigger point injections over Petitioner's left latissimus dorsi area and they were performed during the visit. He modified her lifting restriction to 25 pounds but continued the rest of her restrictions. (PX 6, p. 4; RX 1)

Petitioner returned again to Dr. Bansal on April 29, 2005, as instructed, reporting continued low back pain that was radiating. She had not improved and was having difficulty sitting or standing. She had palpable thoracolumbar tenderness into her mid back and pain with movement of the back. Dr. Bansal recommended that she obtain a lumbar MRI and continued her work restrictions. (PX 6, p. 5; RX 2)

A lumbar MRI was performed on May 3, 2005, which showed moderately severe spinal stenosis at L4/5 secondary to a central subligamentous disc herniation as well as facet arthropathy, and a mild concentric disc bulging at L5/S1. (PX 6, p. 6)

After the MRI, Petitioner returned to see Dr. Bansal on May 6, 2005, reporting continued low back pain and pain radiating in to her right leg to the knee. She reported that it was uncomfortable to sit and stand for any period. Dr. Bansal noted palpable tenderness on examination and pain with movement of the back. Dr. Bansal's diagnosis was changed to an L5/S1 disc bulge. Due to her continued symptoms, Dr. Bansal referred Petitioner to Dr. Smucker. Dr. Bansal continued her work restrictions. (PX 6, p. 7; RX 1)

Throughout the foregoing time period Petitioner continued to participate in physical therapy at Progressive Wellness Center. When noted, Petitioner's effort was described as maximum and her compliance as full. Petitioner attended physical therapy on the following dates: March 28; March 30; March 31; April 4; April 6; April 7; April 11; April 13; April 14; April 18; April 20; April 22; April 25; April 27; and April 29, 2005. The only "Patient Daily Note" which contains any reference to Petitioner's neck or shoulder region is the one dated April 27, 2005, in which Petitioner reported that her neck and shoulder region and mid-back were sore from the new exercises. Overall Petitioner reported her low back was feeling fine. (PX 6, pp. 80 – 96)

Petitioner was initially examined by Dr. Smucker on May 9, 2005, reporting a history of injury while assisting in the transfer of a donor and feeling her back pop at that time. (PX 5, p. 51) Petitioner reported seeing Dr. Bansal that very day and noting a "re-exacerbation" of her symptoms four days later at which time she was rechecked and given work restrictions which could not be accommodated. Petitioner described her treatment with Dr. Bansal and noted that her symptoms had eased somewhat with therapy but her low back pain radiating into her thighs persisted. She reported that she had pain and tingling not only through her low back but also up through her thoracic back to her neck, shoulders and arms. She reported that the low back symptoms were the worst. Petitioner reported that sitting would exacerbate her symptoms the most, but that bending and standing were also uncomfortable. On examination, Dr. Smucker noted some tenderness throughout the thoracolumbar para-midline region bilaterally. He

reviewed the MRI and diagnosed Petitioner with lumbar degenerative disc disease with large subligamentous L4/5 disc herniation and resultant stenosis at that level, low back and thigh pain secondary to those findings and thoracolumbar complaints probably related to those findings, combined with soft tissue/myofascial pain. Dr. Smucker prescribed medication and an epidural steroid injection in Petitioner's lumbar spine. He placed her on restrictions of no lifting over 25 pounds, sit/stand option and no twisting or bending at the waist. He also directed Petitioner to resume therapy. (PX 5, pp. 51-53)

Petitioner underwent an epidural steroid injection at the L5 level on May 27, 2005, as well as continuing therapy at Progressive Wellness. (PX 5, pp. 44-49; PX 6, pp. 68-79)

Petitioner followed up with Dr. Smucker on June 1, 2005. Petitioner had stopped taking the Skelaxin and Mobic because she developed hoarseness and a sore throat. The lumbar epidural injection had resolved most of the pain radiating down into her legs; although, she still experienced fleeting radiating pain on occasion. Petitioner's low back pain was better but still ongoing, as was her thoracic pain. On examination, Petitioner had a negative neural tension sign on the right, equivocal on the left. There was no tenderness in palpating her low back but there was tenderness when palpating the thoracic back region on the left side. Dr. Smucker recommended a second injection, ongoing therapy, and continued work restrictions. (PX 5, p. 45)

Petitioner underwent a second injection on June 1, 2005. (PX 5)

Petitioner testified that the upper back, neck and arm pain that she described to Dr. Smucker had been present since the date of her accident, though Dr. Bansal had focused his treatment entirely on her low back, which had initially been a greater source of pain.

Petitioner presented to Springfield Clinic's Prompt Care on June 14, 2005 complaining of some neck swelling which started earlier in the evening. Petitioner described the location of the swelling as just above the collarbone in the area of her sternocleidomastoid area. She denied any pain. Petitioner reported that her muscles felt like they were straining as though she was holding something heavy. Petitioner denied any difficulty swallowing or breathing. She denied any radiating arm pain, numbness or weakness. Petitioner did report being treated for an ongoing back problem over the last three months and that she was currently undergoing physical therapy. Physical examination of Petitioner's neck revealed normal range of motion of her cervical spine without any pain. The attending doctor noted no edema, redness, swelling, or signs of infection. Petitioner displayed normal range of motion of her cervical spine without any pain. (RX 3) Cervical x-rays revealed no fracture, dislocation, or other acute anomaly. There was evidence of mild degenerative cervical spondylosis particarly at the C5-6 level with vertebral interspace narrowing and uncovertebral hypertrophy. (RX 3, p. 6) Dr. Campbell's assessment was swelling to the anterior neck, "not really appreciated on my exam." Petitioner was advised to continue her other medications and use ice a couple of times per day to help with the swelling. She should follow up with her doctor if no better or return to Prompt Care, as needed. (RX 3)

Petitioner presented to physical therapy on June 15, 2005, reporting that she had to go to Urgent Care on the 14th due to sharp pain in her neck in between her shoulder blades. Petitioner also reported a major increase in swelling in her neck/shoulder region. Petitioner was instructed to call her doctor immediately. Petitioner tolerated her treatments well without increased complaints of pain. No traction or new exercises were added due to her neck symptoms. (PX 6, p. 69)

Petitioner returned to Dr. Smucker's office on June 17, 2005, in a visit described as "urgent." Petitioner was complaining of swelling and pain in her neck, shoulder girdle, and extending into the bilateral upper extremities with radiating parasthesia. She reported that her low back and leg symptoms had quieted down some. Though Dr. Smucker did not observe swelling he indicated that a therapist had called and reported seeing swelling. He noted that cervicothoracic complaints had been present to various degrees since the reported injury and that her current symptoms suggested myofascial pain. Dr. Smucker noted that Petitioner's cervicothoracic complaints had been present to various degrees since the reported injury. The current intense pain Petitioner described was suggestive of cervicothoracic myofascial pain. He recommended an EMG/NCV to check for radiculopathy or neuropathy. He continued Petitioner's work restrictions, noting that Respondent had been unable to accommodate them so far. (PX 5, pp. 42-43)

Petitioner presented to physical therapy later in the day on the 17th. According to the daily note, Petitioner had just been seen by Dr. Smucker and was to undergo a test on her neck. Petitioner reported she had to leave early that day because she had an appointment scheduled with her primary care physician. Petitioner reported soreness n her low back. Petitioner did not complete all of her exercises due to her need to leave early. (PX 6, p. 68)

Petitioner underwent another therapy session on June 20, 2005. She described her low back pain as 1-2/10 and her upper back/shoulder pain as 4/10. Petitioner was still waiting for authorization to proceed with the EMG testing recommended by Dr. Smucker. (PX 6, p. 67)

Petitioner was seen at the Memorial Medical Center emergency room on June 21, 2005, reporting a history of a back injury on March 21, 2005. Petitioner had been evaluated by her family physician and Dr. Smucker and was initially started on Skelaxin and Mobic but was feeling "strange" and five days ago was switched to phenoprofen and amitryptiline. Petitioner reported persistent pain over her shoulder blades unrelieved by any medication. Petitioner described pain in her back and up to her neck, with swelling in her neck and pain across her shoulders and radiating into her left arm. (PX 7, pp. 7, 10) Petitioner was prescribed Decadron and Tramadol for pain. (PX 7, p. 8)

Petitioner testified at the arbitration hearing that this was the same pain she had been experiencing since her work accident, though it had become more intense without any new accident or injury.

Petitioner underwent physical therapy from June 24, 2005 through July 7, 2005. During this time Petitioner repeatedly reported that the swelling she was experiencing in her neck was due to the steroids she had been taking. (PX 6, pp. 64, 62) As of July 7, 2005, the therapist noted that Petitioner was reporting 85% improvement in her low back pain overall. Petitioner continued to note severe pain in her upper back into her left upper extremity with numbness and tingling; however, she was improving. Petitioner was discharged to a home program for her back. The doctor was asked to advise if anything more was to be done for Petitioner's neck. (PX 6, pp. 58-59; PX 5, p. 39)

At the request of Central Illinois Community Blood Center, Petitioner was examined by Dr. Michael Orth in Chicago on July 11, 2005. Petitioner testified that her TTD benefits ended as a result of that examination when Dr. Orth released her to work without restrictions. Petitioner testified that she did not return to work as Dr. Smucker still had prescribed work restrictions which Central Illinois Community Blood Center would not honor. Petitioner testified that Central Illinois Community Blood Center terminated her shortly after Dr. Orth released her.

Petitioner returned to see Dr. Smucker on July 27, 2005, at which time the doctor noted that the EMG/NCV study had been denied by the insurance carrier. He further noted that the insurance company had obtained an IME that indicated that Petitioner could return to full duty work. Petitioner continued to complain of cervical and upper thoracic pain with pain and paresthesia radiation into the upper extremities, left greater than right. Examination revealed a diminished biceps reflex on the left. Dr. Smucker's impression was lumbar degenerative disc disease with lower extremity symptoms improved with two epidural steroid injections and cervicothoracic complaints with upper extremity paresthesia and diminished left biceps reflex, suggesting a C5 or C6 radiculopathy. He continued to recommend the EMG/NCV as well as a cervical MRI. He provided work restrictions of no lifting over 25 pounds and no overhead work. He also recommended physical therapy 3 times per week. (PX 5, p. 38)

Petitioner underwent a Physical Therapy Initial Evaluation on August 2, 2005. According to the history, Petitioner reported a March 21, 2005 accident when she was transferring a patient from one wheelchair to another and she felt a pop and severe pain in her low back. She was treated with physical therapy and her low back pain was steadily improving. The history then states,

> However, she reports that on 6/15, while standing, she noted a sharp pain in between her shoulders [sic] blades extending up into the back of her neck. She states that later her neck and shoulders became very swollen, leading her to seek treatment at Prompt Care.
> (PX 5, p. 34)

Petitioner reported that her neck pain had continued to worsen while her low back pain had improved. Petitioner's primary complaint was mid-back and neck pain extending up into the back of her head and throughout both arms. Petitioner also reported "stinging at right arm" and "tingling and burning" at her left hand, along with giving away. Petitioner's lower extremity pain had resolved but some low back pain spasms continued. Petitioner's cervical movements were described as "guarded." No edema or ecchymosis was visualized. Petitioner was to be seen two to three times per week for 3 -4 weeks, initially. (PX 5, p. 34-36)

An MRI of Petitioner's cervical spine was obtained on August 6, 2005, showing degenerative disc and endplate osteophytic changes on the right at C3/4 and C5/6 with right greater than left foraminal narrowing at those levels. An MRI of Petitioner's thoracic spine showed minimal bulges present in the mid thoracic spine at T2/3, 3/4 and 4/5 with no cord impingement. The radiologist concluded that the scan was "essentially unremarkable". (PX 5, pp. 29-30) Petitioner underwent EMG/NCV testing by Dr. Smucker on August 19, 2005 which showed a mild C6 radiculopathy and no evidence of any peripheral neuropathies. (PX 5, pp. 24-28)

Petitioner's Progress Note from Progressive Wellness Center dated August 24, 2005 stated Petitioner had given maximum effort and full compliance during the reporting period. Petitioner was not responding well to physical therapy at that time as Petitioner was noting increased pain in her cervical spine and low back which she rated a 6-7/10. Despite attempts with distraction and myofascial techniques, Petitioner was unable to tolerate. She was noted to be performing a pain-free exercise program. (PX 5, p. 23)

Petitioner returned to Dr. Smucker on August 26, 2005. He noted that Petitioner continued to complain of cervical and thoracic pain and pressure as well as paresthesia into both upper extremities. He noted she had work restrictions but had been terminated from her job. On physical examination, Dr. Smucker

noted a decreased left biceps reflex. He noted that the cervical MRI had shown disc-osteophyte complexes at C3/4 and C5/6. He continued her work restrictions and recommended cervical epidural steroid injections. Petitioner was not taking any medications. (PX 5, p. 21)

Petitioner had a left C7/T1 epidural steroid injection on September 12, 2005. (PX 5, p. 19)

Petitioner's September 23, 2005 Progress Note from physical therapy indicated Petitioner was noting temporary improvement in her neck pain as a result of physical therapy. "Very minimal objective" improvement in cervical range of motion was noted. Petitioner was scheduled for another injection in the upcoming week. (PX 5, p. 18))

Dr. Smucker re-examined Petitioner on October 7, 2005. Dr. Smucker noted that Petitioner had experienced no improvement with the first injection so the second planned injection was cancelled. He further noted she had been set up for an appointment to see Dr. VanFleet. Physical therapy was to be continued. She was placed back on Tizanidine, which helps her sleep at night. Petitioner's ongoing complaints included pain in her neck and trapezius areas and into both arms to the fingers, especially the index and middle fingers of the hands. He noted that her symptoms were initially on the left side and were now on both sides. His impression was cervical radiculopathy and cervical degenerative disc disease with osteophyte complexes as noted and some flattening of the cord. Petitioner's work restrictions were continued but her physical therapy sessions were decreased. (PX 5, p. 17)

As of October 6, 2005, Petitioner was reporting significant temporary relief of pain with her physical therapy treatments. However, with any increased activity level, her pain would return. Petitioner had progressed in her therapy, however. (PX 5, p. 14)

Dr. Timothy VanFleet examined Petitioner at Dr. Smucker's request on October 19, 2005. In connection with the examination, Petitioner completed a "Spine Sheet." Petitioner's primary problem was listed as pain and swelling in the cervical area and periodic low back pain. Petitioner stated that her first episode of pain began on March 21, 2005 as a result of an injury/accident. She listed "March 21, 2005" as the date of accident and identified her "Back" as the part of the body she injured. Petitioner denied any prior back or neck trouble. Petitioner described the accident as follows:

> 3-21-05 I was working at Central IL Comm. Bld Cntr.
> Donor had bad reaction. I helped transfer donor from
> w/c to recliner. I lifted upper body during transfer,
> back popped very hard. Pain started in my lower back
> radiated down left leg. Also had pain in upper back.
> Pain increased in upper back 6.15.05."
> (PX 5, p. 4)

Petitioner further stated that her most recent episode had started on June 15, 2005 and she went to the emergency room. Petitioner provided additional information concerning the nature of her pain, its location on a pain drawing, and its severity (7/10). (PX 5, pp. 4-7)

When examined by Dr. VanFleet, Petitioner's complaints included difficulty with neck pain and bilateral radiating arm pain. Petitioner had evidence of multilevel cervical degenerative disc disease without any evidence of focal neurologic compression. He did not feel she was a surgical candidate at the present time as he didn't believe her symptoms would respond well to an operation. He emphasized the importance of

continued non-operative care with a structured physical therapy program. Petitioner provided a consistent history of her initial accident with a pop in her back and pain in her back and leg as well as neck pain. She reported that her symptoms in her back and leg were intermittent and of lesser concern. These had responded well to injections. She described pain and swelling in her interscapular area and paresthesias in her upper extremities. Dr. Van Fleet felt that Petitioner was suffering from multilevel degenerative disc disease but did not feel that she was a surgical candidate. He recommended that she continue with active stretching and exercise. (PX 5, pp. 11–13)

Petitioner saw Dr. Smucker on the same date. He noted Dr. Van Fleet's conclusions. Petitioner reported to him that she had been terminated from her job and she was planning to return to Peoria, Illinois and seek work there. Dr. Smucker released Petitioner to full duty, full-time work, and stated "I feel that we have done everything that I know to do to try and help and therefore, I consider her to have achieved maximum medical improvement." She was to continue Tizanidine at bedtime. (PX 5, p. 10)

Petitioner telephoned the physical therapist on October 20, 2005, to notify Progressive that she was cancelling the remainder of her appointments as she was moving out of town and had been released by her doctor. (PX 6, p. 27)

Petitioner testified that she continued to experience pain in her low back, upper back and neck after her release by Dr. VanFleet. Petitioner changed jobs on November 22, 2005, going to work for Respondent in Peoria, Illinois. Petitioner testified that this job involved attending blood drives and moving equipment associated with those drives.

Post-Accident Events, Treatment, and Testimony

Petitioner testified that on or about August 15, 2006, while attending a blood drive in Galesburg, Illinois, she was moving a piece of heavy equipment that was on wheels up a ramp onto a lift of a truck. As the equipment was being moved it started to roll and she reached out and grabbed it and pulled it back onto the truck's platform, resulting in a sudden increase in her lower and upper back and neck pain. Petitioner testified that she filled out paperwork with Respondent to report this incident as a workers' compensation case. Petitioner testified that she had consulted with an attorney about this incident and had completed paperwork to be sure that proper notice was given within the 45 day statutory period.

Petitioner filed her Application for Adjustment of Claim against Central Illinois Community Blood Center on September 15, 2006. Petitioner claimed she was transferring a patient on March 21, 2005 when she injured her back and neck. (AX 2)

Petitioner underwent no medical treatment between October 19, 2005 and September 21, 2006.

On September 21, 2006, Petitioner presented to Dr. Richard Kube at the Midwest Orthopedic Center in Peoria, complaining of upper back and neck pain. (PX 1, p. 310) Petitioner testified that this was the earliest appointment that she was able to obtain after her August 15, 2006 accident. A new patient information sheet completed by Petitioner is silent concerning an alleged August 15, 2006 accident. (RX 3) According to the records Petitioner had been having some problems with upper back and neck pain for about a year and that the problems began when she was moving a patient at her former job with Central Illinois Community Blood Center. Petitioner reported she was now working for Respondent and continuing to have some problems. Petitioner expressed concern that she might lose her job. "This is a litigious issue work comp claim from previous." At this time Petitioner was working as phlebotomist for

Respondent. Petitioner was noted to be married, but living alone. On examination, Dr. Kube noted that Petitioner walked with an antalgic gait, but did not have signs of myelopathy. He noted that she had pain in her back with a right-sided Spurling's maneuver. He noted that she had some point tenderness in her upper thoracic spine at mid-line. X-rays on that date showed diffuse degenerative change in her thoracic and cervical spine. She showed some cervical spondylosis at C3/4 and C5/6. He recommended physical therapy and an MRI and noted that steroid injections may be required. An MRI was taken on September 25, 2006, showing multi-level degenerative changes in Petitioner's cervical spine, worse at the C3/4 and C5/6 levels. (PX 1, pp. 306-307) It was noted that there was moderate proximal right neuroforaminal stenosis at C3/4, and moderate to severe right neuroforaminal stenosis at C5/6. (PX 1)

Petitioner underwent an initial physical therapy evaluation at the Midwest Orthopedic Center on September 26, 2006. Petitioner's presenting diagnoses included cervicalgia, joint stiffness in the neck, and muscle weakness. She reported that her recent problem had started while at work as a phlebotomist when she was pushing something heavy and heard a pop in her low back. She reported that pain was now radiating into her upper back and neck and that the problem had been aggravated by her new job as phlebotomist for Respondent pushing and lifting heavy objects. Petitioner wished to get the pain under control and avoid surgery. Petitioner was tearful during the evaluation, worried about losing her job, undergoing a divorce, and living with her granddaughter who she took care of. Petitioner sated "she noticed the pain started at the same the major life changes of the move and the separation from her husband took place." Her doctor tried to medicate her for depression but she declined noting she could not tolerate the medication due to her sensitivity to medicine. (PX 1, pp. 303-304)

Petitioner returned to Dr. Kube on October 16, 2006, who noted the MRI results. He recommended another round of steroid injections to see if that would help alleviate her nerve pain, and also recommended an EMG to localize the source of her pain. (PX 1, p. 299)

An EMG was performed on October 24, 2006 by Dr. Yibing Li finding bilateral mild carpal tunnel syndrome and bilateral ulnar neuropathy at the wrists. (PX 1, pp. 293-297) He noted that there were some findings suggesting early or mild cervical radiculopathy bilaterally at C5/6 and C6/7 but the findings were not definitive. [not related.]

At the request of Dr. Kube, Petitioner was seen by Dr. Demaceo Howard on October 26, 2006. Dr. Howard records a history of "persistent pain following a work-related injury in which her low back was involved." Petitioner had been treated with both lumbar epidural steroid injection and cervical injections. Petitioner reported improvement with the injections in her low back but not her neck. He noted that she has continued gainful employment without any significant interruption and noted that the recent EMG findings that did not explain her ongoing pain. Dr. Howard performed a physical examination. He concluded that she was suffering from non-radicular neck pain with evidence of disc degeneration and facet arthropathy and bone spur complex. He felt that she was suffering from possible facet arthropathy or discogenic neck pain. He planned to proceed with a medial branch block. (PX 1, pp. 290-291)

Petitioner underwent medial branch blocks at the C3,4 and 5 levels on December 7, 2006 on the right and on December 15, 2006 on the left at the Methodist Medical Center. (PX 4, pp. 9, 38) Petitioner returned to Dr. Howard on January 3, 2007, reporting that her neck pain was about 50% better, but still present. (PX 1, p. 260) Dr. Howard recommended conservative treatment with Ultram and Skelaxin and directed to follow up on a PRN basis.

Petitioner returned to Dr. Kube on January 18, 2007, reporting continued pain in her neck and shoulders. (PX 1, p. 248) She also reported some occasional pain in her right upper extremity. She reported that she had not experienced any real significant relief from the injections in her neck. Based upon her MRI and EMG findings, Dr. Kube stated that he did not think that there was a surgical intervention that would relieve her symptoms at that point, and released her from care to return as needed.

Petitioner testified that she continued working and continued to experience the same pain in her neck that she had experienced since her initial accident.

On September 21, 2007, Petitioner was seen by Dr. John Mahoney for complaints of right wrist pain that had been present for the past 6 to 8 weeks. (PX 1, pp. 240-241) As part of the examination Petitioner completed a Medical History Questionnaire (PX 1, pp. 244 – 245) In the Questionnaire, Petitioner listed her chief complaint as pain in her right wrist and thumb which had started six weeks earlier. Petitioner listed her employer as Respondent. She denied having injured herself on the job.

Dr. Mahoney noted that Petitioner had previously been seen by Dr. Kube for complaints of neck pain that "seems to be a different problem." Her biggest problem was reportedly radial-sided wrist and thumb pain. (PX 1, p. 240) Dr. Mahoney believed Petitioner had right De Quervain's tenosynovitis and he recommended a steroid injection which Petitioner underwent that same day. Petitioner followed up with the doctor on October 19, 2007 at which time Petitioner reported the injection had helped a lot but she was not completely cured. Petitioner denied any numbness or tingling in her hand. (PX 1, p. 239) Petitioner testified that she pursued treatment through Dr. Mahoney for treatment of her hands, which is the subject of another claim not now before the Arbitrator.

Petitioner returned to see Dr. Mahoney on January 15, 2008. At that time he diagnosed Petitioner with recurrent right wrist DeQuervain's tenosynovitis and bilateral carpal tunnel syndrome with superimposed cervical radiculopathy. (PX 1, pp. 236-237) Dr. Mahoney injected the first dorsal compartment of Petitioner's right wrist and the carpal tunnel of Petitioner's left wrist. Dr. Mahoney also referred Petitioner to Dr. Mulconrey to assist him in determining how much of her symptoms were coming from her neck versus how much was coming from the median nerve compression in her carpal tunnel.

When Petitioner returned to Dr. Mahoney on January 29, 2008, she reported that the DeQuervain's injection had helped a little but that the carpal tunnel injection to the left wrist had not helped much. She still complained of tingling in her median nerve digits bilaterally. She also reported some pain radiating down from her neck into her shoulders as well. He opined that's he may benefit from surgery on her DeQuervain's, and that she may be suffering from a double crush effect with both her neck and carpal tunnel compressions contributing to the numbness and tingling in her fingers. She was to see Dr. Mulconrey in the next couple of weeks. (PX 1, p. 235)

Petitioner did see Dr. Mulconrey initially on February 11, 2008. (PX 1, pp. 232-233) His history noted that she had been involved in a work accident in June of 2005 with recurrent problems since that time. She reported axial neck pain rated at 4.2/10 and upper extremity pain at 6/10. Her pain was worse in her right arm than her left. She reported pain in her bilateral trapezial region, right shoulder, upper arm and both hands. Raising her arm would worsen her pain. She also reported weakness in her right hand and intermittent paresthesia in the lateral three digits bilaterally. She reported occasional headaches that were moderate but frequent. On examination, he noted decreased sensation in her bilateral lateral forearms, and decreased strength on the right in her biceps, triceps, wrist flexors and extensors when

compared to the left. X-rays showed bilateral uncinate spurring at C5/6, mild degenerative disc disease at C3/4 and mild uncinate spurring on the left at C6/7. Dr. Mulconrey diagnosed multilevel cervical spondylosis, degenerative disc disease and bilateral upper extremity radiculopathy. He opined that Petitioner had foraminal stenosis with radicular symptoms that was causing her decreased sensation and strength. He ordered an MRI of her cervical spine which was done on February 14, 2008 and showed multilevel spondylosis C3 through C6 with uncinate spurring and disc bulging, and borderline central stenosis at all three levels. (PX 1, p. 215) Foraminal narrowing was also present, worse at C5/6 and C3/4. There was also a left paramedian protrusion at C6/7.

Petitioner returned to Dr. Mulconrey on March 21, 2008. (PX 1, p. 213) He reviewed the MRI results and recommended an anterior cervical decompression and fusion. He noted that she had experienced some relief with the previous injections by Dr. Howard. (PX 1, p. 212) He felt that the pain that Petitioner was experiencing in the right hand was related to problems at C5/6. Dr. Mulconrey saw Petitioner back for a pre-operative review of the procedure on May 7, 2008, (PX 1, p. 200) and then proceeded with surgery on May 27, 2008 at OSF St Francis consisting of an anterior cervical decompression and fusion at C5/6. (PX 2, pp. 6-7)

Petitioner followed up with Dr. Mulconrey on June 16, 2008, reporting some difficulty swallowing after surgery that was improving. (PX 1, p. 196) Dr. Mulconrey noted that she was to remain off work and directed her to start physical therapy. Petitioner returned on July 23, 2008, and was noted to be doing well overall, but was still complaining of interscapular pain which Dr. Mulconrey expected to improve as her fusion solidified. (PX 1, p. 194) She also complained of continued intermittent upper extremity radiculopathy, and complained that she was having occasional problems with her voice. Dr. Mulconrey noted that her problems with her voice could be related to her cervical surgery, but that he anticipated they would improve. Petitioner returned to Dr. Mulconrey again on August 27, 2008, reporting improvement in her interscapular pain, but complained of swelling on the left anterior portion of her neck in the supraclavicular area. (PX 1, p. 103) She also reported improvement in her voice and Dr. Mulconrey noted that a laryngoscopy had been done by an ENT and found no evidence of vocal cord paralysis. (See PX 3, pp. 81-86) She was given a 25 pound lifting restriction and advised to return in three months. However, Petitioner testified that, at her urging, the Dr. Mulconrey released her without restrictions at that time so that she could return to work.

Petitioner returned to Dr. Mulconrey on November 19, 2008, overall doing well, but reporting a recent increase in her mid-scapular pain. (PX 1, p. 100) Her upper extremity radiculopathy had nearly resolved. X-rays indicated that instrumentation was in appropriate position, but that the superior portion of the graft was not yet completely healed. Dr. Mulconrey continued her Neurontin and directed her to return for a one-year follow-up. Petitioner returned on May 20, 2009, reporting that she was doing well overall but was having intermittent pain in her cervical spine. (PX 1, p. 92) X-rays showed proper positioning but there was some question as to whether the upper end plate had completely fused. Dr. Mulconrey prescribed Flexeril, a Medrol dose pack as well as Naprosyn. He noted that she was having considerable lumbar based symptoms that might require therapy.

Petitioner filed an Application for Adjustment of Claim against Respondent on July 28, 2008. Petitioner alleged she injured her neck on August 15, 2006 while "pushing." (AX 4)

Petitioner underwent no treatment between November 19, 2008 and April 25, 2011.

Petitioner returned again to Dr. Mulconrey on April 25, 2011, three years following her cervical fusion. (PX 1, p. 49) Petitioner reported that she continued to suffer axial neck spasms but no significant upper extremity pain or symptoms. Petitioner did, however, describe significant low back pain, with symptoms in her lumbar spine and bilateral buttocks. Petitioner reported having difficulty at work and a recent incident where she had bent over and had difficulty straightening back up. On examination, Petitioner had some limitation in lumbar extension and a mildly positive straight leg raising test. Dr. Mulconrey diagnosed spondylolisthesis by x-ray examination, spinal stenosis and lumbar spondylosis. He prescribed physical therapy, injections by Dr. Sureka and Neurontin and Naprosyn. (PX 1, p. 49) Petitioner saw Dr. Sureka on the following day, April 26, 2011, reporting a six year history of low back and right leg pain. (PX 1, pp. 46-47) She reported that the pain traveled along the right anterior thigh and was worse with walking or bending. Dr. Sureka diagnosed possible lumbar radicular pain with low back and leg pain and recommended an MRI of her lumbar spine and physical therapy. Records show that Petitioner began a course of physical therapy on April 29, 2011. (PX 1, pp. 43-44) The MRI performed on May 2, 2011, showed anterolisthesis at L4/5 with moderate central canal stenosis in combination with facet arthropathy and ligamentum flavum hypertrophy. It also showed a broad based disc protrusion at L3/4 with moderate neural foraminal narrowing and impingement of the exiting nerve at L3. (PX 1, pp. 63-64)

Petitioner returned to Dr. Sureka on May 4, 2011, reporting that her buttock and leg pain had improved but her low back pain remained the same, and was exacerbated by bending or prolonged walking. (PX 1, p. 41) After reviewing the MRI, Dr. Sureka recommended a course of right L4 transforaminal epidural steroid injections, Gabapentin and continued therapy. Petitioner did undergo epidural steroid injections on June 1, 2011 (Left L5), June 8, 2011 (Right L4) and June 22, 2011 (Left L5). (PX 1, pp. 65-68) Petitioner returned to Dr. Sureka on July 13, 2011, reporting that the third epidural steroid injection did not give significant relief. (PX 1, p. 13) She reported cramping pain in her leg and continued low back pain. She reported that bending, standing and walking tended to worsen her pain. Dr. Sureka recommended a bone scan and use of Cyclogenzaprine three times daily for symptom relief. (PX 1, p. 13) A bone scan was done on July 18, 2011, but did not reveal significant abnormalities other than "mild facet osteoarthritic osteoblastic activity in the lower lumbar region at L3 to S1". (PX 1, p. 75) Dr. Sureka's office recommended referral to a surgeon (PX 1, p. 11) but the suggestion was not pursued at that time as Petitioner was beginning a new job. (PX 1, p. 10)

Petitioner offered the evidence deposition of Dr. Daniel Mulconrey, an orthopedic spine surgeon taken on March 29, 2010. Dr. Mulconrey testified that since he saw Petitioner some time after her accidents had occurred he had difficulty relating specific findings on the MRIs to her work accidents, as they could be either acute or chronic changes. (PX 10, pp. 16-17) However, he testified that a tugging or pulling type of injury can aggravate these conditions in the cervical spine. (PX 10, p. 18) He testified that such conditions can be aggravated by accidents without significant changes on the MRI. (PX 10, p. 19) He also testified that findings as he had found on the MRIs can be present without symptoms. (PX 10, p. 20) He testified that if a patient with such changes is symptom free and then develops symptoms in connection with a work accident, those accidents would be considered contributing causes for her need for surgery. (PX 10, p. 21) He testified that based upon a hypothetical question describing both work accidents, it would be difficult, if not impossible, to separate the two and give an opinion as to the relative contribution of each accident to her condition. (PX 10, p. 21) Dr. Mulconrey acknowledged having given Petitioner off work slips dated June 16, 2008 and July 23, 2008, the latter keeping her off work until her next appointment in 4 or 5 weeks. (PX 10, p. 23, Pet Depo Ex. 2 and 3).

On cross-examination by counsel for Respondent, Dr. Mulconrey testified that Petitioner's complaints and pain diagram that Petitioner provided initially to Dr. Van Fleet on October 16, 2005, could be consistent with the findings that he observed on the MRI in 2008. (PX 10, p. 28) He also testified that the pain diagram that Petitioner completed for Dr. Kube when Petitioner saw him on September 21, 2006, could be consistent with the condition for which the he performed surgery on May 27, 2008, though the pain diagram was different than the one completed for Dr. Van Fleet. (PX 10, p. 29) Dr. Mulconrey testified that the findings on the MRI dated September 25, 2006 could be present absent any traumatic event. (PX 10, p. 32) He testified that he could not determine the age of the findings without seeing pervious MRI studies, though the finding of a right paracentral disc protrusion could possibly be an acute finding. (PX 10, p.33) Based upon a review of records presented to him by Respondent's attorney, Dr. Mulconrey testified that the symptoms that Petitioner described to him appeared to relate to the March 2005 incident. (PX 10, p. 39) Based upon those records, he opined that the surgery that he performed could have been required absent any other inciting factor beyond that initial incident in March 2005. (PX 10, pp. 39-40) Dr. Mulconrey testified under cross-examination by Central Illinois Blood Bank's attorney that comparing the MRI that he had performed in 2008 and the report of the MRI done in 2006 it appeared that the findings were similar. (PX 10, p. 50)

Central Illinois Community Blood Center offered the deposition of Dr. Michael Orth who examined Petitioner pursuant to Section 12 of the Illinois Workers' Compensation Act on July 8, 2005. Dr. Orth claimed in his report and deposition testimony that Petitioner indicated to him that her neck pain began on June 15, 2005. (See RX 4, p. 7) He opined that Petitioner had suffered an acute lumbosacral strain at the time of her first work injury that was superimposed upon a pre-existing degenerative arthritis with spinal stenosis at L4/5. (RX 4, p. 9) Dr. Ortho opined that her low back condition had reached maximum medical improvement by the time of his examination. (RX 4, p. 10) Dr. Orth testified that Petitioner had a normal examination regarding her cervical region though she had an unidentified condition in her supraclavicular area. (RX 4, p. 10-11) Dr. Orth did state that Petitioner had some tenderness in the paraspinal muscle mass, the trapezius and upper half of the thoracic paraspinal musculature. (RX 4, p. 13) Dr. Ortho opined that the complaints that Petitioner had in her cervical area and supraclavicular area were not related to her work accident in March 2005. (RX 4, p. 14) Dr. Orth admitted on cross-examination that if he accepted the history to Dr. Smucker of cervical and thoracic complaints since the reported injury, he would have to relate those complaints to the accident. (RX 4, pp. 16-17) He also acknowledged that the type of accident that she described in lifting a patient would be consistent with an injury that would cause such cervical complaints. (RX 4, p. 17) He also acknowledged that his findings of cervical paraspinal muscle mass tenderness were consistent with a problem in the cervical spine. (RX 4, p. 17) Dr. Orth testified that his current practice is limited to doing independent medical evaluations and that he had retired from clinical practice in December 2004. (RX 4, p. 18) He testified that his examinations are nearly 100% at the request of respondents. (RX 4, p. 19) Dr. Orth testified that when he was in active orthopedic practice, he did not do neck surgery. (RX 4, p. 19) Upon further cross-examination, Dr. Orth acknowledged that Petitioner was off work at the time of his examination and he did not release her to return to work. (RX 4, p. 26) He acknowledged that Petitioner had complaints of numbness in her hands and tingling sensations that could be an abnormality associated with one of the cervical nerve roots. (RX 4, pp. 23-24)

Respondent offered the deposition of Dr. Marshall Matz taken on May 26, 2010. Dr. Matz testified that Petitioner had reported to him that she injured her back on August 15, 2006, near the end of her work day as a phlebotomist, when she was loading a piece of equipment onto a vehicle and the equipment started to roll backwards and she attempted to stop it and injured her back. (RX 7, p. 7-8) He stated that he asked Petitioner whether she had any prior treatment to her back or spine and she denied any similar

conditions or complaints in the past. (RX 7, p. 8) Dr. Matz testified that medical records contradicted this statement, showing "a variety of spinal complaints and specifically complaints involving her neck and limbs" going back to early 2005. (RX 7, p. 8) He confirmed that an injury date of May 21, 2005 contained in his report may be a typographical error. (RX 7, p. 8-9) Dr. Matz testified that records of Dr. Bansal dated April 29, 2005 and of the Orthopedic Center of Illinois dated May 9, 2005 show spinal complaints. (RX 7, pp. 9-10) He testified that complaints reflected in the office note of June 17, 2005, from the Orthopedic Center of Illinois were consistent with cervical radiculopathy preceding her accident at American Red Cross. (RX 7, p. 10) Dr. Matz testified that complaints at the Orthopedic Center of Illinois on July 27, 2005, of radiating paresthesia and diminished biceps reflex would be consistent with some nerve root irritation of the C5/6 level pre-dating Petitioner's accident in 2006. Dr. Matz noted that a history in a physical therapy note of August 2, 2005, of the onset of pain between the shoulder blades on June 15, 2005 that extended to her neck followed by swelling in the neck and shoulder could refer to referred pain from the neck. (RX 7, p. 12) Dr. Matz testified that decreased cervical range of motion and strength, with stinging pain in the right arm and tingling down the left described in that note could be consistent with cervical radiculitis. (RX 7, p. 12) Dr. Matz testified that complaints of pain in the neck, trapezius and both arms noted in an Orthopedic Center of Illinois note of October 7, 2005 show further pre-existing symptoms. (RX 7, p. 13) In reviewing findings on a cervical MRI of August 6, 2005, Dr. Matz testified that the findings on C3/4 to the right were an incidental finding, but that findings at C5/6 with left foraminal narrowing could be the source of Petitioner's neck and arm complaints. (RX 7, pp. 13-14)

Dr. Matz testified that findings on an EMG of August 19, 2005 demonstrated a C6 radiculopathy that pre-existed her accident with Respondent, and was consistent with her prior reference to a diminished reflex. (RX 7, p. 14) Dr. Matz testified that the Orthopedic Center of Illinois note of August 26, 2005, showing complaints of cervical and thoracic pain and pressure and paresthesia in the bilateral upper extremities were further evidence of a pre-existing chronic condition. (RX 7, pp. 14-15) Dr. Matz noted that the initial treatment note of Dr. Kube on September 21, 2006, after Petitioner's accident of August 15, 2006, referred to neck and upper back pain that had been present for about a year and started while moving a patient at a former job, and did not refer to any new accident. (RX 7, p. 15-16) He reviewed the intake note for that appointment, noting that it referred to an accident date of March 21, 2005 and that her complaints had been going on for a year. (RX 7, pp. 16-17) Dr. Matz testified that he reviewed the film of the MRI of September 25, 2006, and testified that there was no significant change from the prior film and that he did not feel that it showed any acute findings. (RX 7, p. 17) Dr. Matz also testified that he had reviewed a record of Dr. Howard dated October 26, 2006, and noted that there was no history of an August 15, 2006 occurrence. (RX 7, p. 19) Dr. Matz was also directed to the office note of Dr. Mulconrey of February 11, 2008, and noted that the history referring to an accident in June 2005, referred to long standing issues long pre-dating August 2006. (RX 7, p. 19) He confirmed that her complaints at that time were similar to those voiced in 2005. (RX 7, p. 19) Dr. Matz's attention was also directed to the history form completed at the time of the February 11, 2008 visit with Dr. Mulconrey referring to neck pain and that had been present since June 2005, and testified that this was also consistent with long standing pre-existing complaints. (RX 7, p. 20) Dr. Matz testified that the radiology findings of the MRI taken on February 14, 2008, were similar to the MRI findings in 2005 and testified that there were no acute findings on that scan that would be attributed to the incident of August 25, 2006. (RX 7, pp. 20-21)

Dr. Matz testified that in his opinion there was no causal connection between Petitioner's work-related accident of August 15, 2006, and her treatment starting with Dr. Kube on September 21, 2006 and subsequent surgical intervention on May 27, 2008. (RX 7, p. 24) On cross-examination, Dr. Matz confirmed that the degenerative conditions as found in Petitioner's spine can be aggravated by incidents of lifting or pulling heavy objects as she described, where a history relates no prior symptoms and a

sudden onset of symptoms related to the incident. (RX 7, p. 30) Dr. Matz acknowledged that some patients with such MRI findings would not have symptoms and that surgery would be performed only associated with symptoms that affect the patient's quality of life. (RX 7, pp. 31-32) Dr. Matz testified that he has not done surgeries for five years and that currently 30 percent of his practice is related to performing medical-legal examinations. (RX 7, pp. 33-34) He testified that he does a couple exams per month for Respondent's counsel's firm. (RX 7, pp. 34-35)

Petitioner also offered the evidence deposition of Dr. Paul Smucker taken on March 3, 2011. Dr. Smucker testified that when he saw Petitioner initially on May 9, 2005, she was reporting pain, not only in her low back, but also pain and tingling radiating up the thoracic back and into the neck, shoulder and arms. (PX 9, p. 6) Her primary complaint at the initial visit was of the pain in her low and mid back. (PX 9, p. 6) Following examination, Dr. Smucker diagnosed lumbar degenerative disc disease with a large broad based midline L4/5 disc herniation causing stenosis. He felt that the low back and thigh pain was related to that herniation. He also felt she had some soft tissue or muscle pain. (PX 9, p. 8) Dr. Smucker recommended use of Mobic and Skelaxin, and suggested an epidural steroid injection series. (PX 9, pp. 8-9) Dr. Smucker placed Petitioner on a 25 pound lifting restriction and recommended that she avoid twisting or bending at the waist. (PX 9, p. 9) Petitioner had the first epidural steroid injection and saw Dr. Smucker on June 1 and Dr. Smucker's impression at that time was that she had lumbar degenerative disc disease and a disk herniation at L4/5 that was somewhat improved by the initial injection. (PX 9, p. 10) Petitioner had a second injection on June 6, 2005 and then returned to Dr. Smucker earlier than scheduled on June 17, 2005, reporting pain and swelling in her neck, shoulder girdle and arms with radiating numbness and tingling. She reported improvement in her low back and legs after the two epidural steroid injections. (PX 9, p. 11) Dr. Smucker noted that the cervicothoracic complaints had been present to varying degrees since the reported injury. He noted she had intense pain coming on intermittently on either side which he felt was consistent with myofascial pain, but ordered an upper extremity EMG to check for radiculopathy or neuropathy. (PX 9, pp. 12-13) When seen on July 27, 2005, Petitioner showed a diminished biceps reflex on the left side though other neurological testing was normal. (PX 9, pp. 13-14) Dr. Smucker felt that the diminished biceps reflex could be consistent with a radiculopathy. (PX 9, p. 14) Dr. Smucker again recommended an EMG as well as a cervical MRI. (PX 9, p. 14) An MRI was done on August 6, 2005, that showed osteophytic change and degenerative disk changes on the right at C3/4 and C5/6 with right greater than left neuroforamina narrowing at both levels. (PX 9, p. 15) An EMG was done on August 19, 2005, that showed a mild left C6 radiculopathy. (PX 9, p. 15) Dr. Smucker testified that the EMG findings were consistent with the clinical finding of diminished reflex and stenosis at C5/6 shown on the MRI. Petitioner returned to Dr. Smucker on August 26, 2005, with continuing complaints, and Dr. Smucker recommended continued work restrictions, therapy and a cervical epidural steroid injection. (PX 9, pp. 16-17) The epidural injection on October 7, 2005, provided no improvement and an appointment was set with Dr. VanFleet, with continued physical therapy. (PX 9, pp. 14-15) Petitioner was complaining of pain in her neck and in the muscles between her shoulder blades and radiating in to her arms and fingers. Her symptoms were on both sides rather than primarily on the left. (PX 9, pp. 18-19) Petitioner returned to Dr. Smucker on October 19, 2005 after having seen Dr. VanFleet that day. Dr. VanFleet had not felt that she required operative intervention at that time. Dr. Smucker's diagnostic impression remained the same, being cervical radiculopathy and degenerative disc disease. (PX 9, p. 20) As Petitioner was not considered an operative candidate, Dr. Smucker felt that he had done all he could do and released Petitioner at maximum medical improvement and to return to work. (PX 9, pp. 20-21)

Dr. Smucker opined that Petitioner's low back complaints were causally related to her first work-related accident. (PX 9, p. 21) Dr. Smucker also opined that the cervical complaints that he treated were causally related to her work accident. (PX 9, p. 22) Dr. Smucker acknowledged that he had reviewed records of Petitioner's subsequent treatment that he detailed in his report attached as Exhibit 2 of his deposition, and included Petitioner's subsequent cervical fusion at C5/6. (PX 9, pp. 22-23) Based on those records and his knowledge of Petitioner's initial treatment, Dr. Smucker opined that Petitioner's cervical fusion was causally related to her March 2005 accident. (PX 9, p. 23) Dr. Smucker acknowledged that the subsequent diagnoses of Petitioner's cervical conditions as well as her complaints were consistent with what he had diagnosed. (PX 9, p. 24) On cross-examination, Dr. Smucker acknowledged that on June 17, 2005 Petitioner appeared seeking treatment for her neck and upper back, but volunteered that she had complained of her neck, shoulder girdles and upper extremities on the first day he saw her, though the degree of complaint was greater at the subsequent visit. (PX 9, pp. 32-33) He testified that throughout his treatment Petitioner had "consistently any time we reviewed the question of how did this all begin, each time she indicated that all of the above symptoms, the low back, the neck, the upper back and all that stuff began with this incident of a pulling in her back the day she was transferring someone" referring to the incident of March 21, 2005. (PX 9, pp. 33-34) Addressing his release of Petitioner without restrictions, Dr. Smucker commented, "I would also point out that this individual was leaving the community, and I have no doubt that I would have confided in her and asked her if she wanted me to give her any restrictions because we were at the end of the road and she was moving to a new community and she was hoping to find work there. And both she and I would have known that her going to a new community and having work restrictions could have made it very difficult for her to find a job." (PX 9, p. 38) Dr. Smucker reviewed the initial treatment records from Dr. Bansal and Progressive Wellness and acknowledged that they contained no reference to complaints of the neck. (PX 9, pp. 29-30) However, Dr. Smucker testified later that Petitioner and her doctors may have been focused on her then primary complaint of low back pain, just as Dr. Smucker had focused on the complaint primarily in his first visit with Petitioner, though he did note her complaints in her neck and upper extremities. (PX 9, pp. 42-45) Dr. Smucker testified that the notes that he reviewed from Dr. Bansal did not change his opinion on causation, and that he had noted that there were other medical issues that Dr. Bansal did not refer to, which would suggest the low back complaints were being focused upon to the exclusion of other present issues. (PX 9, pp. 47-48)

Petitioner testified that she continues to experience spasms and pain in her neck and low back. Petitioner testified that she no longer performs many of her household duties and that her children have taken over many of them due to her pain. Petitioner testified that she currently works as a phlebotomist for Central Illinois Cancer Care which involves only drawing blood and does not involve the lifting and moving of equipment that she was required to do previously. Petitioner testified that she avoids activities involving bending or lifting over 10 pounds. She no longer drives long distances as this exacerbates her low back and neck pain. She limits climbing stairs. Petitioner testified that she takes over-the-counter-pain medication daily for her pain.

<u>The Arbitrator concludes:</u>

Accident.

Petitioner failed to prove she sustained an accident on August 15, 2006. Petitioner's testimony as to accident was not corroborated by or consistent with any of the medical records generated after her alleged accident and prior to her filing her workers' compensation claim against Respondent. While there is a vague general reference to "pushing and lifting heavy objects" in the September 26, 2006 physical therapy note, that is different that the very specific occurrence Petitioner described in her testimony. Petitioner was not a credible witness.

Notice.

Petitioner failed to prove she provided timely notice of her alleged August 15, 2006 accident to Respondent. Petitioner testified that she completed some papers within 45 days and that a lady named "Mary" was to get the papers. Petitioner could not recall her title. Petitioner testified she did not retain or get a copy of the report she gave to Mary. Petitioner bears the burden of proving timely notice of the accident was given. In this instance Petitioner could not establish exactly when she gave notice or to whom she provided notice. Petitioner failed to meet her burden of proof.

Causation.

Even assuming Petitioner had established she sustained an accident on August 15, 2006, Petitioner's claim for compensation must be denied as she failed to prove that her current condition of ill-being in her neck and low back is causally related to that accident. Petitioner continued to work after the alleged accident on August 15, 2006. She could not recall exactly when it occurred that day. Thereafter, she continued to work her regular schedule and sought no treatment until September 21, 2006. A close inspection of the medical records generated after the alleged accident fails to reveal any mention of an August 15, 2006 accident. Petitioner either doesn't mention any accident or references an accident in March of 2005. The Arbitrator further notes Petitioner's testimony that at the time of the alleged August 15, 2006 accident she experienced "increasing" back pain as she was still supposedly experiencing low back and neck pain from an earlier accident in 2005. At most (and assuming an accident occurred) Petitioner may have sustained a temporary exacerbation of her underlying neck condition; however, she did not undergo much treatment (physical therapy and a visit with Dr. Kube) before embarking on care and treatment for her unrelated right hand/wrist/thumb problems. Petitioner also had some substantial gaps in treatment in 2007 and from 2008 through 2011. Petitioner never mentioned an accident with Respondent or one occurring in August of 2006 while treating with Dr. Mulconrey or Dr. Sureka.

Petitioner's claim for compensation is denied. No benefits are awarded. All other issues are rendered moot.

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STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Brenning,
Petitioner,

vs. NO. 10 WC 36220

14IWCC0322

State of Illinois,
Menard Correctional Center.
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 15, 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.

DATED: MAY 0 1 2014

Daniel R. Donohoo

Daniel R. Donohoo

Charles J. DeVriendt

Charles J. DeVriendt

Ruth W. White

Ruth W. White

o-04/22/14
drd/wj
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRENNING, LARRY
Employee/Petitioner

Case# **10WC036220**

SOI/MENARD CORRECTIONAL CENTER
Employer/Respondent

14IWCC0322

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
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

JUL 15 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Larry Brenning
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # 10 WC 36220

Consolidated cases: ____

14IWCC0322

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on May 8, 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. [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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On September 10, 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 not sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $57,108.00; the average weekly wage was $1,098.23.

On the date of accident, Petitioner was 56 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $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, Petitioner's claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator
ICArbDec p. 2

July 8, 2013
Date

JUL 15 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury to his right and left arms/shoulders arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of September 10, 2010. Respondent disputed liability on the basis of accident, notice and causal relationship. Petitioner's counsel also filed a petition for Section 19(k) and Section 19(l) penalties and Section 16 attorneys' fees

Petitioner was employed by Respondent as a Correctional Officer from February 23, 1987, until he retired in December 30, 2010, a period of almost 24 years. Petitioner testified that his job duties were the same as what he testified to in a prior repetitive trauma case involving his hands/elbows. A copy of the decision that was rendered in that case was received into evidence at trial (Petitioner's Exhibit 9). Petitioner also prepared a hand-written description of his job duties which was also received into evidence at trial (Petitioner's Exhibit 10). According to Petitioner's hand-written job description, from 1987 to 1992, Petitioner worked in a cell gallery with each gallery containing at least 48 cells. Petitioner would bar rap, used keys, carried food racks and trays, carried ice buckets and containers. Petitioner would also sweep/mop the galleries and pick up trash. Petitioner's statement also indicated that he worked in the tower and that he would inventory ammunition, transport weapons to the armory and would, on occasion, be removed from the tower and assigned to a gallery. At the conclusion of Petitioner's hand-written statement, he noted "In summary I would say I used my shoulders, hands and elbows extensively, especially the first 14 years of my working career." Petitioner's testimony was that for the first 14 years as a Correctional Officer, he worked primarily in the cell galleries performing the tasks generally associated with that assignment. For the remaining 10 years (approximately 2000 to 2010), Petitioner worked primarily in the tower. Petitioner did state that he worked a substantial amount of overtime and, on those occasions, he was generally not working in the tower but in the prison galleries. When the facility was on a "lockdown" Petitioner was usually removed from the tower and assigned to pass out the food trays in the galleries. Petitioner testified that in 2008, 2009 and 2010, the facility was on lockdown for approximately 250 days. Respondent introduced into evidence a record of those lockdowns for those years. The Arbitrator has reviewed the record and is not able to determine with any certainty the precise number of times the facility was on lockdown (due to various codes contained in the document); however, the actual number of days the facility was on lockdown appears to be approximately 100.

Petitioner testified that in the course of performing his job duties, in particular, the last 10 years that he worked for Respondent, that he began to develop symptoms in his elbows/wrists as well as his shoulders. Petitioner testified that when the facility was on lockdown that there was no inmate movement and that he was required to carry trays up and down stairs and in the galleries and that this specific activity caused his shoulders to hurt and become symptomatic. Petitioner testified that while he was experiencing this gradual onset of pain that he simply "...put up with the pain."

Petitioner did not seek any medical treatment for his shoulder problems until he was seen by Dr. George Paletta, an orthopedic surgeon, on September 10, 2010. At that time, Petitioner informed

Dr. Paletta that the onset of symptoms occurred approximately five years ago, and that the primary activity that caused shoulder pain was carrying the racks of trays with food weighing various amounts. Petitioner testified that this procedure involved a significant amount of repetitive lifting from chest to shoulder level.

Dr. Paletta examined the Petitioner and noted positive findings in respect to the AC joints. His preliminary diagnosis was probable distal clavicle osteolysis of both shoulders. In his medical report of that date, Dr. Paletta opined that based on the history Petitioner provided to him and his job requirements that the bilateral shoulder problems were either caused or aggravated by Petitioner's work activities. Dr. Paletta had MRIs performed on September 10, 2010, of both shoulders. The MRI of the right shoulder revealed tendinopathy of the infraspinatus and subscapularis tendons, AC arthrosis and swelling of the AC joint. The MRI of the left shoulder had essentially the same findings as the right with the exception that the swelling of the AC joint was more significant than what was observed on the right.

Dr. Paletta subsequently reviewed the MRI of the right shoulder on September 15, 2010, and opined that it revealed significant AC joint inflammation, distal clavicle edema and AC joint arthrosis. Dr. Paletta initially recommended conservative treatment and referred Petitioner to Dr. Matthew Bayes, an orthopedic surgeon associated with him, who saw Petitioner on October 1, 2010. Petitioner also informed Dr. Bayes of the gradual onset of his bilateral shoulder symptoms over the preceding five years. Dr. Bayes gave Petitioner injections in both of his shoulders.

On September 29, 2010, Petitioner completed a "Notice of Injury" in which he indicated a date of injury September 10, 2010, and that Petitioner injured his shoulders by "Turning keys, packing trays, closing doors." (Respondent's Exhibit 1). On that same date, Major R. D. Moore completed the "Supervisor's Report of Injury or Illness" which indicated that Petitioner had injured both shoulders while performing repetitive motions through turning keys, packing trays and closing doors (Respondent's Exhibit 3).

Petitioner's bilateral shoulder conditions were unresponsive to conservative treatment so Dr. Paletta performed arthroscopic surgeries on the right and left shoulders on January 4, and March 17, 2011, respectively. In both instances, the surgical procedure consisted of a subacromial decompression, bursectomy and acromioplasty with distal clavicle excision. Following the surgeries, Petitioner received physical therapy and was released to full activity on June 13, 2011.

At the direction of the Respondent, Petitioner was examined by Dr. James Emanuel, an orthopedic surgeon, on August 1, 2011. Petitioner informed Dr. Emanuel that for the first 10 years of his employment his primary job was carrying trays up/down stairs and that he would, on occasion, lift the trays from waist to shoulder height. Petitioner advised Dr. Emanuel that for the last 14 years on the job, he was primarily in the tower and occasionally in the galleries when he would be required to feed the inmates. Dr. Emanuel examined Petitioner, reviewed both of the MRIs and the medical treatment records. Dr. Emanuel opined that Petitioner's work duties did not cause or aggravate the bilateral shoulder condition noting that during Petitioner's last 14 years of employment he was primarily in the tower and very little activity that involved the repetitive use of the upper extremities was, in fact, required and that Petitioner only occasionally participated in the movement of the trays. He also noted that the duration of symptoms reported

to both Dr. Paletta and Dr. Bayes was five years but that it was 10 years, when he examined the Petitioner.

On August 31, 2011, Petitioner was seen by Dr. Paletta and his condition was improved. Although Petitioner had retired at that time, Dr. Paletta opined that Petitioner could return to full unrestricted duties and that he was at MMI. Dr. Paletta was deposed on April 19, 2013, and his deposition testimony was received into evidence at trial. Dr. Paletta testified that he diagnosed Petitioner with arthritis and osteolysis of the clavicle. When questioned about osteolysis, Dr. Paletta stated that it develops as a result of an inflammatory response at the distal end of the clavicle, typically due to repetitive stress. It is a somewhat common situation or condition for individuals that do a substantial amount of weightlifting. Dr. Paletta opined that Petitioner's job duties of carrying trays and pushing/pulling cell doors were a contributing cause of the condition.

Dr. Emanuel was deposed on December 20, 2011, and his deposition testimony was received into evidence at trial. Dr. Emanuel's testimony was consistent with his medical report and he reaffirmed his opinion that there was not a causal relationship between Petitioner's bilateral shoulder condition and the work activities. Dr. Emanuel specifically noted that Petitioner only performed a minimal amount of repetitive activities during the last 14 years of his employment for Respondent.

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 to his right and left arms/shoulders arising out of and in the course of his employment for Respondent and that his current condition of ill-being in regard to the right and left shoulders is not causally related to his work activities.

In support of this conclusion the Arbitrator notes the following:

The time of the initial onset of Petitioner's bilateral shoulder symptoms cannot be determined with any reasonable certainty because Petitioner informed Dr. Paletta and Dr. Bayes that the shoulder symptoms began five years prior to their examinations (September and October, 2010, respectively); but when seen by Dr. Emanuel in August, 2011, Petitioner stated that the symptoms began 10 years prior.

The Petitioner spent the last 10 years of the time he worked for Respondent (approximately 2000 to 2010) working in the tower. While he performed some of the tasks that he believed caused his bilateral shoulder problems, the evidence does not support that he did so on any regular and continuous basis.

In the Report of Injury Petitioner stated that turning keys, carrying trays and closing doors caused his shoulder problems; however, the evidence does not support that he performed these various activities on any continuous and repetitive basis for the last 10 years that he worked for Respondent.

Petitioner's statement that he simply lived with bilateral shoulder pain for a period of 10 years before seeking any medical treatment is not credible.

The Arbitrator finds the opinion of Dr. Emanuel to be more persuasive than that of Dr. Paletta, primarily because Dr. Emanuel's opinion was based on a more complete and accurate understanding of Petitioner's work activities.

In regard to disputed issues (D), (E), (J), (L) and (M) the Arbitrator makes no conclusions of law because these issues are rendered moot because of the Arbitrator's conclusions in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Corey Jackson,
Petitioner,

vs. NO. 11 WC 37264

14IWCC0323

Southern Illinois University,
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 temporary total disability, the nature and extent of Petitioner's disability, medical expenses and choice of Petitioner's physician 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 July 17, 2013 is hereby affirmed and adopted.

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

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

14IWCC0323

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 $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: MAY 0 1 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-03/26/14
drd/wj
68

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

JACKSON, COREY
Employee/Petitioner

Case# **11WC037264**

14IWCC0323

SOI/SOUTHERN ILLINOIS UNIVERSITY
Employer/Respondent

On 7/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

0478 EDWARD J FISHER
1300 SWANWICK ST
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CHESTER, IL 62233

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
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0558 ASSISTANT ATTORNEY GENERAL
MOLLY WILSON DEARING
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CARBONDALE, IL 62901

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

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

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/19

JUL 17 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Corey Jackson
Employee/Petitioner

Case # 11 WC 37264

v.

Consolidated cases: _____

State of Illinois/Southern Illinois University of Carbondale
Employer/Respondent

14IWCC0323

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on May 10, 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 [ ] Maintenance [x] TTD

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

N. [ ] Is Respondent due any credit?

O. [x] Other Exceeded choice of physicians and mileage

FINDINGS

On May 17, 2011, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $1,438.48.

On the date of accident, Petitioner was 33 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $305.50 to SIU-Carbondale Student Health Program, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Based upon the Arbitrator's Conclusions of Law attached hereto, all other compensation benefits are 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)

July 15, 2013
Date

JUL 17 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on May 17, 2011. According to the Application, Petitioner fell off the back of a work truck while strapping a gang box and sustained injuries described as "Multiple - spine." Respondent stipulated that Petitioner did sustain a compensable accident on May 17, 2011; however, Respondent disputed liability on the basis of causal relationship. Respondent also took the position that Petitioner had exceeded the choice of physicians as prescribed by the Act. This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits, medical bills, mileage and prospective medical treatment.

Petitioner worked for Respondent as an electrician and was hired out of the Union Hall in West Frankfort to perform electrical work on the campus of Southern Illinois University. On May 17, 2011, Petitioner was in the process of loading what he described as a "gang box" and was putting it in the back of a truck. While performing this task, Petitioner stepped onto a "Tommy gate," a lifting device attached to the back of the truck. When the gate stopped moving, Petitioner backed up and fell backwards into one of the gate's steel supports. Petitioner submitted into evidence a photo of the truck with the gate in place and Petitioner circled the support that he landed on when he fell (Petitioner's Exhibit 12). Petitioner testified that when he fell, his shirt was ripped and he sustained a scrape/cut on his low back. The accident was reported in a timely manner and the "Notice of Injury" was completed and signed by Petitioner on May 20, 2011, in which he described the injury as being a "scrape on my lower back." A "Supervisor's Report of Injury or Illness" was prepared by Tom Clark, Petitioner's supervisor, on May 23, 2011, and it also described the injury as being a scrape of the low back. (Respondent's Exhibits 2 and 3).

Following the injury, Petitioner was taken to the SIU Medical Clinic where he was seen by Dr. Melodi Ewing, who noted that Petitioner had a five cm abrasion in the mid-line of the lumbosacral area of the back with some mild tenderness. X-rays of the lumbosacral spine were obtained which were normal and the Petitioner was directed to call if he was not better.

The Petitioner's family physician was Dr. Bharat Patel who had previously treated him for a variety of health issues, including muscular spasms of the back. Dr. Patel's medical records indicated that Petitioner was seen for muscular back spasms on December 1 and December 22, 2010, as well as March 31, 2011. Dr. Patel prescribed Flexeril for this condition. At trial, Petitioner testified that he had no prior low back symptoms and that the prior treatment that he had received from Dr. Patel was for the upper back and shoulder blade areas.

Petitioner was seen by Dr. Patel for the first time subsequent to the accident on May 31, 2011. Petitioner testified that he had not scheduled an appointment and that he simply went to the doctor's office. Petitioner's primary reason for seeing Dr. Patel at that time was for bilateral knee pain and an anxiety disorder, both of which were conditions for which he was previously treated by Dr. Patel. There was no reference to the accidental injury of May 17, 2011, or any back symptoms or complaints. Petitioner testified that he did inform Dr. Patel of his back problems at that time and had no explanation as to why it was not contained in the medical record.

Petitioner was seen by Dr. Patel on July 14, 2011, which was a routine scheduled appointment to have his testosterone levels checked. Dr. Patel's record of that date also contained the notation of muscular spasm; however, it is not clear if this was in reference to the back or not. Petitioner was seen again by Dr. Patel on August 5, 2011, again primarily because of his testosterone level. There was no reference in either record to the work accident of May 17, 2011.

Petitioner continued to work full duty for Respondent as an electrician until August 26, 2011, when his temporary job for Respondent ended. Subsequent to the cessation of employment, Petitioner was seen by Dr. Patel again on September 6, 2011, and, for the first time, Dr. Patel's record of that date indicated that in May, 2011, Petitioner fell off of a truck and hit his low back and that he was treated at Student Health Services and had an x-ray. At trial, Petitioner testified that his back was sore even though he continued to work full duty as electrician.

Dr. Patel ordered an MRI without IV contrast and one was performed on September 13, 2011, which revealed degenerative changes, foraminal narrowing and some disc bulges. On September 14, 2011, Dr. Patel reviewed the MRI and opined that it revealed no acute trauma. Dr. Patel noted that Petitioner complained of low back pain but there were no radicular complaints. Dr. Patel authorized Petitioner to be off work and ordered a second MRI with IV contrast which was performed on September 16, 2011. The findings of this second MRI were consistent with the findings of the one that had just been performed two days prior. Dr. Patel referred Petitioner to Dr. K. Brandon Strenge, an orthopedic surgeon.

Dr. Strenge saw Petitioner on September 22, 2011, and Petitioner provided him with a history of the work-related accident of May, 2011, and advised that he had complaints of low back pain. Dr. Strenge's findings on clinical examination of the low back revealed no tenderness, a negative straight leg raising test and symmetrical neurological findings at both the ankles and knees. Dr. Strenge reviewed the MRI and noted that it revealed an enhanced lesion at L1-L2; however, he noted "I do not see any pathology on his MRI that would elicit any further back pain." Dr. Strenge opined that the lesion could be a hematoma so he referred him to Dr. Theodore Davies, who saw Petitioner on October 11, 2011. In regard to Petitioner's low back, Dr. Davies' findings on clinical examination were consistent with those of Dr. Strenge; however, he noted an area of hyperpigmentation in the low back consistent with a hematoma and referred Petitioner to Dr. Matthew McGirt of the Vanderbilt Spine Institute.

Dr. McGirt examined Petitioner on November 16, 2011. In connection with that evaluation, Petitioner completed an information sheet in which he described the circumstances of the work-related accident and that he had been experiencing symptoms for three and one-half months, which indicated an onset date of sometime in August, 2011. Petitioner informed Dr. McGirt of having sustained a fall on his back in May and having chronic low back pain but that he had no leg pain or numbness/tingling. Dr. McGirt reviewed the MRI and noted that it showed no structural abnormalities in the low back. In regard to the lesion, Dr. McGirt opined that it was either an ependymoma or schwannoma, but that it was not responsible for any of his back symptoms. In regard to the low back, Dr. McGirt stated that Petitioner had a back strain/sprain and recommended that he have some physical therapy and use a back brace.

Petitioner was seen by Dr. Strenge on December 13, 2011. Dr. Strenge opined that Petitioner's pain was muscular myofascial and he had Petitioner continue with physical therapy and authorized him to remain off work. Dr. Strenge saw Petitioner again on January 10, 2012, and, on physical examination, there was no tenderness of the lumbar paraspinals, straight leg raising was negative bilaterally and the neurological findings were symmetric at both the ankles and knees. Dr. Strenge authorized Petitioner to remain off work and ordered continued physical therapy. On February 23, 2012, Dr. Strenge recommended Petitioner transition from physical therapy to work hardening.

Dr. Strenge referred Petitioner to Dr. Monte Rommelman, a physiatrist, who initially saw Petitioner on February 29, 2012. Petitioner complained of low back pain and stated that his symptoms began in May, 2011, following a fall at work. Dr. Rommelman recommended Petitioner have some epidural steroid injections at L4-L5 and that he continue physical therapy. Dr. Rommelman gave Petitioner steroid injections at L4-L5 on May 1 and May 22, 2012, but Petitioner's condition did not improve. When Dr. Rommelman saw Petitioner on June 13, 2012, Petitioner informed him that his pain was worse.

At the direction of the Respondent, Petitioner was examined by Dr. Kevin Rutz, an orthopedic surgeon, on April 5, 2012. In connection with his examination of the Petitioner, Dr. Rutz reviewed the medical records of the providers who had previously treated the Petitioner. Dr. Rutz's findings on examination revealed a full range of motion of the back, normal strength and reflexes and a negative straight leg raising test. Petitioner informed Dr. Rutz that he did not have pain following the accident of May 17, 2011, but that he experienced a slow gradual onset of pain sometime thereafter. Dr. Rutz reviewed the MRIs and opined that they were unremarkable in regard to the lumbar spine. Dr. Rutz opined that the accident of May 17, 2011, resulted in a skin abrasion. Dr. Rutz further opined that given the fact that Petitioner did not experience an onset of pain at the time and did not seek medical care for several months the accident was not a causative factor of his current condition of ill-being. Dr. Rutz further opined that Petitioner was at MMI and could return to work without restrictions.

On November 19, 2012, Petitioner was seen by Dr. Matthew Gornet, an orthopedic surgeon. Petitioner informed Dr. Gornet of having sustained the injury on May 17, 2011, and the medical treatment that he received thereafter. Dr. Gornet opined that Petitioner's symptoms may have been related to a subtle disc injury at L4-L5 versus an aggravation of pre-existing facet arthritis at that level. He further opined that Petitioner's symptoms were related to the accident of May 17, 2011. Dr. Gornet ordered that a new MRI be performed and he authorized Petitioner to return to work on light duty with no lifting over 35 pounds. On January 14, 2013, Petitioner underwent an MRI which suggested the presence of a nerve sheath tumor at L1-L2 and a broad based disc protrusion at L4-L5, probably a partial annular tear. Dr. Gornet saw Petitioner on that date and recommended that he have some facet blocks at L4-L5. Dr. Gornet referred Petitioner to Dr. Kaylea Boutwell who performed nerve blocks on Petitioner on January 23, and February 6, 2013. Petitioner was again seen by Dr. Gornet on February 25, 2013, and informed him that the injections did help but that the pain had returned. Dr. Gornet ordered that Petitioner have a CT/myelogram which was performed on April 22, 2013, and revealed facet changes at L4-L5.

In April, 2013, Dr. Rutz reviewed additional medical records including those of Dr. Gornet. Dr. Rutz prepared a supplemental report dated April 30, 2013, in which he reaffirmed his opinion that Petitioner's back pain was not causally related to the accident of May 17, 2011. Dr. Rutz stated that the timeline of Petitioner's complaints was consistent with a long-standing degenerative condition and not any acute trauma.

Dr. Strenge was deposed on September 13, 2012, and his deposition testimony was received into evidence at trial. Dr. Strenge testified that he initially saw Petitioner on September 22, 2011, and that Petitioner's symptoms were the result of a myofascial strain which he related to the accident of May 17, 2011. Dr. Strenge agreed that his opinion regarding causality was based on the history provided to him by the Petitioner and that he relied on the fact that Petitioner had experienced an immediate onset of pain following the accident. He further agreed that if the records indicated that Petitioner did not sustained an immediate onset of pain following the accident and was able to continue to work, that he could have potentially changed his opinion in regard to causality. He also stated that if Petitioner had back problems prior to May 17, 2011, that this could also cause him to potentially change his opinion in regard to causality.

Dr. Patel was deposed on October 18, 2012, and his deposition testimony was received into evidence at trial. Dr. Patel testified that Petitioner had been a patient of his since August, 2007, and that Petitioner had degenerative joint disease which was symptomatic prior to May, 2011. While Dr. Patel opined that the accident of May 17, 2011, aggravated this pre-existing condition, he agreed that an onset of pain/symptoms three months post accident would be inconsistent with a traumatic event.

Dr. Rommelman was deposed on October 18, 2012, and his deposition testimony was received into evidence at trial. Dr. Rommelman testified that there was a causal relationship between the accident of May 17, 2011, and the Petitioner's low back condition; however, this opinion was based on the Petitioner having an immediate onset of pain at the time of the accident continuing until the time he saw him. Dr. Rommelman was not aware that Petitioner had back pain from 2007 to 2011 and that he had not sought any medical treatment until three months following the accident and that he had continued to work.

Dr. Rutz was deposed on May 3, 2013, and his deposition testimony was received into evidence at trial. Dr. Rutz's testimony was consistent with his medical reports and he reaffirmed his opinion that there was not a causal relationship between Petitioner's low back condition and the accident of May 17, 2011. Dr. Rutz noted that the Petitioner's timeline of not seeking any medical treatment until three and one-half months following the accident was consistent with a degenerative condition with a slow gradual onset as compared to an acute trauma. Further, when Dr. Rutz read the MRIs he noted that other than some degenerative changes, but there was nothing revealed which would account for Petitioner's subjective pain complaints other than those degenerative changes.

Petitioner testified that he had no prior symptoms in regard to his low or middle back prior to May 17, 2011, and that the treatment he received for muscular spasms was in the upper area of the back between the shoulder blades. Petitioner agreed that he worked continuously from May 17, 2011, through August 26, 2011, when he was laid off from the job. He stated that during this

period of time, he experienced back complaints while performing his job duties but that he did not seek any treatment from a physician. Petitioner admitted to having received some disability payments through his union and receiving unemployment compensation benefits for a period of time. Petitioner testified that he is presently unable to do anything that requires any physical exertion.

Jennifer Batson testified on behalf of the Respondent. Ms. Batson is the Respondent's Workers' Compensation/Disability Coordinator who handles all of the necessary paperwork for both occupational and non-occupational employee disability claims. Batson confirmed that Petitioner reported the accident in a timely manner. She confirmed that Petitioner's job was a temporary assignment that ended on Friday, August 26, 2011, and that Petitioner called her on Monday, August 29, 2011, requesting that she approve treatment for his May, 2011, back injury.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being is not causally related to the accident of May 17, 2011.

In support of this conclusion the Arbitrator notes the following:

While there is no dispute that Petitioner sustained an accidental injury arising out of and in the course of his employment for Respondent on May 17, 2011, Petitioner continued to work in a full unrestricted capacity until his job with Respondent ended on August 26, 2011. Petitioner sought no medical treatment for any back issues during this period of time. Although Petitioner was seen by his family physician, Dr. Patel, on May 31, July 14 and August 5, 2011, he did not inform Dr. Patel of having sustained a work-related back injury nor did he have any complaints of low back symptoms. Further, Dr. Patel previously treated Petitioner for muscular spasms in the back and agreed that Petitioner had degenerative changes in his back that pre-existed the accident of May 17, 2011.

Petitioner's testimony that he experienced back symptoms immediately following the accident of May 17, 2011, is not credible and contradicted by his failure to report any back symptoms to Dr. Patel until September 6, 2011, and his advising both Dr. McGirt and Dr. Rutz that the onset of symptoms occurred sometime in August, 2011, or gradually developed over a period of time, respectively. Additionally, the unrebutted testimony of Jennifer Batson raised significant doubts as to Petitioner's credibility in that she testified Petitioner called her the Monday following the ending of his temporary assignment requesting that she approve treatment for his May, 2011, back injury.

The opinions of Dr. Patel, Dr. Strenge and Dr. Rommelman in regard to causality are significantly flawed because they are based upon incomplete and inaccurate history regarding the onset of Petitioner's symptoms. However, all three of these physicians agreed that a gradual onset of pain was inconsistent with a traumatic event.

The opinion of Dr. Rutz is the most persuasive, primarily because it is the only opinion that is based upon the correct information regarding Petitioner's medical treatment, history and onset of symptoms. Dr. Rutz's opinion that Petitioner's treatment and report of a gradual onset of pain subsequent to the accident is consistent with the degenerative condition as opposed to an acute traumatic event.

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

The Arbitrator concludes that Petitioner received reasonable and necessary medical treatment immediately following the accident of May 17, 2011, and that Respondent is liable for payment of the medical bill associated therewith. All other bills for medical services are denied.

Respondent shall pay reasonable and necessary medical services of $305.50 to SIU-Carbondale Student Health Program, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issues (K), (L) and (O) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusions in regard to disputed issue (F).

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Summers,
Petitioner,

vs. NO. 12 WC 02257

14IWCC0324

Republic Waste,
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 accident, temporary total disability, permanent partial 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 May 1, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 1 2014

Daniel R. Donohoo

o-04/22/14
drd/wj
68

Charles J. DeVriendt

Ruth W. White

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

SUMMERS, DAVID
Employee/Petitioner

Case# **12WC002257**

14IWCC0324

REPUBLIC WASTE
Employer/Respondent

On 5/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

1580 BECKER SCHROADER & CHAPMAN PC
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4942 LEAHY WRIGHT & ASSOCIATES
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10805 SUNSET OFFICE DR STE 306
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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)

David Summers
Employee/Petitioner

v.

Republic Waste
Employer/Respondent

Case # 12 WC 2257

Consolidated cases: ___

14IWCC0324

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 **Collinsville**, on **3-19-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

C. [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. [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 **14IWCC0324**

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 **$51,057.76**; the average weekly wage was **$981.88**.

On the date of accident, Petitioner was **43** years of age, *single* with **0** children under 18.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $654.58/week for 54 and 2/7 weeks, commencing 3/12/2012 through 3/27/2013, as provided in Section 8(b) of the Act. The parties stipulated that Petitioner was paid all owed TTD benefits from the date of accident until 3/11/2012.

Respondent shall pay reasonable and necessary medical expenses, pursuant to the medical fee schedule of $765.00 to Dr. Rhunda El-Khatib, as provided in Section 8(a) and 8.2 of the Act. Respondent shall receive an 8(j) credit for any amounts actually paid to medical providers by Respondent's group insurance. Respondent shall hold Petitioner harmless in keeping with Sections 8(j).

Respondent shall authorize and pay for the reasonable, necessary and related medical treatment proposed by Petitioner's treating physician, including appropriate surgical intervention to Petitioner's lumbar spine.

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

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

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

Signature of Arbitrator

4/29/13
Date

ICArbDec19(b)

MAY - 1 2013

Findings of Fact

Petitioner is a 44 year-old diesel mechanic for Respondent. On October 4, 2011 Petitioner sustained an injury to his low back. Specifically, Petitioner was working under a diesel truck, laying-flat on his back on a creeper board, maneuvering a torch rod. As he was positioning the torque-rod he twisted and felt a pop in his back and immediately felt pain in low back. Petitioner continued to work the rest of his shift. He testified that throughout the rest of the work day, he had to do substantial bending over at the waist, which caused increased symptoms. Petitioner had trouble getting out of bed the next morning due to pain. The next morning he sought medical treatment and reported the injury to Respondent.

On October 5, 2011, Petitioner had a pre-arranged visit with his primary care physician, Dr. Rhunda El-Khatib, to address anxiety issues. At this visit, Petitioner reported his October 4, 2011 work injury. Dr. El-Khatib treated Petitioner for his anxiety and also ordered an X-ray of Petitioner's lumbar spine and provided him pain medicine. (PX 1at 3-4)

At the request of Respondent, Petitioner reported to Dr. George Dirkers, at Midwest Occupational Medicine. A pain diagram completed by Petitioner the day after the injury indicated he was having pain in his left lower back and left upper hip. (RX 4 at 20) Dr. Dirkers ordered physical therapy at the Work Center in Alton, Illinois. Petitioner was authorized off of work. (PX 6 at12) On November 17, 2011, Dr. Dirkers ordered an MRI of Petitioner's lumbar spine. (PX 6 at 27)

The records from Midwest Occupational Medicine indicate, specifically in the October 13, 2011 and November 3, 2011 office records, that Petitioner was complaining of pain in his low back and pain into his left lower extremity. Petitioner testified that he had pain from his low back into his left lower extremity following the injury and that, as indicated in the records, he reported this to the staff at Midwest Occupational Medicine. When ask why he did not mark leg pain on multiple pain diagrams, Petitioner testified he did not understand how to properly fill out the pain diagrams.

The physical therapy records from the Work Center indicate Petitioner complained of throbbing, burning pain in his left lower back and anterior left hip. At the time of his discharge from the Work Center, Petitioner continued to complain of low back pain with pain radiating into his left lateral thigh and left groin. (PX 6 at 29)

Petitioner underwent an MRI on November 21, 2011 at Excel Imaging. (PX 8) The MRI indicated: "Multilevel facet degenerative changes with accompanying annular L3-4 and more broad based L4-5 disc bulges with superimposed right lateral annular tear at L4-5. There is resulting left greater than right L4-5 and to lesser extent mild to moderate bilateral L3-4 neuroforaminal encroachment without central canal compromise" (PX 8 at 1)

After reviewing the results of the MRI, the company doctor referred Petitioner to Dr. Kaylea Boutwell for epidural steroid injections. (PX 3 at 1) Petitioner first saw Dr. Boutwell on December 14, 2011. Petitioner denied any history of a similar symptoms complex. His complaints on that day were left greater than right low back pain, deep, aching and stabbing in nature, and intermittent radiating sensation down the left leg approximately to the level of the knee. Dr. Boutwell reviewed the November 21, 2011 MRI and concurred with the radiologist's interpretation. Dr. Boutwell referred Petitioner to Apex Physical Therapy to undergo aquatic therapy. Ultimately, Dr. Boutwell performed three epidural steroid injections on Petitioner. Petitioner testified, and the records reflect that he had some relief with the injections but did not have total resolution of his symptoms.

Petitioner then sought medical treatment with Mark Eavenson, DC. Chiropractor Eavenson referred Petitioner to Dr. Matthew Gornet for a neurosurgical evaluation. (PX 5 at 1)

Petitioner first saw Dr. Gornet on January 6, 2012. Dr. Gornet noted a history of injury in which Petitioner was laying-flat on his back changing a part under a truck, when he reached and twisted and felt a pop in his back. (PX 10 at 7-8) Petitioner's pain was mild at first, but progressed throughout the day and became severe that evening. (PX 10 at 8) He reported it to his employer the next day. His main complaints to Dr. Gornet were constant left low back pain, worse with bending, lifting, twisting, pain and numbness in his left leg wrapping around anteriorly to his knee. (PX 10 at 7-8) He reported to Dr. Gornet that the first injection by Dr. Boutwell improved his leg symptoms, but that the symptoms returned with increased activity. (PX 10 at 8) Petitioner denied prior back or leg issues. Id.

Dr. Gornet reviewed the November 21, 2011 MRI films, which he noted to be of moderate to poor quality. It revealed a lateral disc herniation at left foramen at L4-5 with some subtle changes in disc hydration. (PX 10 at 9) Additionally, there was possibly a small protrusion on the foramen on the left at L3-4. Id. Dr. Gornet's diagnosis was disc injury at L4-5 with a lateral disc herniation. (PX 10 at 10) Dr. Gornet recommended that the Petitioner have two more injections from Dr. Boutwell and to continue treatment with Mark Eavenson at Multicare Specialists. (PX 10 at 10 and PX 2 at 2) Petitioner was to continue on light duty. (PX 10 at 10)

Petitioner reported back to Dr. Gornet on February 9, 2012. He indicated that his symptoms were still present, but was clinically improving after the last two injections. Dr. Gornet's plan was for Petitioner to finish his physical therapy at Multicare Specialists and then transition into full duty on February 20, 2012. (PX 10 at 11) The office notes from that date indicate: "[Petitioner] understands he should continue with his light duty work with a ten pound limit until 2/20/12. He is not at maximum medical improvement and if his symptoms increase in severity, then consideration could be given to microdiscectomy through a lateral intertransverse process approach, left side L4-5. We will see him back in two months' time." (PX 2 at 7) In his deposition, Dr. Gornet explained that returning to Petitioner to full duty on February 22, 2012 was a trial and in no way meant he has plateaued or had reached maximum medical improvement. (PX 10 at 12)

On March 9, 2012, Petitioner called Dr. Gornet's office and reported that he had increased symptoms in his left leg and wished to proceed with the recommended surgical procedure. (PX 2 at 10) Petitioner testified, and his phone records show that he had placed his call to Dr. Gornet at 9:50am on March 9, 2012. The testimony at trial showed that Petitioner did not clock into work until 12:00pm on Friday, March 9, 2012. The doctor's office prescribed him steroids. (PX 10 at 14) Dr. Gornet took the Petitioner off of work from March 12, 2012 until he was seen on March 26, 2012. (PX 10 at 15)

On March 26, 2012, Dr. Gornet examined Petitioner and noted a left foraminal disc herniation at L4-5. (PX 2 at 12) Petitioner continued to have left leg pain and weakness. Dr. Gornet recommended a microdiscectomy through a lateral intertransverse process approach. He noted that Petitioner's condition prevented him from working. (PX 2 at 12) Dr. Gornet's office has sought approval of the microdiscectomy and Respondent has denied the treatment. Dr. Gornet testified that he believed delaying Petitioner's treatment may affect his overall outcome. (PX 10 at 16)

Dr. Gornet returned Petitioner to light duty on June 26, 2012. Petitioner testified that Respondent has not accommodated this light duty.

In his evidence deposition, Dr. Gornet testified that he believed the work activity as Petitioner described occurring on or about October 4, 2011, is directly causally connected to Petitioner's disc pathology and subsequent symptoms and requirement for surgical treatment. (PX 10 at 18) Further, he testified, that the causal connection was not broken because of the short period in which Petitioner was returned to work. (Id) Dr. Gornet testified that he would like to perform at least a microdiscectomy, but Petitioner might ultimately require a more invasive procedure. Prior to going to surgery Dr. Gornet would like to perform a repeat MRI and a CT scan. Px10at19.

14IWCC0324

At the request of the Respondent, Dr. David Lange examined the Petitioner pursuant to Section 12 of the Act. Following the examination, Dr. Lange testified by way of deposition on March 14, 2013. He testified that the November 21, 2011 MRI was of less than ideal diagnostic quality. (RX 1 at 14) Dr. Lange diagnosed Petitioner with axial low back pain and left-legged symptoms which might be radicular in nature. He indicated that the MRI was diagnostic enough to determine that the area of concern in the lumbar spine was the L4-5 level, and that there was no question the lower lumbar region was abnormal. (RX 1 at 34) Dr. Lange determined that Petitioner needed a better workup before he could recommend maximum medical improvement or further treatment. (RX 1 at 34) He testified that the Petitioner can work medium capacity work, occasional lifting up to 50lbs, but with lesser amounts more frequently. He further opined that Petitioner's symptomatology is the result of a traumatic injury. (RX 1 at 23)

Respondent produced a DVD showing Petitioner moving a washing machine on March 24, 2012. The investigator, David N. Coffey, testified that he spent approximately 24 hours total attempting to observe Petitioner and that there is only 5.16 minutes of video total. Petitioner is actually seen on the video for a much shorter period of time. Petitioner testified that he did not injure, or re-injure, his low back while moving the washing machine.

Petitioner testified that his current symptoms are low back pain with pain, numbness, and tingling radiating down his left leg into the left foot and occasional into his right leg. The left leg symptoms are now constant. Petitioner has never had treatment for a low back condition prior to October 4, 2011 and has never experienced leg symptoms from a low back injury prior to that date of accident. Petitioner is aware of the treatment recommended by Dr. Gornet and wishes to proceed.

Petitioner has not received TTD benefits since March 12, 2012.

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

1. The Arbitrator finds Petitioner sustained an accidental injury that arose out of and in the course of his employment. This is based on the testimony of Petitioner, Dr. Gornet, and Dr. Lange, as well as all of the medical records presented by both Petitioner and Respondent. Petitioner's testimony regarding the events that occurred on October 4, 2011 were not refuted, and are in fact supported by the medical records.

2. The Arbitrator finds that Petitioner's condition of ill-being - disc injury at L4-5 with a lateral disc herniation - is causally connected to his work injury of October 4, 2011. This finding is based on the testimony of Petitioner, Dr. Gornet, Dr. Lange, and the medical records presented by both Petitioner and Respondent. The Arbitrator notes that the Respondent's IME does not refute the finding of causation as indicated by the Petitioner's treating physician, Dr. Gornet, nor was there any other evidence presented to the contrary.

3. The Arbitrator finds the prospective medical treatment proposed by Dr. Gornet to be reasonable and necessary and causally related to Petitioner's October 4, 2011 work accident. Therefore, the Arbitrator orders Respondent to approve and pay for the proposed, related medical treatment, including an updated MRI and possible surgical intervention to Petitioner's lumbar spine.

4. The Arbitrator finds that Respondent shall pay reasonable and necessary medical expenses, pursuant to the medical fee schedule of $765.00 to Dr. Rhunda El-Khatib, as provided in Section 8(a) and 8.2 of the Act. Respondent shall receive an 8(j) credit for any amounts actually paid to medical providers by Respondent's group insurance. Respondent shall hold Petitioner harmless in keeping with Sections 8(j). This finding is based on the testimony of Dr. Gornet.

5. Respondent shall pay Petitioner temporary total disability benefits of $654.58/week for 54 and 2/7 weeks, commencing 3/12/2012 through 3/27/2013, as provided in Section 8(b) of the Act. Petitioner has either been held off of work or put on restricted duty from 3/12/2012 through the date of trial. Respondent has not paid TTD for the periods after 3/12/2012 where Petitioner was held off of work. Further, Respondent has not accommodated or offered to accommodate work within the restrictions recommended by the Dr. Gornet or the IME doctor. The parties stipulated that Petitioner was paid all owed TTD benefits from the date of accident until 3/11/2012; therefore this award covers the period of TTD after 3/11/2012 and is not offset by the amounts paid to Petitioner prior to 3/12/2012.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Bruehl,
Petitioner,

vs. NO. 13 WC 07509

14IWCC0325

State of Illinois
Murray Developmental Center,
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 accident and causal connection 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 July 5, 2013 is hereby affirmed and adopted.

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

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

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

DATED: MAY 0 1 2014

o-04/22/14
drd/wj
68

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

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

BRUEHL, ROBERT
Employee/Petitioner

Case# **13WC007509**

SOI/MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

14IWCC0325

On 7/5/2013, 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:

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CHICAGO, IL 60601-3227

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

JUL 5 - 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Bruehl
Employee/Petitioner

Case # 13 WC 07509

v.

Consolidated cases: ____

State of Illinois/Murray Developmental Center
Employer/Respondent

14IWCC0325

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on May 8, 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. [ ] 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 November 15, 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 $39,668.72; the average weekly wage was $762.86.

On the date of accident, Petitioner was 57 years of age, single with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $2,289.00 (enumerated in the conclusions of law), as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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)

June 28, 2013
Date

JUL 5 - 2013

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on November 15, 2012. According to the Application, Petitioner was operating a floor stripper machine and sustained injuries to the left arm/shoulder, neck and body as a whole. Respondent disputed liability on the basis of accident and causal relationship. This case was tried as a 19(b) proceeding and Petitioner sought an order for payment of medical bills. Petitioner has another case with Respondent for a low back injury for which Respondent has accepted liability paying both medical and temporary total disability benefits. There was not a demand for payment of temporary total disability benefits in this case because Respondent's making payment of same in the companion case. These two cases were not consolidated for the purposes of trial.

Petitioner worked for Respondent as a housekeeper and, in November, 2012, Petitioner was required to operate both a floor scrubber and a floor buffer for several days. The purpose of the scrubber device was to remove old wax from the floors. The buffer was then used to prepare the floor surface for application of the new wax. Petitioner described the machines as being similar to one another each weighing approximately 100 pounds and both requiring the use of both hands to operate although the buffer was somewhat easier to operate in the scrubber. Petitioner testified that when operating these devices it was necessary to lean against the machine and hold it with both hands close to the chest. While operating the machines, Petitioner testified that they "jerked" virtually all of the time.

Petitioner testified that by the end of the workday on November 15, 2012, he noticed that his left arm was sore and that he was experiencing numbness and tingling down his arm and into his hand. The following day, November 16, 2012, Petitioner completed an "Employee's Notice of Injury" which indicated that while he was buffing the day room and bedrooms, his arm kept falling asleep. Petitioner continued to work; however, on November 19, 2012, he completed another form which indicated that Petitioner was operating the buffer on November 14, 15 and 19 and that on the night of November 15, his left arm ached and kept falling asleep and that it remained in that condition through the weekend up to and including the present.

On November 20, 2012, Petitioner was seen by Roger Young, a Certified Nurse Practitioner. Petitioner informed Young that he had a three week history of left arm pain, parasthesias and numb feelings and that he worked at Murray Center as a custodian and used a lot of vibrating tools, floor scrubbers and pushing devices. Young's assessment was possible carpal tunnel syndrome and cervical neuritis. It was recommended Petitioner have nerve conduction studies performed.

Concurrent with this treatment, Petitioner was also being treated by Dr. Matthew Gornet, an orthopedic surgeon, for a compensable low back injury. When seen by Dr. Gornet on January 3, 2013, Petitioner informed Dr. Gornet that in mid-November he was using a buffer to wax floors and that he subsequently developed neck/shoulder pain and numbness and tingling in his left arm. Dr. Gornet opined that "His symptoms in his neck and shoulder in my opinion are causally connected to his recent work injury of mid-November, 2012."

Dr. Gornet obtained an MRI of Petitioner's cervical spine on January 3, 2013, which revealed degenerative disc disease at multiple levels and foraminal stenosis, in particular, at C5-C6 on the

left side which correlated with Petitioner's symptoms and what appeared to be a central herniation at that level. Dr. Gornet recommended Petitioner have some steroid injections performed. Respondent did not obtain a Section 12 examination of the Petitioner.

At trial, Petitioner testified that he was not working because of the fact that he was still under active medical treatment for his low back. He denied any prior injuries to either the neck or left arm and stated that he still has pain in the neck and shoulder areas as well as tingling in his left arm.

Conclusions of Law

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

The Arbitrator concludes that Petitioner sustained a work-related accident on November 15, 2012, and that his current condition of ill-being in regard to his neck and left upper extremity is causally related to same.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding his work activities that precipitated the symptoms in his neck and left arm was unrebutted.

Dr. Gornet opined that Petitioner's neck and left upper extremity symptoms were related to the work-related accident. There was no expert medical opinion to the contrary.

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

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

Respondent shall pay reasonable and necessary medical services of $2,289.00 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:

Petitioner's Exhibit 1 contains medical bills for services provided to Petitioner; however, the vast majority of the bills contained in said exhibit are for medical services provided to Petitioner as a result of the injury to his low back. The Arbitrator has reviewed the medical bills and has determined that the medical bills for services related to the cervical spine and left upper extremity injury are as follows:

Dr. Gornet	1/3/13	$ 139.00
MRI Partners of Chesterfield	1/3/13	$2,150.00
Total		$2,289.00.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Hugh Jones,
Petitioner,

vs. NO: 10 WC 44346

Ameren,
Respondent,

14IWCC0326

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, temporary total disability, causal connection, medical expenses, permanent partial disability, mileage, credit for past award, can the arbitrator amend the onset date on her own motion after the closing of proofs 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 January 16, 2013 is hereby affirmed and adopted.

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

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

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

DATED: MAY 0 2 2014

MB/mam
O:4/24/14
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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, HUGH
Employee/Petitioner

Case# **10WC044346**

11WC021550

AMEREN
Employer/Respondent

14IWCC0326

On 1/16/2013, 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:

1937 TUGGLE SCHIRO & LICHTENBERGER PC
TODD LICNTENBERGER
510 N VERMILION ST
DANVILLE, IL 61832

1337 KNELL & KELLY LLC
PATRICK JENNETTEN
504 FAYETTE ST
PEORIA, IL 61603

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

Hugh Jones
Employee/Petitioner

v.

Ameren
Employer/Respondent

Case # **10** WC **44346**

Consolidated cases: **11 WC 21550**

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 **November 19, 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. [ ] 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. [x] Other **mileage**

FINDINGS

On **07/29/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,512.00**; the average weekly wage was **$1,068.00**.

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

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 any medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act and any monies paid for lost wages through group disability insurance provided by Respondent pursuant to Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $712.00/week for 14-2/7 weeks, commencing March 14, 2012, through June 21, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $644.63 to Safeworks Illinois, $536.00 to Lakeland Radiology, $4,460.30 to Provena Covenant, $17,693.20 to Dr. Lawrence Li, $995.00 to Danville Polyclinic, $17,520.00 to Ireland Grove, and $8,107.36 to Pro Physical Therapy, 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 by Petitioner's group insurance, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8 (j) of the Act.

Respondent shall pay mileage reimbursement for the 1480 miles traveled by Petitioner for physical therapy appointments at the applicable governmental rate for reimbursement as such is an incidental expense as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $640.80/week for 50 weeks, because the injuries sustained caused 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from July 29, 2010 through November 19, 2012, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Nancy Lindsay
Signature of Arbitrator

January 13, 2013
Date

ICArbDec p. 2

JAN 16 2013

Hugh Jones v. Ameren, 10 WC 44346

The Arbitrator's Findings of Fact

Chronology of Events pre-arbitration

Petitioner began working for Respondent in 1998 when the company was known as "CIPS." Petitioner sustained an injury on August 14, 2007 when he was working as a lineman for CIPS and he fell off a pole twenty feet in the air. In an effort to keep from falling, Petitioner grabbed onto the pole but was unable to stop the fall and ultimately landed on a fence injuring his right shoulder. He suffered a full-thickness tear of the right rotator cuff and underwent surgery with Dr. Lawrence Li on October 3, 2008. Petitioner continued to treat with Dr. Li post-operatively and during his course of recovery Petitioner mentioned left shoulder pain stemming from a work injury Petitioner had sustained a few years earlier (office note of November 6, 2008). Petitioner had undergone an MRI which showed impingement but the pain was worsening and Petitioner felt he needed it looked at. Treatment to the left shoulder was briefly interrupted after Petitioner fell on ice shortly before Christmas in 2008 and felt a pop in his right shoulder. Petitioner sustained a new tear in the right shoulder which required another surgery on January 28, 2009. Treatment to Petitioner's left shoulder resumed in July of 2009 with injections and physical therapy followed by a left shoulder arthroscopy, biceps tenodesis, rotator cuff repair, subacromial decompression, and debridement of a Type I labral tear on August 19, 2009. Petitioner's left shoulder surgery was followed by physical therapy and a return to work on a restricted duty basis. Therapy progressed slowly and a functional capacity evaluation was performed in February andMarch of 2011. At that time Petitioner had full range of motion and 5/5 supraspinatus and external rotation strength. There was some concern about Petitioner's ability to perform a "top pull rescue" but a way to perform it was found and he was released to regular duty and determined to be at maximum medical improvement on April 8, 2010. (RX 9)

Petitioner resumed his regular work duties for Respondent on April 8, 2010. Petitioner was apprenticing to become a lineman for Respondent.

On August 25, 2010, a meeting was held between representatives for Respondent and Petitioner concerning Petitioner's job options. According to meeting minutes/notes, Petitioner's last performance evaluation was unacceptable. Petitioner was reportedly not progressing or completing the required program and concern was expressed about Petitioner's safety and the safety of those working with him. Petitioner was encouraged to seriously consider bidding on a meter reading position that would be posted in the next day or two. Otherwise, his removal from the apprenticeship program was under serious consideration by the apprenticeship committee and management. Petitioner was noted to be a hard worker but not cut out to be a lineman. (RX 8)

Petitioner filed three workers' compensation claims against Respondent as a result of accidents in 2003 and 2007 (see RX 5). Petitioner settled those claims during August of 2010. The settlement contract Petitioner had signed on August 19, 2010 was approved on August 31, 2010. The parties signed one contract dealing with Petitioner's injuries to his right arm, left arm, and body as a whole. Petitioner was represented by counsel when he signed the contracts. Petitioner settled his claims for the sum of $118,505.51, representing 20 % loss of use of the left arm, 40%

loss of use of the right arm, and 10% loss of use of Petitioner's body (less an overpayment of TTD of $186.24). The contract specifically states:

> It is agreed by and between the parties that the sum of $118,505.51 represents the entire measure of liability owed Petitioner by Respondent as a result of this claim (DOA 12/10/03;08/14/07;12/07/07) and any other claims to date. (RX 13)

Another meeting was held on September 1, 2010 at which time Petitioner was reminded that he was not progressing at a satisfactory rate and that the meter reader position remained open. A discussion ensued at the conclusion of which Petitioner indicated he would give the job serious consideration and thought. (RX 8)

Petitioner presented to Safeworks on September 21, 2010, regarding left shoulder pain complaints which had been present since August 1, 2010. Petitioner indicated he hurt his shoulder pulling on wire to unlock something off a block. Petitioner described constant pain in his left shoulder going down to his elbow and the occasional inability to sleep on his left side due to discomfort. Dr. Fletcher ordered left shoulder x-rays which showed evidence of a prior rotator cuff tear but no definite fracture or dislocation. The doctor's treatment plan was not indicated on the office note; however, a left shoulder gadolinium arthrogram performed on October 11, 2010 showed a full-thickness rotator cuff tear with a gap in the supraspinatus tendon and other post-surgical changes. (PX 1, PX 2, RX 7)

Petitioner presented to Dr. Lawrence Li on October 14, 2010, regarding his left shoulder complaints. Dr. Li had previously operated on Petitioner's left shoulder in August of 2009 when Petitioner required a left rotator cuff repair. According to the doctor's notes, Petitioner had done very well since then but re-injured his left shoulder on August 1, 2010 when he was pulling a "lok block" and felt instant pain. Petitioner initially thought it would improve with time but when it didn't he went to Dr. Fletcher who confirmed a recurrent tear and referred Petitioner to Dr. Li. Dr. Li noted Petitioner was currently working as a meter reader since he could not use his shoulder in a strenuous manner. Dr. Li recommended surgery to the shoulder. (PX 3)

Petitioner gave a recorded statement to Chris Frye on October 27, 2010. Petitioner stated that he had been working for Respondent and its predecessor, Illinois Power, since November of 1998 and was currently a "Meter Reader Groundman." It was awarded to him on September 7, 2010. The adjustor indicated the claimed accident date was August 1, 2010; however, Petitioner explained that he was not "completely sure" about that. He recalled he was working on the Monticello Road project and he was working as an Apprentice Lineman. Petitioner had climbed a pole to help "sag" the wire and he was pulling the wire and finally gave it a "big jerk" and felt immediate pain in his left shoulder. According to Petitioner the pain started out as mild but worsened over time. Petitioner did not believe he said anything to his two co-workers, John and Jason, although he "mighta said something to Jason but [he] can't, you know, cause [he] just, [he] thought it was maybe just a muscle strain and never really said anything about it." Petitioner further explained that he did not notify his supervisor about his shoulder until probably "at least a month later" because he was trying to hold it off. Petitioner explained that he was the type of person who just puts things off till they got so bad and then he would say something if necessary. Petitioner believed it was the middle of September before he said anything and then he told Jim he was going to the doctor to get him to look at his shoulder. "..., that was the first time I really

ever told anybody about it." Petitioner acknowledged he never told Bill Fleming, his supervisor at the time of the alleged accident, about the accident. (RX 1)

During the recorded statement session with Frye Petitioner explained that he had undergone two right shoulder surgeries in 2008 and a left shoulder surgery in August of 2009. Petitioner acknowledged that he had settled those claims. (RX 1)

A "Form 45: Employer's First Report of Injury" was completed by Michelle Feise on October 29, 2010. The accident date was listed as August 4, 2010, the location was "Monticello Road," and the description given was "report shoulder issue on 10/7/10 related back to." (RX 4)

Petitioner signed his Application for Adjustment of Claim in this case on November 8, 2010. A copy of same was presumably mailed to Respondent on November 9, 2010. (RX 5)

Petitioner returned to see Dr. Fletcher at Safeworks on December 6, 2010, reporting that his claim had been denied and that he had sustained a new injury to his left knee since his earlier visit in September. Petitioner's examination of his left shoulder was positive for limited range of motion and a loss of 90 degrees abduction. Dr. Fletcher confirmed the MRI shoulder findings. Dr. Fletcher noted that Petitioner had internal derangement of his left knee but was still dealing with left shoulder issues stemming from Petitioner's August 1, 2010 work accident. Petitioner was told he could continue working his regular job as a meter reader. In addition to recommending treatment to Petitioner's left knee, Dr. Fletcher still recommended a left shoulder repair. (PX 1)

Petitioner next presented to Dr. Li on December 9, 2010 and updated Dr. Li concerning his recent accident while meter reading at a house when he tripped over an anchor for a dog chain and landed on his left side, twisting his left knee and re-aggravating his left shoulder, which already had evidence of a rotator cuff tear. Petitioner reported he was still working but having ongoing knee difficulties while doing so. Dr. Fletcher had referred Petitioner to him. Petitioner's left shoulder showed limited abduction and flexion to about ninety degrees along with pain in the anterior aspect of Petitioner's shoulder. Dr. Li noted Petitioner was still scheduled for shoulder surgery but he also needed an MRI of his left knee. (PX 3) As of December 21, 2010 Dr. Li noted Petitioner's left shoulder was still bothering him significantly and he was scheduled for an IME. (PX 3)

Petitioner was examined by Dr. George A. Paletta Jr. at Respondent's request and pursuant to Section 12 of the Act on January 17, 2011 in Chesterfield, Missouri. In conjunction with the examination, Dr. Paletta reviewed medical records from Dr. Li, Dr. Fletcher, Dr. Milne (an IME), a functional capacity evaluation, and imaging studies. After the examination, Dr. Paletta issued a report which included a discussion of Petitioner's care and treatment both before and after his 2010 left shoulder and left knee accidents. In addition to summarizing Petitioner's medical care outlined above in the Arbitrator's Findings, Dr. Paletta also reviewed an independent medical examination report authored by Dr. Michael Milne on April 19, 2010 in which the doctor commented on Petitioner's left shoulder repair of August 19, 2009, from which Petitioner had done well and, while noted to have some weakness in the supraspinatus and some mild motion limitations, Petitioner was otherwise ready for full duty work as he was at maximum medical improvement and needed no further medical care. (RX 6)

Petitioner provided Dr. Paletta with a history of both his August 4, 2010 work accident to his shoulder and his November 18, 2010, accident to his knee. Petitioner told the doctor he reported the injury but did not seek medical attention because it really didn't get worse for a couple of weeks until he was using ratchet cutters overhead in late August. Dr. Paletta wrote:

> He states that he was using these ratchet cutters up above shoulder level and that he 'had one time where it popped real loud and the shoulder gave out. I think that what done it in.' Once again, he apparently did not report that injury or seek initial medical treatment.
>
> (RX 6, p. 2)

Thereafter, Petitioner had continued pain and difficulty sleeping on his shoulder. Petitioner explained to Dr. Paletta that he then realized he probably could not continue as an apprentice lineman and switched to a meter reader position in early September of 2010.

Petitioner also described the November 18, 2010 accident to Dr. Paletta and advised him that he thought he aggravated his left shoulder at that time as things had been bothering him "a little bit more" since that injury. (RX 6, pp. 2-3)

At the time of the exam with Dr. Paletta, Petitioner described ongoing discomfort in his left shoulder and some difficulty in the elbow position and lying on the affected side. He complained of some pain at night but no radiating pain or associated numbness, tingling, or paresthesias. Petitioner denied the use of any medications for his shoulder. On physical examination of the shoulder, Petitioner displayed some cuff weakness and external rotation strength and supraspinatus strength was 4+/5. Impingement signs were mildly positive. O'Brien sign was equivocal. Dr. Palletta agreed with the diagnosis of a left rotator cuff tear and believed it was causally related to Petitioner's accident of August 10. Dr. Paletta stated "It is impossible to state whether the tear actually occurred in August or whether he had failure of his previous rotator cuff repair with aggravation of symptoms related to persistent underlyng tear." Dr. Paletta further opined that his findings seemed consistent with those of Dr. Milne, thus showing "no material change" in Petitioner's physical examination. Dr. Paletta also believed that the extent of retraction suggested that Petitioner's tear might be more chronic than new. The accident in November of 2010 did not materially impact the left shoulder. All in all, Dr. Paletta found it impossible to state within a reasonable degree of medical certainty whether Petitioner's rotator cuff tear was torn on August 10 or represents a failure of the previous repair. (RX 6)

Petitioner returned to see Dr. Li on November 17, 2011 and reported ongoing symptoms in his left shoulder which were aggravated with reaching and lifting as well as outstretched positions. Surgery was still recommended. (PX 3)

Petitioner underwent left shoulder arthroscopic surgery on March 14, 2012. Dr. Li's post-operative diagnosis was left shoulder massive re-tear of the rotator cuff, impingement syndrome, adhesive capsulitis and grade 2 osteoarthritis of the glenohumeral joint. (PX 5) Surgery was followed by physical therapy. (PX 6) Petitioner's post-operative care was monitored by Dr. Li who returned Petitioner to full duty on June 25, 2012. Petitioner's last visit with Dr. Li was on July 26, 2012 at which time Petitioner reported no complaints but some ongoing weakness in his shoulder. Provocative testing showed 5/5 strength testing and 4/5 external rotation. (PX 3)

Testimony of Dr. Li

(April 30, 2012)

Dr. Li testified he has practiced medicine in central Illinois since 1996. He is board certified with local privileges at multiple hospitals in the central Illinois area. Dr. Li testified he specializes on the shoulders, knees, and hands. Dr. Li testified he does see patients with back pain but does not perform back surgery.

Dr. Li testified Petitioner became a patient on April 17, 2008, for a right rotator cuff tear. Petitioner had a right rotator cuff repair with biceps tenodesis in October 2008. Dr. Li also treated Petitioner for a left shoulder rotator cuff tear in 2009. Petitioner underwent surgery on August 19, 2009, for a biceps tenodesis and rotator cuff repair. Petitioner was released April 8, 2010, for the left shoulder condition when he completed work conditioning and went back to work.

Dr. Li saw Petitioner again on October 14, 2010. Petitioner gave a history of injuring himself when he was on a 40 foot hose hoist pulling a lock block with a really tight lock block. Petitioner tried to pull the lock and felt instant pain in his left shoulder. Petitioner felt instant pain in his left shoulder and saw Dr. Fletcher who obtained an arthrogram. This confirmed Petitioner had a full thickness rotator cuff tear of the left shoulder. Dr. Li saw him shortly thereafter and recommended shoulder surgery.

With regard to restrictions, Dr. Li left those to Dr. Fletcher. Dr. Li did not recall reviewing Dr. Fletcher's notes. Dr. Li would have no reason to disagree with the work restrictions placed upon Petitioner by Dr. Fletcher.

Dr. Li performed left shoulder surgery on March 14, 2012. Dr. Li performed a left shoulder arthroscopy with rotator cuff repair, subacromial decompression, and debridement of scar tissues as well as underlying arthritis.

Dr. Li testified the rotator cuff repair was similar to the one that he performed in 2009; however, the newer rotator cuff repair also showed adhesions and arthritis. Dr. Li noted that there were new bone spurs that had recurred and were also removed, and the arthritis had gotten worse since 2009. Dr. Li testified that is not uncommon.

Dr. Li saw Petitioner as recently as April 19, 2012, for the left shoulder condition. Petitioner was improving and he was going through therapy. Petitioner was scheduled to come back on May 17, 2012, for the left shoulder.

Dr. Li diagnosed Petitioner with rotator cuff tear, adhesive capsulitis, and impingement syndrome, and glenohumeral arthritis. Dr. Li testified the rotator cuff tear was caused by his work injury of August 1, 2010, and the adhesive capsulitis was caused by the wait and time it took for Petitioner to have surgery. Dr. Li noted the impingement syndrome goes along with

rotator cuff tear and is caused by the same problem, and the glenohumeral arthritis was just a natural progression.

Dr. Li testified he anticipated Petitioner being at maximum medical improvement for his left shoulder four to six months post surgery.

On cross-examination Dr. Li testified that his understanding was that Petitioner was pulling some sort of rope with a lock block when he injured his left shoulder. Dr. Li acknowledged Petitioner had immediate pain after that, but did not know how long Petitioner waited for treatment and care. Dr. Li testified it would not surprise him if Petitioner sought no treatment immediately after his claimed injury. Dr. Li testified that Petitioner had his information and was told to come back to see him if he had any problems with his left shoulder. Dr. Li testified that he eventually did come back to see him based upon the re-tear.

Dr. Li could not testify based upon the operative findings whether or not the tear was caused by trauma, as Petitioner's left shoulder surgery occurred more one-and-a-half years after the accident and there was no way to identify trauma during surgery.

Dr. Li testified that if Petitioner continued working following his shoulder injury he would expect him to complain of pain with certain movements.

Testimony of Dr. Paletta

(May 25, 2012)

Dr. Paletta testified he is a board certified orthopedic surgeon that specializes in sports medicine. Dr. Paletta testified that he primarily treats problems with the shoulder, elbow, and knee. Dr. Paletta testified he routinely performs surgeries with 85% to 90% of the procedures performed arthroscopically.

Dr. Paletta had the opportunity to examine Petitioner on behalf of Respondent for purposes of an independent medical evaluation. Petitioner claimed injuries to both his left shoulder and left knee.

Dr. Paletta took a history of Petitioner pulling on a tail of a rope on about 8/4/10 resulting in left shoulder pain. Petitioner told him he was working as an apprentice lineman for Respondent when he was working with refilling some lines with water. Petitioner was pulling on a rope over his right shoulder. As Petitioner was pulling on the tail of the rope he felt immediate pain in the left shoulder. Petitioner did not think he initial injury was that bad, but when it did not get better on its own he sought medical attention. Dr. Paletta had the opportunity to review the MRI and records regarding the left shoulder. Dr. Paletta took a physical examination of the left shoulder which showed positive physical findings consistent with rotator cuff tear. Dr. Paletta found the rotator cuff tear and the need for a revision of the rotator cuff repair to be reasonable. (RX 14)

Dr. Paletta testified that Petitioner's accident in august of 2010 aggravated and/or casued a recurrent tear of Petitioner's rotator cuff in his left shoulder. The mechanism of injury was

appropriate for aggravating and causing a recurrent tear. Dr. Paletta opined that the incident of August 2010 was causally related to Petitioner's shoulder condition. (RX 14, pp. 10-11)

Testimony at Arbitration

Petitioner's Testimony

Petitioner testified that he became an apprentice lineman for Respondent in April of 2010. Petitioner explained that as an apprentice lineman he is training to become a lineman and his duties include putting power poles in the ground and laying underground wires. This was Petitioner's job on August 4, 2010.

Petitioner testified that on August 4, 2010, he was stringing wiring with a foreman and a journeyman. Petitioner was climbing the poles and "sagging" the line. Petitioner testified there was a chute that attached to a pole with a rope and pulley system that helped pull the power wire tight. The wire was pushed through the chute and tightened. Petitioner testified that the journeyman asked him to pull the wire tighter, and while doing so, he jerked on the wire and felt a pop in his left shoulder. Petitioner testified that he told his co-worker, Jason Sparling (a journeyman) that he felt a pop in his left shoulder. Petitioner testified that Sparling did not hold a supervisory position.

Petitioner testified that he had previously torn his rotator cuff in a work accident in 2007. Thereafter, he underwent left shoulder surgery in August of 2009 with Dr. Lawrence Li. Petitioner testified that he was released to return to work in April of 2010, approximately four months before the August 4, 2010 accident. Petitioner testified that he filed a workers' compensation claim on account of the 2007 accident. Petitioner testified that he experienced no problems with his left shoulder from April of 2010 through August of 2010.

Petitioner testified that he did not immediately notify his supervisor about the August 4, 2010 accident because he wanted to see how "it" went and he was settling his other claim.

Petitioner further testified that he continued working as an apprentice lineman from August 4, 2010 through September 7, 2010.

Petitioner testified that he signed the settlement contract stemming from his 2007 left shoulder accident (RX 13) on August 19, 2010. Petitioner testified that he didn't tell anyone about the August 4, 2010 accident when he signed it. Petitioner further testified that he did not review the contract with his attorney before signing it. He acknowledged that someone went over the contract with him but he "didn't listen like [he] should've."

Petitioner testified that he was not keeping up with the other linemen and it was strongly recommended that he change jobs. On September 7, 2010, Petitioner started as a meter reader in Tuscola, Illinois. The meter reader position paid less than Petitioner's prior position.

Petitioner testified that he notified his supervisor, Jim Ippolito, on September 17, 2010 of his August 4, 2010 accident. Petitioner testified that he told Ippolito that he had made an appointment to see Dr. Fletcher because he could not sleep. He wanted to let the company know he would be off work.

Petitioner acknowledged that he gave a recorded statement to Chris Frye indicating that he gave notice to his supervisor. Petitioner saw Dr. Fletcher on September 21, 2010 who subsequently referred him back to Dr. Li. An MRI was ordered on October 11, 2010, and Petitioner saw Dr. Li on October 14, 2010. Dr. Li told Petitioner he needed shoulder surgery and it was scheduled for November of 2010 but then cancelled.

Petitioner continued to work as a meter reader, and could have undergone surgery through his group health insurance; however, he had some problems with bills and elected not to do so. Petitioner returned to see Dr. Li on November 17, 2011. Petitioner testified that during his gap in treatment he was never symptom free. Petitioner ultimately underwent shoulder surgery on March 14, 2012. Before that, however, Petitioner underwent knee surgery as requested by Dr. Li. After his shoulder surgery, Petitioner underwent physical therapy and returned to work on June 21, 2012 as a meter reader.

Petitioner testified that he did not receive any workers' compensation benefits while off work but, instead, received extended sick leave and two weeks of vacation time. Petitioner's bills were submitted through his group health insurance.

Petitioner testified that he continues to work as a meter reader, a job that primarily requires walking. Petitioner also testified that his left shoulder is no longer as strong as it once was. When he goes to pick up a gallon of milk he uses his right hand to assist. Petitioner still feels pain and cannot perform any overhead work,

On cross-examination Petitioner testified that he was intimidated as an apprentice and didn't want to tell anybody about his accident. Jason was the only person Petitioner told about the accident. Petitioner also testified that he had meetings in August and September of 2010 concerning his job performance and during those times he never told anyone he was having problems performing his job due to a shoulder problem. Petitioner testified that he told Ippolito he wanted to go to the doctor before he filled out an accident report. Petitioner agreed that from June 1, 2010 through September 7, 2010 he never told his supervisor, Bill Fleming, that he had any problems with his shoulder. Petitioner acknowledged that he never required any restrictions during this time period and was able to perform all of his job duties as an apprentice lineman. Petitioner agreed that he left his work as an apprentice lineman due to performance issues and not due to any problems with his shoulder.

Petitioner acknowledged on cross-examination that he was working with co-workers when he claimed he was injured on August 4, 2010. Petitioner agreed he gave a recorded statement to the adjustor and agreed that his memory was better when he gave his recorded statement in 2010 than it was when testifying. Petitioner agreed that he was working with John Hyde and Jason Sparling when he claimed he was injured and admited in a recorded statement that he did not tell John Hyde and Jason Sparling about his claimed accident.

Petitioner agreed that after his claimed accident on August 4, 2010 he continued to work as an apprentice lineman for about another month without any problems.

Petitioner acknowledged on cross-examination that he was familiar with reporting requirements at his job as an apprentice lineman and was aware that he had to report any work injury as an apprentice lineman to his supervisor.

With regard to Petitioner's treatment and care, Petitioner acknowledged on cross-examination that he chose this medical treatment and care for his left shoulder. Petitioner specifically sought out medical treatment with Dr. Fletcher. Furthermore, Petitioner specifically sought out medical treatment with Dr. Li. Petitioner acknowledged that he had similar treatment options, including orthopedic care with potential surgeries much closer to home than Dr. Fletcher or Dr. Li. Petitioner acknowledged that those physicians were his choice and that he chose to go additional distances for his treatment and care.

Petitioner acknowledged on cross-examination that he was not exactly sure of the date of his accident. Petitioner was uncertain as to whether or not his injury occurred on the last day of the Monticello Road Project. Petitioner acknowledged that the accident could have happened on a different date as he was not 100% certain as to the exact date his accident occurred. Petitioner was quite certain, however, that Jason Sparling and John Hyde were present on the date of the accident.

Petitioner was called as a witness by Respondent in its case-in-chief. Petitioner acknowledged that he did fill out paperwork for Dr. Fletcher on September 21, 2010 requesting that Dr. Fletcher's office submit bills to Petitioner's group health insurance carrier. Petitioner testified that he did this because he didn't want to report his injury as work-related.

Testimony of Bill Fleming

Bill Fleming testified he has worked for Respondent as a line supervisor for quite some time and that Petitioner was an apprentice lineman under his supervision.

Fleming further testified that as an apprentice lineman, employees were required to perform work involving electrical lines. This included running electrical lines in the ground as well as running electrical lines along poles and running wire from pole to pole. Fleming testified that an apprentice lineman position involves heavy use of both shoulders and can involve pulling on rope, use of heavy equipment, pole climbing, and overall heavy use of both arms.

Fleming acknowledged he had Petitioner working for him in 2010 as an apprentice lineman. Fleming had Petitioner working for him on a project known as the Monticello Road Project that ran from June 1, 2010 through August 4, 2010. Fleming testified that Petitioner never reported an accident to him as occurring on the Monticello Road Project. Fleming testified Petitioner never reported pain to him in performing job duties during the Monticello Road Project. Petitioner never reported any shoulder pain or any pain at all while working for Fleming as an apprentice lineman.

Fleming testified that Petitioner stopped working for him as an apprentice lineman due to performance issues. Bill Fleming testified that Petitioner had problems working as an apprentice

lineman. Fleming testified there were meetings set up with Petitioner regarding his job performance, where it was suggested Petitioner take a different job such as a meter reader position. Fleming discussed the job change from apprentice lineman to meter reader with Petitioner. Various persons were present during these meetings and discussions and these were introduced as Respondent's Exhibit No. 8. During these meetings, Petitioner never mentioned shoulder pain or shoulder problems as a reason for leaving as an apprentice lineman.

Fleming testified that Petitioner never reported a work accident to him. Fleming testified that his employees, including Petitioner, in the capacity of apprentice lineman, were required to report accidents to him. Fleming testified that if Petitioner had reported an accident to him he would have informed the proper sources at Ameren including filling out an accident report. Fleming testified that Petitioner never reported a work accident and he never filled out an accident report for Hugh Jones.

Fleming testified he first learned of Petitioner's claimed accident when an e-mail was sent by Jim Ippolito on October 20, 2010. Otherwise, he was unaware of Petitioner's claimed accident until that date.

Fleming testified that he reviewed the daily job notes for the Monticello Road Project prior to testifying. Fleming testified that there was only one day that Jason Sparling was working on the job and that was on July 29, 2010. Fleming testified that he was present on that day in addition to Petitioner, Jason Sparling, as well as John Hyde. Fleming testified on cross-examination that he was certain from reviewing the daily log jobs that the only day Jason Sparling would have been working on the Monticello Road Project would have been July 29, 2010.

Testimony of Jim Ippolito

Jim Ippolito testified he has been a distribution design engineer for Respondent since 2003. He has been Petitioner's supervisor since September 8, 2010 when Petitioner came to work for him as a meter reader.

Ippolito testified that Petitioner never informed him of any problems with his left shoulder when he came to work for him in September of 2010. Ippolito did not remember Petitioner reporting any injury to him as occurring with Respondent on the line job prior to October of 2010. Ippolito testified if Petitioner had reported an accident to him before October of 2010 he would have informed other persons at Respondent right away.

Ippolito testified he always diligently reports employee accidents and injuries Ippolito testified hypothetically that if Petitioner had come to him in September of 2010 and reported a shoulder injury to him he would have immediately reported it to his superiors at Ameren.

Ippolito testified that he was uncertain of the exact date that Petitioner informed him of his claimed August 2010 work accident. However, Ippolito testified he reviewed an e-mail from October 20, 2010 and agreed that Petitioner would have initially told him about his claimed shoulder accident within a few days of that date. Ippolito testified that he offered an e-mail to his superiors at Respondent regarding the work accident on October 20, 2010, and it would have

been in and around that time period that Petitioner informed him of his claimed shoulder accident/injury while working as an apprentice lineman.

On cross-examination Ippolito acknowledged that when Petitioner saw Dr. Fletcher in September of 2010 he would have to ask for time off from me. However, on re-direct examination, Ipppolito explained that when Petitioner requested the time off, he said nothing about a work accident.

Testimony of Julie Munsch

Julie Munsch testified she is a claims adjuster working for CCMI. Munsch has worked as a workers' compensation claim adjustor for CCMI for some time. Munsch has adjusted claims for CCMI for a number of years and adjusts workers' compensation claims only for Respondent. Munsch does not do work for any other companies other than Ameren in terms of adjusting workers' compensation claims.

Munsch testified that she handled Petitioner's claims while working with Respondent prior to 2010. Julie Munsch testified these claims included injuries to both the right and left shoulders. Julie Munsch agreed to settle those claims with Petitioner and on behalf of Respondent in August and September of 2010. As of the time that Munsch agreed to settle Petitioner's bilateral shoulder claim, she was unaware of any other claims for Petitioner involving his left shoulder.

Munsch testified she did not become aware of Petitioner claiming an injury to the left shoulder in 2010 until after she received approved lump sum settlement contracts for his old claims. Julie Munsch testified she learned of these when she received paperwork from Dr. Fletcher in October of 2010.

Munsch testified that if she were aware of Petitioner's claimed August 4, 2010 accident she never would have agreed to settle the earlier claims with Petitioner. Munsch testified that since Petitioner had an injury to the same part of the body as one of the earlier accidents, specifically a new accident to the left shoulder with Petitioner having a pending potential claim to the left shoulder, she never would have agreed to resolve the earlier claims. Munsch testified that it is Respondent's policy not to settle a claim when a claimant has new claims that are still pending.

Munsch testified that Respondent has been materially affected by Petitioner settling his earlier claim at the same time he had an accident involving a body part that was reflected in those settlement contracts. Specifically, Petitioner had a previous left shoulder claim with a rotator cuff surgery that was similar to the claimed August of 2010 accident. Because of that, Respondent never would have agreed to settle the earlier case if they had been aware of the August 2010 claimed accident.

Munsch testified that Respondent was prejudiced by Petitioner's late reporting of his alleged accident. Munsch explained that she was aware of the new case law ruling that permanency for shoulder injuries should be measured as a loss of a man as a whole, rather than a loss of a percentage of an arm. Petitioner's old claim was settled as a left shoulder/arm claim. With the new standards of man as a whole, Munsch was aware that there is no credit for man as a

whole. Munsch testified that Respondent has been prejudiced in that it may not receive credit for the older claim should Petitioner prevail.

Conclusions of Law

1. Petitioner was credible and his reason(s) for not mentioning the accident earlier than he did were believable.

2. Petitioner sustained an accident on July 29, 2012, that arose out of and in the course of his employment with Respondent. Petitioner testified he hurt himself on August 4, 2012, but was admittedly unsure of the date. Petitioner seemed sure that he was working with Jason Sparling and John Hyde at the time of the accident. Neither of these gentlemen testified to refute the actual events. The initial medical records from Dr. Fletcher and Dr. Li reflect a date of injury of August 1, 2010. The testimony of Bill Fleming suggested that if an injury occurred it would have been on July 29, 2010, as that was the only day Petitioner worked with Jason Sparling on the Monticello Project. Petitioner testified he recalled Jason Sparling working at the Monticello Project more than just one day. Respondent did not offer any evidence to suggest the accident had not occurred, only evidence that the accident did not occur on August 4, 2010. Given the testimony and documentary evidence the Arbitrator finds that an accident did occur as described by Petitioner. The issue seems to be when the accident occurred and not whether or not it actually occurred. Given the testimony of Bill Fleming and the uncertainty of Petitioner, the Arbitrator finds the accident occurred on July 29, 2010. Moreover, the Arbitrator, on her own motion, amends the onset date from August 4, 2010 to July 29, 2010, in order to conform with the evidence and proof.

3. Petitioner did give notice within the statutory time period. It has previously been established that the accident occurred on July 29, 2010. Petitioner claims he gave notice to Jim Ippolito on September 17, 2010, which was 50 days after the accident. Jim Ippolito claimed to have received notice sometime in October 2010 via an email. The Form 45 indicates the injury was reported to the employer on October 7, 2010. Chris Frye of Corporate Claims Management, the workers' compensation administrator for Respondent, took a recorded statement from Petitioner on October 27, 2010. Section 6(c) of the Act requires notice be given to the employer within 45 days of the accident. However, Section 8(j) of the Act extends the period of notice of accident. Section 8(j) provides:

   "In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act. *In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments.* This paragraph does not apply to payments

made under any group plan which would have been payable irrespective of an accidental injury under this Act."

Petitioner testified his group health insurance paid the medical bills and that he received some group disability benefits while he was off work from March 14, 2012, through June 21, 2012. Moreover, on the Request for Hearing form, the parties agreed to Respondent's Section 8(j) credit claim that it paid Petitioner's medical bills and compensated him for time missed from work. The Arbitrator finds that Section 8(j) of the Act extended the Section 6(c) notice period well past any of the notice dates evidenced by testimony or documentation, as referred to above. The Commission had occasion to consider a similar fact pattern in Rudd v. Harris Corporation, 02 WC 28594, 11 IWCC 0045, 2011 WL 507010 (January 13, 2011), and reached the same legal conclusion.

While Petitioner's silence at the time of the settlement does give some pause for thought, the issue of any alleged prejudice to Respondent appears to be moot given the language of Section 8(j). Additionally, Petitioner's silence regarding any left shoulder complaints after the accident could be attributable to his stoic nature and/or job situation at that time.

4. Petitioner's current condition of ill-being is causally connected to the work accident of July 29, 2010. This is based upon the expert testimony of both Dr. Lawrence Li and Dr. George Paletta, Jr. The Arbitrator also notes the causation opinions of Dr. Fletcher periodically expressed in his office notes. Petitioner does have a companion claim (11 WC 21550) in which Petitioner fell over a dog anchor/chain while engaged in meter reading duties on November 18, 2010. According to some of the medical records and Petitioner's recorded statement of December 14, 2010 (RX 2) Petitioner originally believed he may have aggravated his left shoulder in that accident. Any aggravation was a temporary one and did not break the chain of causation between the earlier 2010 accident and Petitioner's shoulder condition.

5. Petitioner is awarded reasonable and necessary medical bills totaling $49,956.49, subject to the fee schedule. Pursuant to a stipulation between the parties, Respondent is entitled to credit under Section 8(j) of the Act for any monies paid for medical bills through group health insurance provided by Respondent to Petitioner. Petitioner is also awarded reimbursement for 1480 miles of travel to and from physical therapy appointments at the applicable governmental rate of reimbursement. Section 8(a) of the Act requires the employer to pay for physical rehabilitation of the employee, including all expenses incidental thereto. The Arbitrator finds Petitioner's travel to and from the physical therapy appointments to be such an incidental expense.

6. Petitioner is awarded temporary total disability benefits beginning March 14, 2012 (the date of surgery) through June 21, 2012 (the day he was released to return to full duty by Dr. Lawrence Li), a period of 14 2/7 weeks. Pursuant to a stipulation between the parties, Respondent is entitled to credit under Section 8(j) of the Act for any monies paid for lost wages through group disability insurance provided by Respondent to Petitioner.

7. Petitioner's testimony regarding the nature and extent of his condition is consistent with the medical records, including those of Dr. Milne. Petitioner underwent surgery and was released to return to work with no restrictions. He returned to full duty work as a meter

reader. Petitioner's inability to return to work as an apprentice lineman (the job he held at the time of the accident) is unrelated to his left shoulder injury. Petitioner testified to experiencing pain and loss of strength. When examined by Dr. Milne on April 19, 2010, Petitioner complained of shoulder weakness. There was some issue as to Petitioner's ability to perform a "pole rescue" due to restrictions of his shoulders as evidenced by an FCE. Nevertheless, Dr. Milne believed Petitioner could return to full duty. Dr. Paletta did not re-examine Petitioner after his surgery and therefore rendered no opinions regarding permanency post-surgery. Petitioner's examination on July 26, 2012 indicated objective findings very similar to those of Dr. Milne back in 2010. Petitioner has sustained permanent partial disability of 10% loss of man as a whole.

8. Respondent is not entitled to credit for a past settlement wherein it paid Petitioner 20% loss of use of the left arm. Section 8(e)17 of the Act does not allow for a deduction of prior awards regarding a subsequent injury which results in an award of benefits pursuant to Section 8(d)2 of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Hugh Jones,
Petitioner,

vs.

Ameren,
Respondent,

NO: 11 WC 21550

14IWCC0327

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 16, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 2 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:4/24/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, HUGH
Employee/Petitioner

Case# **11WC021550**

10WC044346

14IWCC0327

AMEREN
Employer/Respondent

On 1/16/2013, 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:

1937 TUGGLE SCHIRO & LICHTENBERGER PC
TODD LICHTENBERGER
510 N VERMILION ST
DANVILLE, IL 61832

1337 KNELL & KELLY LLC
PATRICK JENNETTEN
504 FAYETTE ST
PEORIA, IL 61603

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

Hugh Jones
Employee/Petitioner

v.

Ameren
Employer/Respondent

Case # **11** WC **21550**

Consolidated cases: **10WC44346**

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, IL**, on **November 19, 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. [ ] Is Respondent due any credit?
O. [x] Other **Payment for medical mileage**

FINDINGS

On **11/18/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**28,832.00**; the average weekly wage was $**1,030.00**.

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

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

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

Respondent shall be given a credit of $**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 any medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act and any monies paid for lost wages through group disability insurance provided by Respondent pursuant to Section 8(j) of the Act.

ORDER

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

Respondent shall pay Petitioner temporary total disability benefits of $686.67/week for 8-6/7 weeks, commencing January 11, 2012, through March 13, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,077.69 to Safeworks Illinois, $9,705.27 to Dr. Lawrence Li, $418.00 to Danville Polyclinic, $10,338.00 to Ireland Grove, and $2,992.00 to Pro Physical Therapy, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay $266.40 for mileage reimbursement for the 480 miles traveled by Petitioner for physical therapy appointments as such is an incidental expense as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $618.00/week for 53.75 weeks, because the injuries sustained caused 25% loss of use of the left leg, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from November 18, 2010 through November 19, 2012, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Nancy Lindsay
Signature of Arbitrator

January 13, 2013
Date

JAN 16 2013

After considering all the evidence, the Arbitrator finds as follows:

Petitioner testified that on November 18, 2010, he was working as a meter reader for Respondent, a company which provides electricity service to homes and businesses. Petitioner testified he was reading meters in Arcola, Illinois, and as he was walking from one yard to another he tripped over a dog chain anchor which was hidden under fallen leaves. Petitioner testified he fell to the ground, landing on his left side, and was eventually able to get up under his own power. Petitioner testified there was pain in the left knee. Petitioner testified he had no prior injuries to his left knee and had no problems with the left knee at any time prior to this accident. Petitioner gave a recorded statement to Julie Munsch of Corporate Claims Management on December 14, 2010, and provided essentially the same information as was provided at trial (RX. 2).

Petitioner saw Dr. David Fletcher of Safeworks Illinois on December 6, 2010 (PX. 1). Petitioner described a stabbing pain in the left knee and indicated the pain was interfering with his sleep (PX. 1). Dr. Fletcher assessed internal derangement of the left knee and referred Petitioner to Dr. Lawrence Li, an orthopedic surgeon (PX. 1). Petitioner saw Dr. Fletcher again on December 9, 2010, and was told he could continue working as a meter reading pending further treatment with Dr. Li (PX. 1).

Petitioner saw Dr. Lawrence Li on December 9, 2010, and a MRI of the left knee was ordered (PX. 2). The MRI of the left knee was done at Dr. Li's office on December 22, 2010, and revealed chronic degenerative tearing of the medial meniscus and maceration involving the posterior horn and body (PX. 2). Petitioner saw Dr. Li again on December 27, 2010, at which time Dr. Li noted the arthritis and underlying degenerative tearing, and opined the accident had made Petitioner's condition significantly worse (PX. 2). Dr. Li gave Petitioner a corticosteroid injection that day which was tolerated well (PX. 2).

Petitioner presented at the offices of Dr. George Paletta, Jr. on January 17, 2011, for an independent medical exam scheduled by Respondent (RX. 14, Exb. 3).

Petitioner testified he continued working as a meter reading for Respondent. Petitioner testified he continued to have problems with the left knee but did not feel the need to complain to his supervisor about the problems. Petitioner testified the knee problems persisted through 2011. Petitioner testified he had problems in the left knee throughout 2011. Petitioner testified he eventually went back to Dr. Li for further treatment.

Petitioner saw Dr. Li again on December 22, 2011, at which time he reported chronic pain which was now worse than the shoulder pain he was experiencing from a different injury (PX. 2). Dr. Li recommended left arthroscopic knee surgery (PX. 2).

Petitioner presented at Danville Polyclinic on January 4, 2012, and January 5, 2012, for pre-operative examinations (PX. 3).

On January 11, 2012, Dr. Li performed surgery on Petitioner's left knee (PX. 2). The procedure was performed at Ireland Grove Surgery Center (PX. 4). The procedure performed by Dr. Li included a left knee arthroscopy with partial medial and lateral meniscectomy, and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochlea and removal of loose bodies (PX. 2; PX. 4). Petitioner saw Dr. Li in follow up on January 19, 2012, at which time Dr. Li prescribed a physical therapy regimen (PX. 2).

Petitioner presented to Professional Physical Therapy on January 23, 2012, for an initial physical therapy evaluation (PX. 5). Petitioner continued physical therapy through February 15, 2012 (PX. 5).

Petitioner saw Dr. Li on February 16, 2012, at which time he noted Petitioner was doing well (PX. 2). Dr. Li advised Petitioner he could go forward with left shoulder surgery (incorrectly noted as right shoulder surgery in the doctor's office note) (PX. 2). Dr. Li testified the left shoulder surgery was performed on March 14, 2012 (PX.11, p. 12).

Dr. Li testified he saw Petitioner in follow up for both the left knee condition and the left shoulder condition on March 22, 2012, and April 19, 2012 (PX. 11, p. 29). Dr. Li testified that Petitioner was released from care regarding the left knee injury approximately three months after the surgery (PX. 11, p. 30).

Petitioner testified he had a good result from the surgery. Petitioner testified he has been working as a meter reader since June 2012 without significant problem. Petitioner testified most of the pain is gone but he has discomfort on occasion. Petitioner testified the left knee becomes painful when walking on uneven surfaces. Petitioner testified he used to run for exercise but can no longer do that on a sustained basis. Petitioner testified he is not taking any prescription medication for residual symptoms but does use over-the-counter pain medications.

Dr. Lawrence Li was deposed on April 30, 2012 (PX. 11). Dr. Li testified that when he saw Petitioner on December 22, 2011, his left knee pain had gotten worse and he continued to have a positive McMurray's test (PX. 14, pp. 23-24). Dr. Li testified that when he performed the arthroscopy on January 11, 2012, he found tears of the medial and lateral meniscus, grade 3 changes on the medial femoral condyle, grade 4 changes to the patella, and loose bodies in the knee (PX. 11, p. 24). Dr. Li testified those condition were caused by a combination of factors (PX. 11, p. 26). Dr. Li testified the chondral changes, namely the arthritis and loose bodies were degenerative in nature (PX. 11, pp. 26-27). Dr. Li testified the Petitioner probably had a pre-existing medial meniscus tear that was made larger and symptomatic by the work related accident (PX. 11, p. 27). Dr. Li testified the lateral meniscus tear was degenerative in nature (PX. 11, p. 27). Dr. Li testified all the conditions were pre-existing and that some or all of them were made worse by the injury (PX. 11, p. 27). Dr. Li testified the most likely cause for Petitioner's need for treatment, including surgery, was the medial meniscus tear (PX. 11, p. 27). Dr. Li testified the pre-existing tear in the meniscus made Petitioner more susceptible to further tearing (PX. 11, p. 40). Dr. Li testified he relied upon the fact that Petitioner was asymptomatic prior to the injury and symptomatic afterwards (PX. 11, p. 39). Dr. Li testified he did not believe the accident resulted in a temporary increase in symptoms since the symptoms had not resolved on their own (PX. 11, p. 27).

Dr. George Paletta, Jr. was deposed on May 25, 2012 (RX. 14). Dr. Paletta testified he saw Petitioner for an independent medical examination (RX. 14, p. 5). The report prepared by Dr. Paletta indicates his examination of Petitioner occurred on January 17, 2011 (RX. 14, Exb. 3). Dr. Paletta took a history of injury to Petitioner's left knee when he was reading a meter and tripped over a dog leash causing him to twist and fall injuring his left knee. Dr. Paletta reviewed a copy of the left knee MRI report. He testified he could reasonably rely upon the report to testify and give an opinion. The report showed a chronic appearing tear of the medial meniscus involving the posterior horn and medial body. There was also evidence of degenerative disease.

Dr. Paletta testified Petitioner was suffering from chronic degenerative joint disease of the left knee, involving mainly the medial compartment and patellafemoral compartment, with associated chronic degenerative meniscus tear (RX. 14, p. 14). Dr. Paletta testified there was no causal connection between those conditions and the work accident of November 18, 2010 (RX. 14, p. 14). Dr. Paletta testified that Petitioner had some symptoms in the left knee related to the accident, but those symptoms had been appropriately treated by Dr. Li, prior to January 17, 2011 (PX. 14, p. 15). Dr. Paletta testified on direct examination that Petitioner was basically asymptomatic when Dr. Paletta saw him on January 17, 2011 (RX. 14, p. 15). Dr. Paletta testified that the corticosteroid injection administered by Dr. Li on December 27, 2010, resulted in complete relief of Petitioner's symptoms (RX. 14, p. 17).

On cross-examination, Dr. Paletta testified Petitioner reported to him that the injection was wearing off (RX. 14, p. 19; RX. 14, Exb. 3, p. 3). Dr. Paletta testified that after the injection wore off, some of the symptoms experienced immediately after the trip and fall had completely resolved and some of the symptoms were starting to recur (RX. 14, p. 21).

Petitioner offered into evidence the following medical bills:

Safeworks Illinois (12/06/10 – 12/09/10) - $1,077.69 (PX. 6);
Dr. Lawrence Li (12/09/10 – 02/16/12) - $9,705.27 (PX. 7);
Danville Polyclinic (01/04/12 – 01/05/12) - $418.00 (PX. 8);
Ireland Grove (01/11/12) - $10,338.00 (PX. 9); and
Professional Physical Therapy (01/23/12 – 02/15/12) - $2,992.00 (PX. 10).

The Arbitrator concludes:

1. Petitioner's current condition of ill-being is causally connected to the work accident of November 18, 2010. This conclusion is based upon a chain of events and the credible testimony of Dr. Li. While both doctors were credible in their testimony, the testimony of Dr. Lawrence Li is more consistent with the evidence in its entirety. Both doctors agree that Petitioner was experiencing symptoms in the left knee, caused by the accident. Both doctors agree there was significant pre-existing degeneration and arthritis in Petitioner's left knee. Petitioner testified his left knee was asymptomatic at all times prior to the accident. That testimony is unrebutted. Dr. Paletta is of the opinion that the injury was temporary and had resolved by the time he saw Petitioner on January 17, 2011. Dr. Paletta initially testified the corticosteroid injection administered by Dr. Li on December 27, 2010, had completely resolved Petitioner's symptoms and brought him back to baseline. However, upon further questioning, Dr. Paletta testified only some of Petitioner's symptoms had resolved and others were recurring as of January 17, 2011. It should be noted that the examination done by Dr. Paletta occurred only 21 days after Dr. Li administered the injection. Given such a short time period, the recurring symptoms suggest the injection only provided temporary relief to a more significant injury. Dr. Li testified the accident caused a worsening of Petitioner's pre-existing torn meniscus which required surgery. Petitioner testified he was having trouble with the left knee throughout 2011 prompting him to return to Dr. Li for more treatment. Dr. Li testified that when he saw Petitioner on December 22, 2011, his left knee condition had not improved compared to the examination in December 2010. Petitioner testified he had a good result from the surgery and that most of the pain was gone from the left knee. The overall evidence of the file does not support a finding that Petitioner's condition had resolved by January 17, 2011. The evidence supports a finding that Petitioner's condition continued throughout 2011 and only resolved after having surgery performed.

2. Petitioner is awarded reasonable and necessary medical bills totaling $24,530.96, subject to the fee schedule. Pursuant to a stipulation between the parties, Respondent is entitled to credit under Section 8(j) of the Act for any monies paid for medical bills through group health insurance provided by Respondent to Petitioner. Petitioner is also awarded reimbursement in the amount of $266.40 (480 miles @ 55.5¢ per mile) for mileage driven to and from physical therapy appointments. Section 8(a) of the Act requires the employer to pay for physical rehabilitation of the employee, including all expenses incidental thereto. The Arbitrator finds Petitioner's travel to and from the physical therapy appointments to be such an incidental expense.

3. Petitioner is awarded temporary total disability benefits beginning January 11, 2012, through March 13, 2012, a period of 8 6/7 weeks. It appears from the records and testimony that Petitioner was off work for the left knee injury up to the time he had a left shoulder surgery on March 14, 2012. Thereafter, any time missed from work was primarily due to treatment regarding the left shoulder condition which is not a claimed injury in this case. Pursuant to a stipulation between the parties, Respondent is entitled to credit under Section 8(j) of the Act for any monies paid for lost wages through group disability insurance provided by Respondent to Petitioner.

4. Petitioner was credible. His testimony regarding the nature and extent of his condition is consistent with the medical records. Based upon the medical evidence and Petitioner's credible testimony, Petitioner has sustained permanent partial disability of 25% loss of use of the left leg. Petitioner sometimes experiences symptoms in the left leg that interferes with his ability to sleep. Petitioner is able to control those symptoms with over-the-counter medications. Petitioner is somewhat limited in his use of the left leg as it becomes symptomatic when he walks on uneven ground at work. Petitioner testified his knee slows down his pace at work. Petitioner no longer jogs.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeff Williams,

Petitioner,

vs. NO: 11 WC 19938

14IWCC0328

Secretary of State,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 6, 2013 is hereby affirmed and adopted.

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

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

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

No bond or summons for State of Illinois cases.

DATED: MAY 0 2 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:4/24/14
43

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

WILLIAMS, JEFF
Employee/Petitioner

Case# **11WC019938**

14IWCC0328

SECRETARY OF STATE
Employer/Respondent

On 3/6/2013, 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 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
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0502 ST EMPLOYMENT RETIREMENT SYSTEMS
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SPRINGFIELD, IL 62794-9255

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM H PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST
8 MAIN
SPRINGFIELD, IL 62794-9208

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

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

MAR 6 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeff Williams
Employee/Petitioner

v.

Secretary of State
Employer/Respondent

Case # **11** WC **19938**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **12/19/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

L. [ ] 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, **5/11/11**, 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 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 **$52,070.00**; the average weekly wage was **$1,001.35**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **$All Medical Paid through group** under Section 8(j) of the Act.

ORDER

Claim Denied. See attached decision.

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

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

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

Edward Lee — Signature of Arbitrator

3/4/13 — Date

ICArbDec19(b)

MAR 6 - 2013

Jeff Williams v. Secretary of State

IWCC No. 11 WC 19938

The Arbitrator finds the following facts:

On May 11, 2011, Petitioner was employed by the Illinois Secretary of State as a public service representative in Mt. Vernon, Illinois. Petitioner's application for adjustment of claim indicates that he sustained repetitive trauma injuries to both his right and left hands and arms on that date.

Petitioner testified that, when he was hired in 1984, his duties involved significantly more active upper extremity use such, as handwriting and fine manipulation. Petitioner testified that the facility's equipment modernized significantly between 2000 and 2003, making several aspects of his job easier and less hand intensive. Petitioner indicated that he previously handwrote each applicant's information and confirmed their information via telephone before rewriting or typing out the relevant documentation. Petitioner now enters only an applicant's driver's license number to pull up their records via the computer system. In the case of new applicants without a prior record in the Secretary of State system, Petitioner enters the relevant information on a form in his computer. Petitioner testified that license photography was initially done with a camera, a card, and a laminator, but is now done with three clicks of a mouse.

Several of the activities described by Petitioner involve handwriting or mouse use. Petitioner testified that he is right handed and does not believe that handwriting or using a mouse contributed to the development of the left sided symptoms for which he is now seeking treatment. Petitioner testified that his typing generally consists of filling out forms, and does not entail the drafting of paragraphs or narrative reports. Petitioner testified that he does not use hand tools or vibratory tools during the course of his duties. Petitioner testified that he sweeps the motorcycle course, but it is not his responsibility to keep the driver services facility clean. Petitioner's testimony was largely corroborated by James Nelson, one of Petitioner's former supervisors; however, Mr. Nelson did clarify that Petitioner rarely sweeps the motorcycle course.

Petitioner's upper extremity treatment did not begin in 2011; it began in 2002. Petitioner first reported upper extremity complaints to Dr. James Chow on May 7, 2002. (Rx 7) On that date, Petitioner was diagnosed with lateral epicondylitis of the right elbow, bilateral thoracic outlet syndrome, and possible carpal tunnel syndrome. (Id) Seven days later, a nerve conduction test revealed bilateral carpal tunnel syndrome. (Id) After an unsuccessful course of conservative treatment, Petitioner underwent a right side endoscopic carpal tunnel release on July 10, 2002. (Id) Petitioner continued to treat with Dr. Chow post-surgically and initially reported significant resolution of his symptoms. (Id) In September of 2002, Petitioner was diagnosed with DeQuervian's disease and fitted for a right thumb splint. (Id) When Petitioner's DeQuervain's splint failed to resolve his symptoms, he was given an abductor splint for his right thumb. (Id) Petitioner was referred to Dr. Joon Ahn for his right hand, thumb, middle finger, and elbow complaints. (Id) On January 24, 2003, Dr. Ahn diagnosed bilateral basal joint synovitis, possible early arthritic changes, middle finger PIP joint stiffness and right lateral epicondylitis. (Id) Petitioner's basal joint was injected with steroids and he continued conservative treatment for his carpal tunnel

syndrome. (Id) Petitioner was seen by Dr. Ahn on March 26, 2003, at which time Dr. Ahn recommended a left sided carpal tunnel release without surgery for basal joint arthritis. (Id) Dr. Ahn noted that there were no significant arthritic changes seen on Petitioner's x-rays, but he did feel that Petitioner had some degree of chondral arthritis changes. (Id)

Petitioner neither sought nor received any upper extremity treatment between March 26, 2003, and April 27, 2004. On April 27, 2004 a report was issued by Dr. James Emmanuel who diagnosed left carpal tunnel syndrome and possible right recurrent carpal tunnel syndrome. (Rx 9) Dr. Emanuel described Petitioner's job activities primarily typing, writing, and doing license plate and title work. (Id) Based on this description Dr. Emanuel felt that Petitioner's carpal tunnel syndrome was related to his work. (Id) Dr. Emanuel felt that Petitioner's neck, shoulder, and elbow complaints were not work related, and could instead to be linked with his hobby of working with horses. (Id)

Petitioner reported to Dr. David Strege on May 12, 2004 with complaints of pain over the right radial aspect of the forearm radiating into his right shoulder. (Rx 8) Electrodiagnostic testing performed on May 12, 2004 revealed a normal right upper extremity. (Id) Dr. Strege diagnosed Petitioner with mild cubtial tunnel syndrome as well as probable radial tunnel syndrome. (Id) Dr. Strege specifically stated that Petitioner did not have signs of carpal tunnel syndrome. (Id) He recommended surgical intervention for cubital tunnel syndrome and radial tunnel syndrome, but Petitioner declined to have the procedure performed. (Id)

Petitioner did not receive any further treatment for his upper extremities until May 11, 2011, when he reported to Dr. George Paletta Jr. (Px 3, Rx 12) Petitioner underwent a repeat nerve conduction study on May 11, 2011, which indicated severe sensory and motor median neuropathy across the left carpal tunnel with axional involvement and mild residual findings on the right median nerve consistent with a previous carpal tunnel release. (Px 4, Rx 12) On June 16, 2011, Dr. Paletta performed a left elbow ulnar nerve transposition and a left-sided carpal tunnel release. (Px 3, Rx 12) Dr. Paletta opined that the surgical intervention yielded a good result in terms or resolution of the elbow and wrist symptoms, but Petitioner continued to describe a significant number of complaints involving his dorsal wrist. (Id) Dr. Paletta opined that these complaints were not directly related to the carpal tunnel. (Id) Petitioner also described tenderness in the classic location for intersection syndrome. (Id)

Petitioner reported to Dr. Young, his fifth treating upper extremity specialist, on November 8, 2011. (Px 9, Rx 14) Dr. Young noted complaints of numbness and tingling involving Petitioner's left upper extremity which Petitioner claimed had not improved since his recent left carpal tunnel release and ulnar transposition. (Id) Petitioner underwent a repeat nerve conduction study which showed compression in the areas where Petitioner had previously undergone surgical intervention. (Id) Petitioner last saw Dr. Young on October 23, 2012, at which time Dr. Young recommended a revision left carpal tunnel release and ulnar nerve revision. (Id)

The deposition of Dr. Young was taken on August 27, 2012. (P 13) During his deposition, Dr. Young testified that Petitioner's weight, smoking history, and alcohol consumption were all potential contributory factors for the development of carpal tunnel syndrome. (Id at 10) Dr. Young also testified

that Petitioner's age and hobby of working with horses could contribute to his development of upper extremity symptoms. (Id at 22-23) Dr. Young was presented with a list of job activities Petitioner claimed to perform during the course of his duties, and opined that the duties as described could have contributed to the development of carpal tunnel syndrome. (P 13 at 11-12) Dr. Young acknowledged that he did not know what portion of the day Petitioner spent writing or typing, and testified that the amount of time spent on those specific activities is relevant to his causation analysis. (Id at 24) Dr. Young acknowledged that he did not review the records of Dr. Chow, Dr. Ahn, or Dr. Strege. (Id at 20) Dr. Young testified that it is possible that Petitioner did not experience relief after his two previous surgical interventions because he does not in fact have carpal or cubital tunnel syndrome. (Id at 21)

Dr. Anthony Sudekum is a board certified plastic and reconstructive surgeon with an added qualification in surgery of the hand. (Rx 16) He is the owner and operator of the Missouri Hand Center, a hand specialty practice involved in the evaluation and treatment of patients with conditions affecting upper extremities. (Rx 16) On December 1, 2011, Dr. Anthony Sudekum performed an independent medical examination to assess Petitioner's upper extremity complaints. (Rx 15) Dr. Sudekum testified that he reviewed the records of Dr. Chow, Dr. Ahn, Dr. Emanuel, Dr. Strege, Dr. Paletta, and Dr. Young, as well as the job descriptions prepared by Petitioner. (Id at 18) Dr. Sudekum testified that Petitioner's age, obesity, smoking history, peripheral edema, and hobby of working with horses could all constitute potential comorbid factors for the development of carpal tunnel syndrome and cubital tunnel syndrome. (Id at 22, 23) Dr. Sudekum listed ten different upper extremity conditions with which Petitioner was diagnosed and indicated that such varied diagnoses indicated an inconsistent presentation of symptoms. (Id 24-26) Dr. Sudekum testified that Petitioner's variety and frequency of subjective complaints, when paired with his equivocal objective findings, indicate a pattern of symptom magnification. (Id at 27-29) Dr. Sudekum opined that, based on his understanding of Mr. Williams job duties, he did not believe that Petitioner's work played any role in the development or exacerbation of any upper extremity conditions. (Id at 36)

At his hearing, Petitioner testified that his symptoms had presented consistently. Petitioner indicated that he did not believe his diagnoses had changed very much over his ten years of upper extremity treatment. Petitioner denied being diagnosed with basal joint arthritis, basal joint synovitis, DeQuervain's, bilateral thoracic syndrome, radial tunnel syndrome, bilateral lateral epicondylitis, bilateral medical epicondylitis, or left intersection syndrome. Petitioner testified that his right sided surgery resolved his symptoms for four to five months. He testified that his experienced no relief after his left upper extremity procedure in 2011.

Therefore, the Arbitrator concludes:

1. Petitioner began his treatment for his bilateral upper extremity complaints on May 7, 2002 and terminated his treatment on June 28, 2004. By the time Petitioner filed his Worker's Compensation claim in 2011 and restarted his treatment, the statute of limitations had long since expired. 820 ILCS 305/6(d). Petitioner's testimony makes it clear that his condition was not resolved in 2004, as he only declined left sided surgical intervention in 2004 due to his fear of a painful surgical procedure. Petitioner's Application for Adjustment of claim

asserts that Petitioner was injured on May 11, 2011; however, there is no evidence that he sustained any identifiable injury on that date. To the contrary, Petitioner's testimony is replete with examples of the modernization of Respondent's facilities, all of which occurred well before 2011.

2. Even if this Arbitrator were to find that Petitioner's condition was resolved in 2004, which is contrary to his testimony, there is no evidence that he suffered an aggravation in 2011. Specifically, Petitioner has failed to demonstrate a causal nexus between his job duties from 2004 to the present and his upper extremity complaints. Petitioner went to great lengths to describe past office procedures and repeatedly indicated that his present duties are far less strenuous than his prior obligations. Petitioner's attempt to reach back in time to the office practices of the 1980's and 1990's is incompatible with the reaggravation theory of the case implied by his application for adjustment of claim. In order for Petitioner's case to be compensable and avoid the statute of limitations problems created by his 2002-2004 treatment, he must have a work related aggravation of his condition caused by the conditions at his work in 2011. By his own admission, the procedures at the Secretary of State's office had modernized by 2003, thereby making their prior procedures irrelevant to the case at hand. Furthermore, most of the hand intensive activities described by Petitioner involve handwriting and mouse use, which he acknowledged are not contributory to his left upper extremity treatment. Petitioner testified that his keyboard use is confined filling out forms, many of which are recalled from the database automatically with the entry of a driver's license number.

3. Petitioner failed to demonstrate that he suffered accidental injuries which were caused or aggravated by his job duties. Dr. Sudekum reviewed not only Petitioner's job analysis as well as the records of Petitioner's five treating upper extremity physicians. This makes Dr. Sudekum the only expert qualified to testify on the totality of Petitioner's medical history. Dr. Young testified that he had not reviewed the records of Dr. Strege, Dr. Chow, or Dr. Ahn. Dr. Young acknowledged that Petitioner may not have responded to his previous surgeries because he was not actually suffering from the pathology the surgeries were designed to remedy. As Dr. Sudekum pointed out; Petitioner has presented with no less than 10 different diagnoses from 5 different upper extremity physicians. Therefore, it is quite possible that symptom magnification is responsible for his inconsistent subjective complaints. There is simply no reason to expect that Petitioner's upper extremity complaints, which have failed to be resolved by any of his prior physicians or any of his prior surgeries, will be resolved by yet another surgical intervention.

4. Finally, an evidentiary issue was raised during the deposition of Dr. Sudekum regarding the admissibility of his opinions. This issue is now moot, as the opinions of Dr. Sudekum are also contained in his report, which was admitted into evidence without any objection from Petitioner's counsel.

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

James Neunaber,
Petitioner,

vs. NO: 07 WC 38476

Monterey Coal Company,
Respondent,

14IWCC0329

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of occupational disease, evidentiary error, legal error, permanent partial disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 2 2014

MB/mam
O:4/24/17
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NEUNABER, JAMES
Employee/Petitioner

Case# **07WC038476**

14IWCC0329

MONTEREY COAL COMPANY
Employer/Respondent

On 3/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0755 CULLEY & WISSORE
BRUCE WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
P O BOX 335
SPRINGFIELD, IL 62705

14IWCC0329

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Neunaber
Employee/Petitioner

v.

Monterey Coal Company
Employer/Respondent

Case # 07 WC 38476

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **2/04/2013**. 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Did the Petitioner develop an occupational lung disease as a result of exposure in the course of his employment with Respondent?**

FINDINGS

On **9/30/06**, 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 was last exposed to the coal dust and fumes arising out of and in the course of employment.

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

Petitioner's condition of ill being is causally related to his occupational exposures.

In the year preceding the last date of exposure, Petitioner earned $**49,200.84**; the average weekly wage was $**946.17**.

On the date of last exposure, Petitioner was **56** years of age, ***single*** with **no** dependent children.

ORDER

Respondent shall pay the Petitioner the sum of $567.70 for 75 weeks, as the injuries resulted in a loss of 15% under section 8 (d) (2) of the Act.

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

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

D. Dale McCarthy KM
Signature of Arbitrator

2/22/13
Date

MAR 1 - 2013

Findings of Fact:

Petitioner, James Neunaber, was born on 2-18-50 and was 62 on the date of arbitration. He coal mined for 35 years, 34 of which were underground. All of his coal mining occurred at Respondent Monterey Coal Company's Carlinville Mine where he was regularly exposed to coal and silica dust, roof bolting and plant glues, and diesel fumes. Petitioner was 57 and working as a Laborer when last occupationally exposed on 9-30-06. Petitioner stated that Monterey was going to sell the company, and he retired because he needed to secure insurance because of his health. Petitioner did not seek employment after he left mining because he felt his lungs "were shot." He did not look for work after leaving the mine, and his prior work involved manual labor.

About 10 years before he retired, Petitioner began noticing breathing problems while mine examining in dusty areas or when around diesel fumes. At times he had to stop his rounds and rest even though he was under time pressures to complete his rounds. Sometimes he had to get down on his hands, elbows and knees and hold his head for a while to breathe and rest before he could continue. During his last years as an examiner temporary examiners had to finish his rounds when he was having a bad day.

In addition to being a laborer, Petitioner operated the continuous miner for twelve years. He bid out of that job to be a mine examiner hoping to have less dust exposure away from the face, but he was examining in dusty entries most of the time. There was always diesel exposure from the vehicle he drove, as well as shield haulers, scoop tractors, and mules. He was exposed to roof bolting glue fumes because he had to examine the freshly bolted areas. Old glue tubes were often discarded and run over by machinery in the mines. Glue and diesel fumes made him short of breath, and he had to leave the area sooner than he should have.

Currently, Petitioner cannot walk very far without becoming breathless. He cannot climb stairs, or visit good friends who live in an upstairs apartment. His breathing problems have progressively worsened, and he has been on 24 hour oxygen since December 18, 2012. Petitioner does not leave the house unless he has to. He hires someone to do his yard work. His step daughter and a friend help him keep his house clean. Petitioner has a small cottage by a lake, but his activity there is limited to watching TV, getting something to eat, and looking out on the lake while he sits. He has been unable to ride a motorcycle for many years. He no longer hunts or fishes and has given his equipment to his kids. After retirement, he did build a cabin at his home, but testified that the work was contracted to others.

Petitioner smoked from age 20 until he went on 24 hour oxygen, but still has one once in a while with a cup of coffee. He testified that he had smoked a pack, maybe two, a day. There were not many hours in the day to smoke because it was not allowed at work, and sometimes he worked 12-20 hour days. He further admitted that he continued to smoke long after he began treatment for pulmonary problems. His treating doctor's notes reflect that he reported smoking two packs a day as late as March 5, 2009. (RX 3)

Petitioner called two longtime co-workers from the Carlinville Mine. David Martioni, a personal friend, saw Petitioner when he examined areas of the mine where he was working. Even when Petitioner was not examining, Mr. Martioni saw him on a daily basis as he left the mine. Mr.

Martioni stated that Petitioner used to be a workhorse, but during the last couple years at the mine Petitioner was unable to finish his routes, and back up examiners had to be called in. He opined that the Petitioner's quality of life has significantly deteriorated since he began his mining career. By the end of the work day Petitioner's physical condition was very poor.

Dick Schulte worked as a roof bolter in Petitioner's unit in the late 1980's while Petitioner was a mine examiner. After he changed to out-by work, Mr. Schulte saw Petitioner on the roadways as he was examining. Later as a repairman he saw Petitioner when he required his unit to make gas checks. Mr. Schulte noticed Petitioner on the roadways leaning and having breathing problems. He would stop to see if Petitioner needed help. Petitioner would have to sit and rest in his unit at times before he could travel on. He said that during the last year of Petitioner's mining career he could not do near the amount of work he'd done previously and had to walk slowly to his car when work was over.

Dr. Chopra, Petitioner's treating physician, has practiced general and family medicine in Carlinville since 1981. Ten to fifteen percent of his patients are coal miners, and he treats miners for pulmonary disease. Dr. Chopra has treated Petitioner since the early 1990's and has done many examinations and patient histories and had chest x-rays and pulmonary function testing performed. Dr. Chopra has had Petitioner on pulmonary medications for many years, including nebulizer treatments and ProAir and Symbicort inhalers. (PX 2, p. 5-6). Dr. Chopra testified that Petitioner has a history of cough and has had shortness of breath and pulmonary limitations for quite some time. Dr. Chopra felt Petitioner had coal workers' pneumoconiosis (CWP). Petitioner also has moderate to severe COPD and chronic bronchitis. After seeing Petitioner's testing showing a 19% drop on his Methacholine testing, Dr. Chopra agreed that there is an asthmatic component in Petitioner's condition and that coal mining was a contributor. (PX 2, p. 8-11, 17). Based on each of Petitioner's pulmonary diseases, exposure to the coal mine environment would risk his health. Petitioner does not have the pulmonary capacity to do the work of a coal miner or work requiring manual labor. Petitioner condition has become slightly worse, but smoking and obesity were contributors. (p. 11-12).

Dr. Chopra stated that Petitioner smokes between one and two packs of cigarettes a day, and has been counseled about that habit. Petitioner who is 5'7" now weighs 262 pounds and in June of 2006 he weighed 193. (PX 2, p. 13-15). The main contributing factor to Petitioner's COPD and chronic bronchitis is smoking. It could also contribute to his asthmatic bronchitis. (p. 17-18). Dr. Chopra was asked about records from 2010 and 2011 where Petitioner denied shortness of breath. He stated they are incorrect because Petitioner had shortness of breath. He explained that any findings of clear lungs would depend on how well Petitioner's medicine was working at the time, but that most of the time he would find wheezing. He did not feel that Petitioner's cardiac problems had any effect on his breathing. However he stated that Petitioner's lung problems can cause an extra burden on his heart function. (p. 19-21).

Dr. Chopra's records were introduced, and showed some back problems, and numerous entries regarding COPD, the use of inhalers and nebulizers, symptoms such as shortness of breath, or denials thereof, cough, and physical findings, such as wheezing, rhonchi and crepitations; his smoking consumption is also documented. (PX 7, p. 2, 5, 7, 9, 10, 12, 31, 33-34, 36, 38-39, 41--45, 47, 49, 51, 53, 55-58, 61-70, 110). The records show an exacerbation of obstructive chronic bronchitis on 3-9-07. (PX 7, p. 45-46). By 12-29-11 Petitioner's work capacity was diminishing, as carrying a bag of groceries caused chest tightness and shortness of breath. Yet, the entry

states he denied shortness of breath or chest tightness, which gives some credence to Dr. Chopra's view of such entries. (PX 7, p. 59). Stress testing on 3-24-09 from Prairie Cardiovascular showed normal perfusion imaging and wall motion, normal left ventricular systolic function, and no ischemia or previous infarction. (PX 7, p. 91-93). Pulmonary function testing of 3-17-09 reported moderately severe obstructive lung disease with low CO diffusions compatible with loss of the pulmonary capillary bed. (PX 7, p. 95). Further cardiac testing of 1-12-12 showed no significant change from the 3-24-09 study, and there was a low probability for coronary disease. (PX 7, p. 108-109). A chest x-ray of 3-17-09 for shortness of breath and chest pain reported chronic lung disease with some fibrosis and emphysema. There was mild interstitial fibrosis. Scarring in the right middle lobe also was noted. There was no change with the mild interstitial fibrosis after a 6 ½ month interval. (PX 7, p. 120). A chest film of 12-17-11 for cough noted a smoking and mining history. It reported mild fibrotic changes. (PX 7, p. 124).

Respondent also submitted records from Dr. Chopra which contained additional older entries. (RX 3). There are abundant references in the records to wheezing, notations of COPD, bouts of bronchitis requiring medication, and some complaints of shortness of breath and cough. The following dates have relevant entries pertaining to pulmonary issues: 6-3-08, 11-19-07, 8-23-07, 5-25-07, 2-23-07, 7-25-06, 6-26-06, 2-27-06, 11-7-05, 8-11-05, 6-24-05, 5-23-05, 1-21-05, 9-4-03, 6-4-03, 3-12-03, 3-3-03, 12-26-02, 10-23-02, 9-19-02, 10-11-01, 10-4-01, 7-30-01, 7-18-01, 12-1-00, 9-7-00, 6-30-00, 3-16-99, 7-20-98, 3-6-98, 7-14-98, 10-7-97, 9-22-95, 11-1-95, and 9-13-95. An x-ray of 8-6-07 showed stable scarring at the right base. A film of 7-24-06 showed stable bibasilar scarring or atelectasis and findings consistent with COPD. A chest x-ray of 5-20-05 showed linear atelectasis in the right lung base. There was no significant change from a 5-12-04 film. The film of 5-12-04 noted some COPD and fibrosis. A 10-21-02 x-ray showed mild COPD changes. A 7-30-01 film was normal.

Carlinville Area Hospital records show some shoulder problems, heart problems, COPD, the complete pulmonary function testing of 3-17-09, and Petitioner's smoking consumption. (PX 6, p. 7, 29, 32-53, 57, 98, 102-104, 137). Many entries are duplicative of Dr. Chopra's records. A chest x-ray for COPD and cough of 8-26-08 reports no change from the past year with moderate emphysema. (p. 58). A chest x-ray for cough from 7-24-06 reports stable bibasilar scarring or atelectasis and findings consistent with COPD with no change from prior chest films. (p. 99).

Memorial Medical Center Records show treatment for Petitioner's heart, back surgery, and rollover accident, during which he had pneumonia. Of relevance are entries showing respiratory complaints and treatments during these hospitalizations. (PX 8, p. 5, 78, 89, 109, 112, 113, 116, 156, 204, 242, 245, 331, 343, 360, 363, 391-394, 397, 402, 418, 425-426, 442-443, 455, 457, 465, 473-474, 477, 481, 489, 495).

Dr. Glennon Paul examined Petitioner at his attorney's request on 2-19-08. Dr. Paul is the Medical Director of St. John's Hospital Respiratory Therapy Department and teaches internal and pulmonary medicine at SUI Medical School. He is the senior physician at the Central Illinois Allergy and Respiratory Clinic which employs six physicians specializing in allergy and pulmonary diseases. He has authored a book on Asthma. His patient census has 50,000 people, and he reads about 5000 chest x-rays and pulmonary function studies each year. Dr. Paul has examined coal miners for federal and state black lung claims, the vast majority of which were for coal companies. (PX 1, p. 6-8). Dr. Paul reported Petitioner had a 10 year history of shortness of breath which was worsening. He becomes breathless after walking a mile or ascending 4 flights

of stairs. Petitioner gets bronchitis with upper respiratory tract infections which are usually treated with antibiotics. Petitioner was a 40 year pack a day smoker. Petitioner's chest exam was normal, and his chest x-ray showed small nodules throughout both lung fields and early fibrosis. Dr. Paul felt that Petitioner had CWP and asthmatic bronchitis, also known as reactive airways disease (RAD). (PX 1, Paul Report; PX 1, p. 9).

Dr. Paul stated that because Petitioner has RAD, his pulmonary function test results will vary depending on how his RAD is on the day of testing. On some days he could be totally disabled because of his lungs, and on others he could generate better test results. (PX 1, p 12). Under the AMA guidelines Petitioner's diffusing capacity of 52% of predicted would rate as a moderate physical impairment. (PX 1, p. 15). The diffusing capacity measures the lungs' ability to transport oxygen. (PX 1, p. 13).

Dr. Paul opined that the 3-17-09 pulmonary function testing from Carlinville Medical Clinic demonstrated obstruction with an FEV1 of 2.28, decreased from his FEV1 of 2.80. The diffusing capacities were similar, but the 10% increase in FEV1 after bronchodilator administration confirmed his diagnosis of RAD. (PX 1, p. 17-18). Dr. Paul stated that Petitioner's exposures to glue fumes in the mines could cause or aggravate Petitioner's RAD. (PX 1, p. 20). He provided that coal mine and silica dusts and diesel and glue fumes in the mines all can harm the lungs, and that mining exposures can cause occupational asthma. (PX 1, p. 35, 38). Dr. Paul agreed that smoking does not cause RAD, but can trigger or aggravate asthma and aggravate asthmatic bronchitis. (PX 1, p. 48, 61). The RAD aggravation would be both temporary and permanent. (PX 1, p. 51).

Based on Petitioner's environmental restrictions and his inability to do manual labor, Dr. Paul felt Petitioner was permanently and totally disabled from coal mining. Dr. Paul felt he was capable of light to medium labor, but because of his RAD there would be days when he would be unable to work at all. (PX 1,p. 24).

B-reader/Radiologist, Dr. Michael Alexander, interpreted Petitioner's quality one chest x-ray of 6-7-07 as positive for CWP in all lung zones, category 1/1. (PX 4).

At Respondent's request, Petitioner was examined by Pulmonologist Dr. Peter Tuteur on 10-14-10. (RX 1, p. 5). Dr. Tuteur was also provided with Dr. Paul's report, Dr. Alexander's B-reading, a 3-24-09 exercise study, a 3-17-09 pulmonary function test, and serial chest x-ray reports from Carlinville Area Hospital. Dr. Tuteur stated that Petitioner's breathlessness required him to stop after walking ¾ of a mile or climbing 2-3 flights of stairs. Petitioner had a cough throughout the day occasionally associated with sputum, and nocturnal wheezing associated with heartburn. Dr. Tuteur reported Petitioner's treater "has offered Symbicort and ProAir, which he is unable to identify whether or not it helps. He has not required hospitalizations for exacerbations, nor has he clearly had even minor exacerbations." Dr. Tuteur stated that the Petitioner was obese, a factor which could cause a reduction in the Petitioner's lung capacity.

According to Dr. Tuteur, after Petitioner was stented, his breathlessness improved. Petitioner's physical exam was normal. There was no evidence of CWP on Petitioner's chest film. (Tuteur report, p. 2). Dr. Tuteur felt that his pulmonary function studies and those of Dr. Paul and Carlinville Hospital showed no worse than a very minimal obstruction that did not improve after bronchodilator. He blamed the decreased diffusing capacities on exaggerated predicted values because of obesity, concluding that the diffusing capacity was essentially normal. Pulmonary

function testing demonstrated a mild obstructive ventilatory defect which did not improve with bronchodilator. Dr. Tuteur concluded that Petitioner had chronic bronchitis and an associated mild obstruction which he blamed on smoking. He felt that if Petitioner had never coal mined his clinical picture would be the same. (Report, p. 3).

Dr. Tuteur testified that Petitioner told him after he retired he built his cabin primarily by himself, contracting some work out. (RX 1, p. 6-7). This is inconsistent with Petitioner's testimony. Dr. Tuteur felt that Petitioner's weight gain would cause shortness of breath. (p. 10). He rated Petitioner's chronic bronchitis and air flow obstruction as clinically insignificant. (p. 14-15). He did not believe Petitioner had any bronchial reactivity based on the Methacholine test, because a positive result requires a 20% change, and Petitioner's was 19%. (p. 18).

On cross-examination Dr. Tuteur stated that coal mine dust can cause shortness of breath and a cough. The tissue reaction caused by CWP is permanent fibrosis or scarring and focal emphysema. The affected tissue cannot function and if there is enough scarring measurable impairment results. One can have CWP with normal pulmonary testing and physical exams. Dr. Tuteur recommends that those with CWP avoid any further dust exposure. (RX1, p. 19-23). Dr. Tuteur conceded that pulmonary function testing cannot determine the cause of an abnormality. (RX 1, p. 28)

He testified that the most common cause of chronic bronchitis was cigarette smoke, but acknowledged that coal dust could also be a cause. In discussing the relative risks in his narrative report, Dr. Tueter said that the risk of the Petitioner developing his problem from cigarettes was 20 %, while the risk from coal mining was at 1 %. He acknowledged that the American Thoracic Society finds a greater comparison between the effects of coal dust and smoking than he does, placing the coal kjine risk at 4 %. He has not published his disagreement with their views. (RX 1, p. 31-33). Dr. Tuteur is familiar with the December 2000 review of medical literature by NIOSH and the DOL published in the Federal Register. The agencies' findings after a review of the literature also conflicts with Dr. Tuteur description of relative risks of smoking and coal dust. Dr. Tuteur has not published his disagreement with their conclusions either. (PX 1, p. 34-35). Dr. Tuteur acknowledged that the inhalation of silica dust as a component of coal mine dust can cause an obstructive defect, or aggravate an obstruction caused by something else. (p. 38).

Dr. Tuteur agreed that Petitioner was exposed to sufficient amounts of coal mine dust to cause obstructive lung disease or a decreased diffusing capacity in a susceptible host. A decreased diffusing capacity is consistent with CWP. (RX 1, p. 49-50). Dr. Tuteur blamed smoking for Petitioner's obstruction because of his view of statistical probabilities. However, he agreed that coal mine exposures could, to a very small degree, be a cause of Petitioner's chronic bronchitis, COPD, and reduced diffusing capacity. He agreed that not all smokers with Petitioner's history develop obstruction, chronic bronchitis, or coronary artery disease. (p. 55-56). Dr. Tuteur conceded that he would blame Petitioner's chronic bronchitis on mining if Petitioner never smoked. (RX 1,p. 58). Chronic coal mine dust inhalation can produce a clinical picture that is indistinguishable from smoking induced COPD. (RX 1, p. 36-37).

Dr. Tuteur agreed that diesel fumes can affect lung function and cause bronchial reactivity, and that roof bolting glue fumes can harm the lungs and cause RAD. (RX 1, p. 36, 47, 49). Dr. Tuteur conceded that wheezing is consistent with bronchial reactivity. As already indicated,

Petitioner's medical records document a history of wheezing. Petitioner's medications are prescribed for air flow obstruction diseases including bronchitis, emphysema, chemically induced bronchial reactivity or asthma. (p. 51). Dr. Tuteur also stated than an obstruction on pulmonary testing can be consistent with chemically induced bronchial reactivity. (p. 52). If Petitioner had chemically induced bronchial reactivity he should not return to environments that aggravate it. (p. 75).

Respondent also submitted B-reader/radiologist Dr. Wiot's negative interpretation of Petitioner's 10-14-10 chest film. Dr. Wiot commented only on Petitioner's spine and aorta. (RX 2).

Delores Gonzalez, a vocational rehabilitation counselor (PX3, p. 4) evaluated the Petitioner on 5/24/12 (PX13, p. 6). She obtained a personal history and a vocational history from the Petitioner (PX3, p. 7-8). She reviewed medical records and did a transferability of skills analysis (PX3, p. 8). She also did some vocational testing on the Petitioner (PX3, p. 10). Ms. Gonzalez concluded that the Petitioner might be able to find a job making $8.50 to $10.00 per hour. However, she indicated that employers usually favor younger individuals who are more work-ready with higher academic skills (PX3, p. 12). Ms. Gonzalez testified that she was not helping the Petitioner find work, with a job search or preparing a resume (PX3, p. 14). As of 5/24/12, the Petitioner was living by himself and caring for himself. He was not looking for work and had not looked for work since his retirement from Respondent (PX3, p. 16).

Conclusions of Law

By all accounts, the Petitioner has diagnosed pulmonary diseases. Dr. Paul testified that he has coal miners' pneumoconiosis and asthma or reactive airway disease. Dr. Tueter testified that the Petitioner had chronic bronchitis and a minimal obstructive abnormality based upon the pulmonary function studies which he ordered. Dr. Chopra, who has treated the Petitioner since 1994, diagnosed moderate to severe chronic obstructive pulmonary disease, restrictive asthma and likely pneumoconiosis. The B-Reader hired by the Petitioner saw CWP on one X-ray, and the B-Reader hired by the Respondent indicated there was none on another X-ray.

Most important to the Arbitrator on the issue of whether a disease or diseases exist are the records of Dr. Chopra. His records support the Petitioner's testimony that his problems have been long standing and consistent. Since 1994, Dr. Chopra has repeatedly diagnosed acute and chronic bronchitis and chronic pulmonary disease based upon the Petitioner's symptoms of coughing and shortness of breath and exam findings of bilateral crepitation, wheezing and rhonchi. While it is true, as the Respondent points out, that the Petitioner did not complain of shortness of breath on every office visit, the doctor's examinations, on

most occasions, revealed the three findings referred to above consistent with the diagnoses. Since that time, the Petitioner has been on numerous medications for his conditions.

The fact that the Petitioner had a long history of treatment for his pulmonary disease distinguishes this case from numerous cases decided by the Commission over the past several years dealing with simple coal miners' pneumoconiosis. See Young v. Freeman United, 12 IWCC 182; Sims v. Freeman United, 12 IWCC 586; Carpenter v. Monterey Coal, 11 IWCC 1120. The facts here more resemble those in Phelps v. Monterey Coal, 11 IWCC 804. There, the Petitioner, a smoker, had a long history of bronchitis, coughing and wheezing for which he received regular medical care.

Based on all the above evidence, the Arbitrator finds that the Petitioner suffers from CWP. The treatment x-ray report of 3-17-09 notes mild interstitial fibrosis, and the film of 2-17-11 reports mild fibrotic changes. (PX 7, p. 120, 124). These findings are consistent with CWP. Dr. Tuteur's film taken in 2010 was interpreted by Dr. Wiot and Tuteur as showing no fibrosis, which seems at odds with the two aforementioned films. In addition, the chest film of 5-20-04 noted fibrosis and post inflammatory calcifications, and other films report scarring in the bases, bibasilar scarring, or atelectasis in the right base. (RX 3, 8-6-07, 7-24-06, 5-20-05). Petitioner's experts and Dr. Chopra both concluded that Petitioner had CWP and I find their opinions more credible.

The issue then becomes whether any or all of the various diagnoses are causally related to the Petitioner's mine exposures, which the parties stipulated were present. (Arb. X1) The Arbitrator notes that the occupational exposure need not be the sole or even predominant cause of the condition, so long as it is a cause. "The occupational activity need not be the sole or even the principal causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. **Gross v. IWCC, 2011 IL App (4th), 100615WC, ¶22.** The fact that the Petitioner has an extensive smoking history and is obese does not negate the argument that his mine exposures contributed to any or all of his conditions.

The Arbitrator disagrees with the opinions of Dr. Tueter concerning the two conditions which he diagnosed, chronic bronchitis and obstructive lung disease. In his narrative report attached to his deposition, the doctor discussed the issue of causation. He concluded that smoking was a causative factor because the known risk of developing the conditions from smoking was higher than the known risk from exposure to coal dust. He did, however, acknowledge the fact that there were known risks from each activity. In referring to the Petitioner's condition, the doctor wrote "Though this symptom complex potentially can be caused by chronic inhalation of coal

mine dust, in this case based upon the approximate 20% risk for the development of cigarette smoke induced pulmonary disease and the approximate 1% risk of development of coal mine induced legal coal workers pneumoconiosis..." the problem was caused by one and not the other. He never explained why the mining risk, albeit slight, was not a contributing factor to the conditions. The Arbitrator believes his rationale, described above represents a misunderstanding of our above stated law on causation.

The opinions of Dr. Chopra, Petitioner's long-time treater, and Dr. Paul were more credible than Dr. Tuteur regarding Petitioner's occupational lung diseases. While acknowledging that the conditions were due to several factors, both testified that Petitioner's coal mining exposures caused, contributed or aggravated his COPD and chronic bronchitis.

On the issue of nature and extent, the Arbitrator again looks to the testimony and records of Dr. Chopra and Dr. Paul. At his deposition taken April 12, 2012, Dr. Chopra opined that the Petitioner could no longer work in the mine. No doctor testified to the contrary. He also said the Petitioner should not perform work requiring manual labor. He also said that over the past several years the Petitioner's condition might be getting a little worse. His follow up treatment notes for 2012 do not show any unusual visits. They are consistent with what one would expect for a person with reactive airways being treated appropriately with medication. Dr. Paul testified on February 15, 2010 that the Petitioner was mildly to moderately impaired. He opined that the petitioner could perform light to medium work, but would have to miss work during periods when his asthma was flared up. (PX 1 at 24) While Dr. Chopra's records since then show an ongoing diagnosis of COPD, there does not appear to be any entries consistent with an asthma flare-up. It should also be noted that Dr. Paul gave his opinions on the Petitioner's ability to work after discussing the pulmonary function studies of March 2009 which showed airway reactivity.

The vocational expert Ms. Gonzalez testified that the Petitioner could perform unskilled sedentary work. While she referenced Dr. Paul's opinions concerning the Petitioner being able to perform at a higher level, she does not explain her basis for assuming sedentary limits. The Arbitrator believes that affects her opinion, and as such, does not believe that the evidence is sufficient to support an award under Section 8 (d) (1).

Looking again at the Phelps case referenced above, along with the Commission decision in Irvin v. Consolidated Coal, 7 IWCC 263, the Arbitrator awards 15% Person as a Whole pursuant to Section 8 (d) (2) of the Act.

Dated and Entered February 21, 2013

D. Douglas McCarthy, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lori Van Note,
Petitioner,

vs. NO: 07 WC 12874

Freedom Oil,
Respondent,

14IWCC0330

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 7, 2012 is hereby affirmed and adopted.

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

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

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

DATED: MAY 0 2 2014

MB/mam
O:4/24/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VAN NOTE, LORI
Employee/Petitioner

Case# **07WC012874**

14IWCC0330

FREEDOM OIL
Employer/Respondent

On 12/7/2012, 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:

0724 JANSSEN LAW CENTER
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333 MAIN ST
PEORIA, IL 61602

0740 THIELEN FOLEY & MIRDO LLC
JOSEPH W FOLEY
207 W JEFFERSON ST SUITE 600
BLOOMINGTON, IL 61701

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LORI VAN NOTE,
Employee/Petitioner

v.

FREEDOM OIL,
Employer/Respondent

Case # 07 WC 12874

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **July 12, 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. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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 **February 16, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the alleged injury, Petitioner earned **$6,288.73**; the average weekly wage was **$330.99**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of $ **46,899.30** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **46,899.30**.

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 **$220.66**/week for **57-5/7** weeks, commencing **March 2, 2007** through **April 11, 2008,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$198.59**/week for **62.5** weeks, because the injuries sustained caused the **12.5%** disability to her **person as a whole**, as provided in Section 8(d)2 of the Act.

Petitioner is now entitled to receive from Respondent compensation that has accrued from **February 16, 2007** through **July 12, 2012,** and the remainder, if any, of the award is to be paid to Petitioner by Respondent in weekly payments.

Respondent is entitled to receive a credit for medical benefits paid in the amount of **$191,585.28.**

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

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

Signature of Arbitrator **JOANN M. FRATIANNI**

December 3, 2012
Date

DEC - 7 2012

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

Petitioner testified that she was employed as an assistant gas station manager. Her job duties included paperwork, stocking shelves, cleaning, counting and sorting. Petitioner testified that on February 16, 2007, a co-worker was ill so Respondent's owner requested that she take the daily deposit to the local bank by 2:00 p.m. As she exited the store and while walking to her head manager's vehicle in the parking lot, she slipped on ice and snow and fell onto her buttocks, back and struck her head. Petitioner testified that immediately after this fall, she became numb, cold and sore. She then managed to get to her feet, drove to the bank to make the deposit, and returned to the station and finished her work shift. Petitioner testified that she noticed her back and buttocks were sore.

Later that evening, Petitioner sought treatment at the emergency room of OSF St. Joseph Medical Center. A history was recorded of a falling and twisting injury two days ago and another history that she had slipped four times over the past two days. A history was also recorded of slipping on ice while at work to her treating physician, Dr. Kattner, on March 15, 2007.

Based upon the above, the Arbitrator finds that the histories provided to the above medical providers corroborate Petitioner's testimony. As a result, the Arbitrator further finds that Petitioner sustained an accidental injury that arose out of and in the course of her employment with Respondent on February 16, 2007.

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

See findings of this Arbitrator in "C" above.

Petitioner testified that prior to this fall she experienced no lower back or leg pains or problems. She further denied any treatment to her lower back or legs prior to this fall.

Petitioner did in fact experience symptoms to her lower back and legs prior to February 16, 2007. Petitioner saw Dr. Santiago, who performed a hysterectomy and laproscopy. She reported back pain to him in 2003, 2004, and 2005. She also reported back pain on August 7, 2003 to Dr. Santiago and related it to a surgery from June of 2003. (Rx4) On February 9, 2007, Petitioner reported sharp back pain and radiating pain along with a prior history of leg and ankle swelling in an emergency room visit at OSF St. Joseph Medical Center. (Px1)

On February 16, 2007, at the same emergency room, she provided a history of a prior back injury and back pain (Px1) and repeated the same history when seen in the emergency room of BroMenn Hospital on February 25, 2007. While at BroMenn she reported back pain down both legs for two years. Later during that same visit, a history was provided by her husband of back pain from a fall two weeks earlier. Petitioner was instructed to see Dr. Kattner, a neurosurgeon. (Rx2)

Petitioner saw Dr. Kattner on March 15, 2007 and reported having slipped on ice at work. She complained of severe low back pain radiating to both hips and legs. Dr. Kattner reviewed an MRI performed on February 25, 2007, and felt there was no significant pathology other than disc bulging and mild degenerative changes. During examination, no significant deficits were noted. Dr. Kattner felt that Petitioner would not improve with surgical intervention and referred her to see Dr. Jhee for pain management. (Px2, Rx3)

Petitioner saw Dr. Jhee on May 7, 2007, who noted the mild degenerative changes on the MRI. Dr. Jhee prescribed physical therapy that was performed through June 11, 2007. Dr. Jhee then prescribed an EMG/NCV study that was performed on June 22, 2007. The EMG/NCV failed to show any evidence of an active and ongoing lumbosacral radiculopathy. Dr. Jhee felt that the pain was more muculoskeletal in origin including sacroiliac joint disfunction. Dr. Jhee prescribed a right S1 joint injection that was administered that same day. During a visit on July 23, 2007, Petitioner felt the injection was quite helpful, and was prescribed home exercises. Petitioner was released to return to work with restrictions effective August 1, 2007. Dr. Jhee decreased the restrictions and by November 20, 2007 she was allowed to lift up to 35 pounds with no frequent bending or twisting.

On March 29, 2008, Petitioner was admitted to OSF St. Joseph Medical Center for chronic lower back pain. A lumbar MRI performed the day before failed to reveal any disc herniation or protrusion throughout the lumbar spine. Petitioner received bilateral S1 joint injections, was noted to be ambulating freely and was discharged on March 31, 2008. At that time she came under the care of Dr. Mulconrey. (Rx3)

On April 11, 2008, Petitioner saw Dr. Salehi at the request of Respondent. Dr. Salehi following a record review and examination concluded that Petitioner may have sustained an injury during the fall in the form of a lumbar strain, S1 joint dysfunction or temporary exacerbation of a pre-existing degenerative disc disease. He concluded the low back pain was more likely the result of the pre-existing degenerative disc disease from L3-L4 through L5-S1. Finally he felt she had reached maximum medical improvement for any lumbar strain and recommended a bilateral S1 joint rhizotomy given her prior positive responses to S1 joint injections. He felt that she would reach maximum medical improvement within four weeks after the rhizotomy, and then be able to return to work. (Rx1)

Petitioner came under the care of Dr. Nord, an orthopedic surgeon. On November 25, 2008, Dr. Nord performed surgery in the form of a left knee arthroscopy with medial meniscal tear repair. (Px9) Dr. Nord testified by evidence deposition (Px11) that the knee problems and surgery were in his opinion causally related to the fall that occurred according to Petitioner in September, 2008. He felt that her knee symptoms were separate from any sciatic pain stemming from her back issues. Dr. Nord was never provided a history of injury occurring on February 16, 2007.

On January 20, 2009, Petitioner underwent surgery with Dr. Mulconrey in the form of a posterior lumbar interbody fusion at L5-S1 with decompression, bilateral hemilaminectomy with partial facetectomy and foraminotomy. (Px5) Post surgery, Petitioner was released at maximum medical improvement by Dr. Mulconrey on October 5, 2009. (Px5)

On November 17, 2010, Petitioner was seen in the emergency room of OSF St. Joseph Medical Center for bilateral ankle and right knee complaints after stepping off a car deck and loading a trailer an hour earlier. At that time her right leg buckled causing her to fall to the ground on her right side. (Rx5) Petitioner also provided a similar history to Dr. Spaniol at OSF St. Joseph Medical Center in that she felt her right knee cap popped out of place. (Rx7) Petitioner later underwent right knee anterior cruciate ligament reconstruction with allograft insertion with Dr. Keller on December 10, 2010. (Px1)

Based upon the above, the Arbitrator makes several findings: (1) that Petitioner has proven that a causal relationship existed between the lumbar sprain sustained in her fall on February 16, 2007; (2) that Petitioner has proven that a causal relationship existed between the S1 joint dysfunction and the fall of February 16, 2007; (3) that Petitioner reached maximum medical improvement from the lumbar sprain and the S1 joint dysfunction as of November 20, 2007, while under the care of Dr. Jhee; (4) that the left knee surgery performed at a later date Dr. Nord is not causally related to the fall of February 16, 2007; (5) that the right knee surgery performed at a later date by Dr. Keller is not causally related to the fall of February 16, 2007, and finally; (6) that the lower back surgery performed on January 20, 2009 is not causally related to the fall of February 16, 2007.

G. What were Petitioner's earnings?

The only evidence presented at trial as to this issue was a wage statement introduced by Respondent. (Rx9) The wage statement revealed a 19 week history of earnings of $6,288.73 which preceded February 16, 2007.

Based upon this evidence, the Arbitrator finds the earnings for the year preceding February 16, 2007 to be $6,288.73, which results in an average weekly wage of $330.99.

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?

See findings of this Arbitrator in "C" and in "F" above.

Based upon said findings, the Arbitrator further finds that all medical charges incurred prior to April 11, 2008, the date of Dr. Salehi's examination, represent reasonable and necessary care related to the cure or relief of the injury sustained in this case.

The parties have stipulated that those charges were paid by Respondent and the total payments were $191,585.28.

All other medical charges incurred after that date are hereby denied.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above. Petitioner as a result of this accidental injury lost time from work commencing March 2, 2007 through April 11, 2008.

Based upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner became temporarily and totally disabled from work commencing March 2, 2007 through April 11, 2008, and is entitled to receive compensation from Respondent for this period of time.

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

See findings of this Arbitrator in "C" and "F" above.

Petitioner testified that she has not worked since March 2, 2007, has not sought employment since that time and was eventually terminated from her job in August, 2008.

Based upon said findings, the Arbitrator finds the above condition of ill-being in the form of a lumbar strain and an S1 joint dysfunction to be permanent in nature.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Wilk,
Petitioner,

vs. NO: 11 WC 29738

14IWCC0331

Illinois State Police,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanency 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 views this case differently than the Arbitrator and finds Petitioner is permanently disabled to the extent of 17.5% man as a whole under Section 8(d)2 of the Act and further finds Petitioner permanently lost 7.5% of the use of his left arm under Section 8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 17.5% loss of a man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 18.97 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the left arm.

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

14IWCC0331

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: MAY 0 2 2014

MB/jm

O: 4/17/14

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILK, RICHARD C
Employee/Petitioner

Case# **11WC029738**

14IWCC0331

ILLINOIS STATE POLICE
Employer/Respondent

On 5/29/2013, 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:

4678 PARENTE & NOREM PC
PARAG P BOSALE
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

2202 ILLINOIS STATE POLICE
124 E ADAMS ROOM 600*
PO BOX 19461
SPRINGFIELD, IL 62794

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE COPELAND
100 W RANDOLPH ST
CHICAGO, IL 60601

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

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

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

MAY 29 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

14IWCC0331

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

RICHARD C. WILK
Employee/Petitioner

v.

ILLINOIS STATE POLICE
Employer/Respondent

Case # **11** WC **029738**

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 **GREGORY DOLLISON**, Arbitrator of the Commission, in the city of **GENEVA, IL**, on **2/06/13**. By stipulation, the parties agree:

On the date of accident, **7/23/10**, 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 **$109,741.84**, and the average weekly wage was **$2,110.42**.

At the time of injury, Petitioner was **44** years of age, ***married*** with **3** dependent children.

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

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

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 **$669.64**/week for a further period of **114.815** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **22.963% loss of a person as a whole.**

Respondent shall pay Petitioner the sum of **$669.64**/week for a further period of **18.975** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **7.5% loss of use of a left arm.**

The parties have stipulated that the following medical bills will be paid directly to the corresponding provider (if not paid already) in accordance with the medical fee schedule of Section 8.2 of the Act: Athletico - $7,700.21; IL Spine & Scoliosis Center - $575.00; Hinsdale Orthopaedics - $41,598.50; Pain Treatment Surgical Suites - $3,967.50; Pain Treatment Centers of Illinois - $3,225.00.

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

5/23/13
Date

ICArbDecN&E p 2

MAY 29 2013

14IWCC0331

FINDINGS OF FACT:

Petitioner has been working for the past 12 years as a master sergeant for Respondent. Approximately 50 individuals work under him on an all drug enforcement task force unit. Although he was working as a master sergeant on the date of his injury, he is currently the acting lieutenant for the region that covers several counties. Due to the nature of his job duties, he is required to work up to 16 hours per day, and he spends 40 percent of his time driving from one location to another. His job duties also include serving warrants, apprehending suspects and other tasks that are significantly physical.

On Friday, July 23, 2010 at approximately 4:45 pm, Petitioner was in the process of effectuating a tactical "surprise" arrest of a suspect who was driving a motor vehicle. Petitioner approached the vehicle with his handgun in his right hand. With his left hand he opened the door and reached into the vehicle to pull the keys out of the ignition. He then wrapped his left arm around the suspect's neck area and pulled him to the ground. During this process he felt a painful tearing sensation from his upper left shoulder area down to his elbow.

Petitioner testified that because of the surge of adrenaline he felt at that time, he did not believe he had suffered a serious injury. He arrived home that night around midnight, took some ibuprofen, and then went to bed. Petitioner provided that when he awoke the next morning, he was completely unable to use his left arm. He notified his supervisor regarding his condition and made an appointment to see his primary-care physician, Dr. Barbara Loeb. He saw Dr. Loeb on 7/26/10 (Monday), who referred him to Dr. Robert Welch, an orthopaedic surgeon.

M&M Orthopaedics (Dr. Robert Welch)

Petitioner saw Dr. Welch on 7/28/10. PX.1, p.8. Dr. Welch noted that Petitioner twisted his left elbow when he was trying to do a tactical takedown on 7/23/10. He had complaints of elbow and forearm pain. An x-ray showed no fracture. Petitioner was assessed with a left elbow sprain and referred for a course of physical therapy and anti-inflammatory medications. The doctor placed Petitioner on light duty, and instructed to follow-up in 1 month.

Petitioner testified that Respondent was able to accommodate him with light duty. He stated that he had to sign an agreement not to do any of the physical aspects of his job. He was given strictly administrative duties, which amounted to working at a desk for the entire day.

On 8/18/10, Dr. Welch noted that in addition to the left elbow, Petitioner's left shoulder was continuing to bother him. PX.1, p. 7. Resisted supination reproduced symptoms and he was not making significant progress with physical therapy. The doctor prescribed a Medrol Dosepak and added shoulder therapy to his treatment course.

On 8/20/10, Dr. Welch noted Petitioner could not fill the Medrol Dosepak prescription as same was not approved by Respondent. PX.1, p.7.

On 9/01/10, Dr. Welch noted Petitioner was experiencing "snapping" with pronation and supination. PX.1, p.6. Dr. Welch administered an injection into the elbow. The doctor noted same did not affect his pain level at all. He again had Petitioner continue with therapy and follow-up in one month.

On 9/22/10, Dr. Welch noted Petitioner had only one day of improvement after the injection and that the pain returned to its previous levels. PX.1, p.5. Petitioner reported that he had recently felt a pop in the elbow and had noticed increasing weakness. His shoulder and elbow pain persisted. Dr. Welch prescribed a left elbow MRI and left shoulder MRI arthrogram. Dr. Welch stopped therapy until he received the results from the testing.

On 10/01/10, a left elbow MRI was performed at Edward Hospital. PX.2, p.5. It was positive for mild per-tendinopathy of the distal biceps tendon. On 10/05/10, the left shoulder MRI arthrogram was completed. It revealed a SLAP tear of the labrum and mild tendinosis of the supraspinatus tendon. PX.2, p3-4.

Petitioner next saw Dr. Welch on 10/13/10. PX.1, p.5. After reviewing the MRI films, he concluded that there was peritendinitis of the biceps tendon and SLAP lesion. At that time, Dr. Welch referred Petitioner to Dr. Thangamani, a sports medicine specialist.

Petitioner testified that he was disappointed that Dr. Welch did not tell him from the beginning that he was not a shoulder specialist. He decided instead to make an appointment with Dr. Giridhar Burra, who was recommended to him by one of his physical therapists at Athletico.

Hinsdale Orthopaedics – Dr. Giridhar Burra & Dr. Kenneth Schiffman

Petitioner first saw Dr. Burra on 10/13/10. PX.3, p.5. Dr. Burra noted a SLAP lesion, a massive labral tear, and biceps tenodesis. He recommended surgery noting that all other conservative options had been explored. PX.3, p.10.

On 11/15/10, Petitioner saw Dr. Burra again and decided to go forward with surgery. PX.3, p.17. Dr. Burra removed him from work as of 11/18/10, the scheduled surgery date. PX.3, p.18.

On 11/18/10, Dr. Burra performed: (1) an arthroscopy of the left shoulder with a SLAP lesion repair, (2) biceps tendon tenodesis, (3) subacromial bursectomy, and (4) debridement of the partial-thickness rotator cuff. PX.3, p.20-22.

Post operatively, Petitioner underwent physical therapy. When he saw Dr. Burra on 11/20/10, Dr. Burra emphasized that his therapy be passive rather than active as his shoulder was still in a healing phase. PX.3, p.24. He remained completely off of work.

On 1/11/11, Dr. Burra noted Petitioner was still experiencing elbow pain and stiffness in his shoulder. PX.3, p.26. Dr. Burra proceeded with a cortisone injection in the shoulder. PX.3, p.28.

On 2/01/11, Petitioner reported shoulder improvement, but his left elbow problems persisted. Dr. Burra wanted him to get an updated left elbow MRI. PX.3, p.30. Petitioner was cleared to return to the sedentary light duty.

The MRI was completed on 2/03/11 showing 1.) mild tendinosis of the distal biceps tendon which was reported to have improved since the prior exam; 2.) moderate tendinosis of the olecranon insertion of the triceps tendon was noted; and 3.) no ligament tears were identified. PX.3, p.32

On 2/15/11 Dr. Burra noted Petitioner continued to experience pain in his elbow. Petitioner also related that when he awakens, he finds his fourth and fifth fingers are numb and that when he rests his left arm while driving , he feels a sharp pain. Since Dr. Burra felt that there was actual improvement in the biceps tendon, he was unable to determine the origin of the pain. He believed that there was possibly involvement of the radial

nerve or cubital tunnel syndrome and therefore referred Petitioner to Dr. Kenneth Shiffman, his partner at Hinsdale Orthopedics who specializes in hand surgery. PX.3, p.36.

14IWCC0331

On 2/28/11, Dr. Schiffman noted that the Petitioner was possibly experiencing "tethering or compression of the radial nerve" in his arm. PX.3, p.38. He suggested a radial nerve block as a diagnostic test, but he wanted Dr. Burra to agree before going forward. Dr. Burra did agree with the plan. PX.3, p.40.

The nerve block was originally scheduled at Good Samaritan Hospital. Petitioner provided that because he and his wife had a bad experiences in the past there, he chose an alternate facility.

On 5/16/11, Dr. Burra noted the nerve block finally proceeded by Dr. Yousuf Sayeed. Because of Petitioner's continual complaint, Dr. Burra reported that it appeared the nerve block was not perform at the correct location. PX.3, p.47. On 5/24/11, Dr. Schiffman also noted that the nerve block was done at the distal lateral arm rather than the correct location. PX.3, p.51. He noted that pain was provoked when Petitioner drives with his left arm on top of the steering wheel. His pain was consistent and in the same location. The doctor suggested that Petitioner continue to follow-up with Dr. Burra.

On 6/22/11, Dr. Schiffman noted that Petitioner continued therapy but still experienced left arm pain. PX.3, p.53. He advised him to continue therapy for four to five weeks.

On 7/12/11, Dr. Burra noted that Petitioner's shoulder condition had progressed to the point where he could try a baseline functional capacity evaluation. He also provided that Petitioner should continue treatment with Dr. Schiffman as a left arm radial nerve exploration surgery was not out of the question. PX.3, p.55.

On 7/20/11, Dr. Schiffman noted that Petitioner would feel more left arm nerve-type pain when he stretched his neck. PX.3, p.58. Given the possible cervical component of his left arm symptoms, Dr. Schiffman considered that a cervical MRI may be warranted.

Illinois Spine & Scoliosis Center – Dr. Anthony Rinella

Upon suggestion from Dr. Burra and referral from Dr. Loeb, Petitioner saw Dr. Rinella on 8/18/11 for a cervical spine evaluation. PX.4, p.4. Dr. Rinella referred him for a cervical MRI to rule out the potential for a cervical radiculopathy. Dr. Schiffman agreed with this referral. PX.3, p.60.

The MRI was performed on 10/20/11. At C4-C5, C5-C6 there were very mild endplate changes to cause some mild impression upon the thecal sac. At C6-C7 there was very mild disc bulge with some minimal impression upon the thecal sac. PX.4, p.6.

On 10/20/11, Dr. Rinella reported that the MRI demonstrated that Petitioner had left C3-4 foraminal stenosis, with no other areas of neural impingement. Dr. Rinella noted his impression of cervical spondylotic radiculopathy. PX.4, p.8. He referred Petitioner to Dr. Faris Abusharif for an epidural steroid injection. PX.5, p.6.

Pain Treatment Centers of Illinois – Dr. Faris Abusharif

On 12/01/11, Petitioner presented to Dr. Abusharif. The doctor noted Petitioner complained of left-sided neck pain with radiation into the left upper extremity with residual shoulder pain. Dr. Abusharif performed a C4-C5 cervical epidural injection with follow-up scheduled in two weeks for a possible repeat injection. PX.5, p.15.

Petitioner followed-up with Dr. Abusharif on 12/21/11. Petitioner reported that his pain had markedly improved indicating an approximate 90% reduction in pain levels. Dr. Abusharif felt that Petitioner's improvement was significant enough that Petitioner should forgo a second injection. PX.5, p.22.

Petitioner returned to Dr. Rinella on 2/17/12 where he was cleared to return to work from a cervical perspective. PX.4, p.10. He saw Dr. Burra again on 3/01/12 where he underwent an ultrasound guided left shoulder injection. PX.3, p.66. He was seen on 4/02/12 where Dr. Burra allowed him to return to work without restriction, and was finally declared to have obtained maximum medical improvement.

Petitioner testified that he had never injured his left arm, left shoulder, or neck prior to the 7/23/10 work incident. This is confirmed by his pre-accident medical records from Dr. Dale Buranosky, who saw Petitioner on 8/30/07 and 9/06/07 for foot and right shoulder problems. PX. 1, p.9. None of these records mention any left arm, left shoulder, or neck problems.

Petitioner testified that he still has left shoulder pain and left arm numbness, and he especially notices the symptoms when he has to drive or twist a doorknob. He was once able to bench press 310 lbs., but now he can barely lift 210 lbs. His total weight has not changed, but his body composition is more fatty than muscle now. He no longer plays basketball, baseball, and other sports which he used to do on a regular basis pre-accident.

Petitioner was asked whether he was able to pass the yearly PFIT exam since his injury, a test required of all state police officers, to which he responded that he did pass. He stated that the test is now geared to various age groups and requires a person to use 70% of their body weight. The test includes strength and bench pressing as well as walking three miles or running a lesser distance.

CONCLUSIONS OF LAW

Based on the medical evidence, Petitioner suffered left shoulder, left arm, and neck injuries as a result of his 7/23/10 work accident. The left shoulder injury was identified by Dr. Welch and Dr. Burra as a SLAP lesion, a massive labral tear, and biceps tendonitis. Petitioner's condition necessitated a SLAP lesion repair, biceps tendon tenodesis, debridement of a partial rotator cuff, and a subacromial bursectomy. Based on the above as well as Petitioner's credible testimony regarding his present complaints, the Arbitrator finds Petitioner is permanently disabled to the extent of 17.963% under Section 8(d)2 of the Act.

Petitioner also suffered an elbow injury that required a radial nerve block, physical therapy, and injections. Dr. Schiffman diagnosed this as radial nerve entrapment. The symptoms radiated into the Petitioner's hand and fingers, restricting his physical activity. The Arbitrator finds that this portion of his injury warrants an award of 7-1/2% loss of use of the left arm under Section 8(e) of the Act.

With regard to his neck, Dr. Rinella and Dr. Schiffman diagnosed cervical radiculopathy. This was confirmed by the Petitioner's stenosis at C3-C4 and disc bulge at C6-C7. The radicular symptoms were markedly reduced after a cervical epidural injection. Petitioner has since returned to full duty work, albeit, he no longer takes part in certain tactical maneuvers. The Arbitrator finds that this portion of his injury warrants an award of 5% loss of a person as a whole under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Baecht,

Petitioner,

vs. NO: 10WC 25527

14IWCC0332

Olin Brass,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 10, 2013, is hereby affirmed and adopted.

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

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

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

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: MAY 0 5 2014
o042214
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

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

BAECHT, JEFFREY
Employee/Petitioner

Case# **10WC025527**

14IWCC0332

OLIN BRASS
Employer/Respondent

On 5/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

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

0299 KEEFE & DEPAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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)

Jeffrey Baecht
Employee/Petitioner

v.

Olin Brass
Employer/Respondent

Case # **10** WC **25527**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 28, 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. [ ] 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, **May 18, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$45,760.00** ; the average weekly wage was **$880.00** .

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **$all bills paid under group** under Section 8(j) of the Act.

ORDER

For reasons set forth in the attached decision, the proposed left knee replacement surgery is not causally related to the accident of May 18, 2010.

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

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

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

Signature of Arbitrator

April 30, 2013
Date

ICArbDec19(b)

MAY 10 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFFREY BAECHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 10 WC 25527**
	)	
OLIN BRASS,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Sections 8(a) and 19(b) of the Act.

STATEMENT OF FACTS

The petitioner is a crane operator for the respondent, 47 years old on the date of loss. He testified that on May 18, 2010, he stumbled in a depression in the floor, approximately two to three inches deep. He reported the incident and neither accident nor notice was disputed. He asserts left knee symptoms following this, culminating in the current surgical recommendation.

The petitioner has had a long and relatively complex history of bilateral knee complaints. Regarding his right knee, he noted complaints beginning with a football injury in high school resulting in surgery, and a lengthy history of osteoarthritis which resulted in a right knee total arthroscopy following this incident (but which the parties agreed was not related to this incident). He also noted right foot complaints which resulted in a July 2010 surgery (also not related to this incident). Regarding the left knee, he acknowledged a history extending back to a 1997 workplace injury for which he had left knee surgery; that case resulted in a finding of 20% loss to the left leg (98 WC 48666, see RX6). Moreover, he also had a 1993 surgery to the left knee involving removal of bursitis following a staph infection to the knee. He has had periodic treatment to both knees for a period of many years as detailed below.

On December 15, 2008, he presented to Dr. Vest, noting complaints of bilateral knee pain for which he received occasional cortisone injections into the knees. He related multiple knee injuries playing sports and had surgeries to both knees. Injectins to both knees were performed at the time. Dr. Vest discussed surgery with the claimant, but the claimant wanted to defer surgery until he was older. RX2.

On January 7, 2009, the petitioner began Supartz injections into both knees. The petitioner asserted Dr. Vest's records were wrong, and he received steroids to the left knee, not Supartz. The Arbitrator notes, however, that Dr. Vest's records show Supartz injections to both knees on multiple dates, suggesting a typographical error would have had to have been made on at least five separate dates with multiple references to the left knee on those occasions. See RX2.

On August 20, 2009, the petitioner returned to Dr. Vest, noting pain relief had lasted for several months but the bilateral knee pain recurred in July 2009. Steroid injections were performed to both knees at that point. RX2.

On February 17, 2010, the petitioner presented to Dr. Vest, complaining of increased left knee pain over the prior three to four weeks. Injections were performed at that time to both knees. RX2.

Following this incident, on May 20, 2010, he presented to Dr. Vest. PX1. Dr. Vest noted a history of degenerative joint disease in the left knee. It was noted he was seeing Dr. Shepperson for his right knee. The petitioner noted twisting his left knee in January, but did not get medical treatment at that time. He related stepping off a two-inch ledge on May 18 and twisted it again. It was noted that he had bilateral knee injections in August 2009 and a Supartz series to the bilateral knees in February 2009, as well as a history of prepatellar busectomy. An MRI of the left knee was prescribed. On May 27, 2010, the MRI was conducted. The MRI noted considerable degenerative osteoarthritis and degeneration in the menisci, resulting in tearing and fragmentation to the knee. PX4.

On May 28, 2010, Dr. Shepperson, Dr. Vest's colleague, saw the petitioner. He noted a recurrence of left knee pain following walking on uneven ground at work. Dr. Shepperson noted that the left knee MRI demonstrated progressive degenerative arthritis resulting in bone on bone contact. Dr. Shepperson opined that "although the symptoms did flare while walking at work, this is not a compelling injury." See RX2 p.25. The petitioner elected to defer surgery at that point, and ceased treating with that facility.

On July 20, 2010, the petitioner presented to Dr. Lux for his right knee. He noted a history of cartilage removal in the right knee in 1979, right foot surgery in 1983, a laminectomy in 1991, and left knee bursa surgery in 1993. He noted unrelenting pain in the right knee and noted medication, bracing, cortisone injections as well as Euflexxa injections in April and May 2010 had not provided lasting relief. The petitioner also advised Dr. Lux of torn cartilage in the left knee which had been causing some trouble over the last few months. Dr. Lux noted the x-rays of the knees demonstrated bone-on-bone degenerative arthritis and osteophytic formation in the right knee and moderate medial compartment arthritis in the left knee. Dr. Lux opined athroscopic surgery would not be of benefit to either knee, and recommended right knee replacement. PX2. The petitioner underwent the right knee replacement on August 23, 2010. PX5.

On September 24, 2010, Dr. Lux saw the petitioner, who noted substantially improved pain in the right knee. Dr. Lux prescribed postoperative therapy. On December 14, 2010, the petitioner was doing quite well regarding the right knee. Dr. Lux discontinued formal therapy and released him to work without restrictions, instructing him to follow up in eight months for a one-year postoperative check. No complaints were noted relative to the left knee at that point. PX2.

On June 21, 2011, the petitioner saw Dr. Lux in follow-up. He was pleased regarding the right knee outcome, but noted his left knee had been troublesome for several months. PX2. He reported injuring it on a slick floor at work. Dr. Lux noted substantial arthritis in the left knee and provided a cortisone injection. He advised the petitioner to tell the petitioner's attorney to contact Dr. Lux and forward any paperwork needed for a causal evaluation.

On February 17, 2012, the petitioner advised that the left knee continued to be painful. Dr. Lux noted the degree of arthritis in the knee and that "[c]ertainly, he will need to have it replaced at some point." Dr. Lux drained fluid from the knee and injected it at that point. In a letter to the petitioner's counsel on February 21, he noted bone-to-bone contact and recommended total knee replacement. He opined that the petitioner's day to day activities and the May 18, 2010 accident played a causative factor in the need for the knee replacement surgery. PX2. He reiterated those opinions in deposition on April 26, 2012. See PX5.

On June 20, 2012, the petitioner was seen by Dr. Nogalski for a Section 12 exam. Dr. Nogalski noted the prior work-related knee arthroscopy took place in approximately 2000, as well as the 1993 bursal excision. Dr. Nogalski had access to a number of pre-injury records, including an MRI of May 5, 2010 which had demonstrated degenerative joint disease with degenerative meniscal tearing. He also noted multiple injection series bilaterally in 2008 and 2009 and Dr. Shepperson's report where he noted the incident was not compelling and this issue was essentially degenerative in nature. Dr. Nogalski opined the petitioner had clearly established bilateral degenerative arthritis which predated this injury, and that the injury neither caused nor accelerated that condition. While total knee replacement was medically appropriate, the need for it predated the injury in question and was not related to any acute process. Dr. Nogalski reiterated those opinions in deposition. See generally RX1.

On August 24, 2012, the petitioner saw Dr. Lux in follow-up. The petitioner reported at that time that he was not yet at the point where he wanted to have it replaced. The left knee was injected at that time and his painkillers were renewed. PX2. At trial, however, the petitioner testified he wanted to have the surgery.

OPINION AND ORDER

The petitioner clearly had significant and symptomatic degenerative joint disease in his left knee prior to May 18, 2010. The petitioner attempted to minimize the true

extent of his prior treatment by asserting Dr. Vest's records were not accurate, but the Arbitrator does not find this allegation believable. The conclusion the Arbitrator draws is that the claimant's intent is to divert attention from his treating physician's conclusion that this minor incident did not cause, aggravate or accelerate the need for the surgery contemplated herein. While treating physicians are usually granted a degree of deference as opposed to Section 12 examiners, in this case, the examiner, Dr. Nogalski, agrees with the first treating physician, Dr. Shepperson, that no causal connection exists. Their opinion is credible and persuasive, and the Arbitrator adopts the same.

Taking the evidence as a whole, the Arbitrator concludes that the petitioner did not establish a causal connection between the incident on May 18, 2010 and his current need for a left knee replacement. The prospective surgery is therefore denied.

The petitioner submits PX6, medical bills, which include bills for $394.00 from Alton Memorial Hospital for an X-ray on May 19, 2010 and $57.00 for evaluation at Orthopedic and Sports Medicine on May 20 and May 28, 2010. These bills appear reasonably related to the initial injury and shall be paid by the respondent to the providers within the confines of Section 8(a) and subject to the limits of Section 8.2 of the Act. Respondent is entitled to any appropriate credit under Section 8(j) for these payments but shall hold the claimant harmless against recoupment efforts for such.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bobbie Smith,
Petitioner,

vs. NO: 10WC 30150

14IWCC0333

State of Illinois - Lawrence Correctional Center,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical, permanent partial disability, penalties, fees, mileage and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2013, is hereby affirmed and adopted.

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

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

DATED: MAY 0 5 2014
o042214
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, BOBBIE
Employee/Petitioner

Case# **10WC030150**

SOI/LAWRENCE CORRECTIONAL CENTER
Employer/Respondent

14IWCC0333

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0332 LIVINGSTONE MUELLER ET AL
D SCOTT MURPHY
P O BOX 335
SPRINGFIELD, IL 62705

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

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM H PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

JUL 15 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Bobbie Smith
Employee/Petitioner

Case # 10 WC 30150

v.

Consolidated cases: _____

State of Illinois/Lawrence Correctional Center
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on May 8, 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] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other Mileage

FINDINGS

On February 9, 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 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 $52,387.00; the average weekly wage was $1,007.50.

On the date of accident, Petitioner was 60 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 $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.

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

July 8, 2013
Date

JUL 15 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury to her left foot arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of February 9, 2010, and that Petitioner was subjected to repetitive walking and standing which caused injuries to her left foot. Respondent disputed liability on the basis of accident and causal relationship. Petitioner also filed a petition for Section 19(l) and Section 19(k) penalties as well as Section 16 attorneys' fees.

Petitioner testified that she worked for Respondent as a Dietary Supervisor II and her job duties required her to supervise 35 to 40 inmates in the prison kitchen. Petitioner's normal work day was seven and one-half hours (7 ½) and she had to stand on her feet on a concrete surface for virtually the entire working day. There were also occasions that Petitioner had to work an extra shift which meant that she had to be on her feet for approximately 17 hours.

Petitioner testified that on February 9, 2010, approximately one-half of the way through her shift, she began to experience pain on the side of her left foot. Petitioner sought medical treatment from Dr. Jason Bickel, a podiatrist, who initially saw her on March 9, 2010, at which time Petitioner had complaints in regard to both her right and left feet; however, the left foot symptoms were greater than those of the right. Petitioner was prescribed a brace for the left foot and some medication.

Dr. Bickel saw Petitioner on March 29, 2010, and noted that Petitioner's left foot symptoms had not improved with the use of the brace. Dr. Bickel opined that Petitioner had likely peroneus brevis tendinitis and a possible peroneus brevis tendon tear. In regard to causality, Dr. Bickel's record of that date stated "I would not argue that this may have been caused during a work activity as her job requires her to remain on her feet for extended periods of time, however with no definite injury on that date, I am unable to say definitely that this was indeed caused at work." Dr. Bickel had an MRI scan performed on June 23, 2010, which revealed swelling and possible bone bruising or a vascular necrosis of the distal fourth metatarsal. Dr. Bickel saw Petitioner again on July 21, 2010, and opined that Petitioner needed a period of immobilization of the foot and decreased weight-bearing. Dr. Bickel prescribed an air cast for Petitioner's left foot and authorized her to be off work.

Dr. Bickel continued to treat Petitioner through December, 2010, but her condition did not improve. When he saw her on December 13, 2010, he recommended that she obtain a second opinion. In regard to causality, Dr. Bickel prepared a report dated September 9, 2010, which stated that "...any type of activity, including walking on concrete floors, but also activities of daily living, can contribute to a stress fracture or tendinitis." He opined that Petitioner's work activities could be a contributing factor to her left foot problems.

On January 3, 2011, Petitioner was seen by Dr. Paul Alley, an orthopedic surgeon, who opined that Petitioner had peroneal tendinitis and recommended Petitioner have another MRI scan performed. On January 10, 2011, an MRI scan was performed which revealed swelling and probable stress fractures of the second and third metatarsal heads. Dr. Alley prescribed some shoe liners, physical therapy and authorized Petitioner to perform sedentary work.

On March 17, 2011, Petitioner was evaluated by Dr. James Butler, an orthopedic surgeon associated with Dr. Alley, who ordered nerve conduction studies and a CT arteriogram, both of which were normal. He referred Petitioner to Dr. Jeremy McCormick, an orthopedic surgeon in St. Louis. Dr. McCormick examined Petitioner and reviewed the prior medical records and diagnostic studies. His initial impression was that Petitioner had continued left foot pain and recommended that she have another MRI performed. Another MRI was performed on June 1, 2011, which was normal other than some mild arthritis in the forefoot. Dr. McCormick recommended Petitioner have some custom made orthotic devices and authorized her to remain off work. Dr. McCormick saw Petitioner on June 29, 2011, and his impression was persistent left foot pain. Dr. McCormick saw Petitioner again on July 27, 2011, and opined that he had no treatment other than the orthotic devices that he could recommend to her. When he saw her on August 24, 2011, he noted that she had attended a NASCAR race in Michigan and was able to ambulate without much difficulty. He examined Petitioner's left foot and described a normal clinical examination. He opined that she could return to work without restrictions, was at MMI and discharged her from care.

At the direction of the Respondent, Petitioner was examined by Dr. Gary Schmidt, an orthopedic surgeon who specializes in foot/ankle surgeries. Dr. Schmidt reviewed various medical records provided to him and examined the Petitioner. Other than "foot pain," Dr. Schmidt could not opine as to a specific diagnosis because of the lack of positive objective findings. Dr. Schmidt could not identify any specific condition attributable to the accident that could explain Petitioner's ongoing complaints.

At trial, Petitioner testified that she still has persistent complaints of left foot pain and that she does wear the orthotic devices if she is going to be on her feet for an extended period of time. Petitioner returned to work in August, 2011, and continued to work until she took early retirement in October, 2012, stating that she got tired of limping at work because of her ongoing left foot problems.

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 to her left foot arising out of and in the course of her employment for Respondent and that her current complaints of ill-being referable to the left foot are not related to any work activity.

In support of this conclusion the Arbitrator notes the following:

The medical evidence fails to support the conclusion that Petitioner has any current identifiable diagnosis of ill-being in the left foot attributable to her work activities. Neither Dr. McCormick, one of Petitioner's treating physicians, nor Dr. Schmidt, Respondent's Section 12 examiner, could make a specific diagnosis other than the fact that Petitioner had "foot pain."

While Dr. Bickle opined that Petitioner's foot symptoms could be work-related, he also stated that normal activities of daily living could also cause the condition. This indicates that

Petitioner's work activities did not exposure her to a risk greater than that to which the general public is exposed.

In regard to disputed issues (J), (K), (L), (M) and (O) the Arbitrator makes no conclusions of law because these issues are rendered moot.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Dwiggins,

Petitioner,

vs. NO: 11WC 14539

14IWCC0334

Dollar General,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2013, is hereby affirmed and adopted.

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

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

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

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: MAY 0 5 2014
o042214
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

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

DWIGGINS, DONNA
Employee/Petitioner

Case# **11WC014539**

DOLLAR GENERAL
Employer/Respondent

14IWCC0334

On 5/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0810 BECKER PAULSON & HOERNER ET AL
RODNEY THOMPSON
5111 W MAIN ST
BELLEVILLE, IL 62226

1505 SLAVIN & SLAVIN
MARCY E BENNETT
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

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)

Donna Dwiggins
Employee/Petitioner

v.

Dollar General
Employer/Respondent

14IWCC0334

Case # 11 WC 014539

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 28, 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 [ ] 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, **Dollar General**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$9,617.40**; the average weekly wage was **$184.95**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** children under 18.

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

Respondent shall be given a credit of **$1,083.27** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$1,083.27**.

Respondent is entitled to a credit of **$340.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to meet her burden of proof regarding the issue of causation. Therefore, her claim for benefits are denied.

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

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

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

Signature of Arbitrator

5/6/13
Date

ICArbDec19(b)

MAY - 9 2013

14IWCC0334

Findings of Fact

Petitioner testified that on July 23, 2009 she was working for Dollar General, as a clerk. While she was working, the stool she was sitting on collapsed. The stool was approximately one foot high or less, and when she fell, she landed on her back. She reported her injury on the same day.

Petitioner was seen at St. Elizabeth's Hospital on July 27, 2009, four days after she fell. She was examined and underwent x-rays of the thoracic spine, which showed a compression deforming of the T3 vertebral body. (Pet. Ex. #5). She sought treatment from Dr. Michael Fuller on July 29, 2009. (Pet. Ex. #3). Dr. Fuller assessed Petitioner as having a T3 compression fracture, and kept her off work for 10 days. At her follow up visit with Dr. Fuller on August 19, 2009, he recommended Petitioner begin physical therapy. Petitioner began physical therapy at Memorial Physical Therapy Center on August 13, 2009. (Pet. Ex. #2). She followed up with Dr. Fuller on August 24, 2009 at which time, he noted negative straight leg raising, negative elevated leg test, and positive posterior tenderness. She continued conservative care, including physical therapy, home exercise and follow-up with Dr. Fuller. On August 31, 2009 Dr. Fuller released the Petitioner to light duty work. (Pet. Ex. #3) Petitioner was seen at Memorial Hospital on September 14, 2009 due to complaints of left shoulder pain. (Pet. Ex. #2)

On September 29, 2009 Petitioner returned to see Dr. Fuller, complaining of pain and stiffening of the neck. Dr. Fuller recommended an MRI of the cervical spine and continued Petitioner on light duty work. (Pet. Ex. #3) Petitioner underwent an MRI on October 22, 2009 at Metro Imaging. The MRI showed evidence of degenerative disc disease at C5-C6 levels. On November 6, 2009, Dr. Fuller noted the MRI did not show evidence of a compressive neuropathy at the spinal level. Petitioner was released to work full duty, on November 6, 2009 and released from care from Dr. Fuller. (Pet. Ex. #3).

Petitioner testified that she returned to work in a full duty capacity on November 6, 2009. She worked in a full duty capacity for Respondent from November 6, 2009 until February 15, 2010 - at which time she was terminated due to a 'short cash register'. She testified that her separation from Dollar General is unrelated to her workers' compensation case. She did not seek any additional treatment following her November 6, 2009 visit with Dr. Fuller for more than 20 months. (Pet. Ex. #1)

Petitioner testified that she began to see Dr. Kennedy, at the request of her attorney on July 21, 2011. Dr. Kennedy examined Petitioner on July 21, 2011 and noted pain between her shoulder blades. Dr. Kennedy reviewed the MRI of the cervical spine from October 22, 2009 and noted degenerative disc disease at multiple levels, and a 50% compression fracture from the July 27, 2009 x-rays. Dr. Kennedy was unable to determine whether the compression fracture was acute or chronic. (Pet. Ex. #1) Dr. Kennedy also stated that Petitioner suffered from Osteopenia, a degenerative thinning of the bone.

Petitioner next saw Dr. Kennedy on December 19, 2011. At that time, another examination was performed. Petitioner underwent an MRI on February 13, 2012. Dr. Kennedy reviewed the films, and noted spinal canal stenosis and foraminal encroachment at C5-6. Dr. Kennedy recommended a cervical discectomy and fusion with plating at the C5-6 level. Dr. Kennedy opined that likely Petitioner's need for surgery was caused by her preexisting condition, and degenerative changes which naturally developed over time. (Pet. Ex. #1, pg. 25) Dr. Kennedy also indicated the Petitioner should remain off work.

Petitioner was seen by Dr. Peter Mirkin at the request of the Respondent on March 5, 2012. Dr. Mirkin opined in his report of the same date, that he noted an 'old' compression fracture at T3 based on the October 2009 MRI. Dr. Mirkin reviewed the x-ray and MRI reports from 2009 and 2012 and noted spondylitic disease at C5-6, old healed compression fracture in the thoracic spine, and moderate degenerative changes in the lumbar

spine. In review, Dr. Mirkin stated the MRI showed spondylitic disease at C5-6 and a healed compression fracture at T3. Dr. Mirkin stated the spondylitic disease is unrelated to her injury and any need for surgery is unrelated to her injury at work. In his report, Dr. Mirkin notes that the Petitioner "...tells me she has applied for social security and has no intention of returning to work." (Resp. Exh. 1, p.1)

The Petitioner testified that she was continuing to have symptoms in her upper back with numbness and tingling radiating into her left upper extremity. She testified that her symptoms seemed to be getting worse. She stated that she was still using medication prescribed by Dr. Kennedy and that she was paying for the prescriptions herself as she had no insurance. She also made some co-payments to Dr. Fuller when she initially saw him for treatment following the accident. She denied any prior injuries to her spine or any further injuries to her spine since the event of July 23, 2009.

Based on foregoing, the Arbitrator makes the following conclusions:

1. Petitioner failed to meet her burden of proof regarding the issue of causation. The Arbitrator notes that the Petitioner did sustain a mid thoracic compression fracture from her fall on July 23, 2009. However, after undergoing conservative treatment for this condition, she was released by her treating physician to return to work full duty as of November 6, 2009 and did not seek any follow up medical treatment until her attorney directed her to see Dr. Kennedy on July 21, 2011. The Arbitrator finds that the 20 month gap in medical treatment, coupled with the Petitioner's own statements to Dr. Mirkin in which she indicated that she had no intention on returning to work, cast serious doubt on the Petitioner's credibility. The Arbitrator finds the opinions of Dr. Mirkin more persuasive on the issue of causation and adopts the same in support of this decision that Petitioner's current condition of ill-being is due to degenerative and spondylitic disease, which is not related to her healed thoracic compression fracture.

2. Based on the Arbitrator's findings regarding causation, Petitioner's remaining claims for benefits are denied.

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	X None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CYNTHIA JENKINS,

Petitioner,

vs. NO: 11 WC 44692

STATE OF ILLINOIS – SOUTHERN ILLINOIS UNIVERSITY, CARBONDALE,

Respondent.

DECISION AND OPINION ON REVIEW

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

In the award section at the end of the Decision of the Arbitrator, the Arbitrator orders that "Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the right arm surgery as recommended by Dr. Choi." In the body of the decision, the Arbitrator found that Petitioner proved causation of a condition of ill being of her right arm. As clarification, the Commission notes that the order for prospective medical treatment is limited to treatment for Petitioner's current condition of ill being of her right arm.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 12, 2013 is hereby affirmed and adopted.

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

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

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

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: MAY 0 5 2014

Daniel R. Donohoo

Charles J. DeVriendt

RWW/dw
O-3/26/14
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DISSENT

I respectively dissent from the majority. I do not believe Petitioner sustained her burden of proving her work activities were a causal factor in the development of her right epicondylitis. I would have reversed the Arbitrator and found no accident/causation.

Petitioner testified she performed routine clerical work such as typing, filing, writing, carrying laptops and periodicals, and loading and unloading a projector for presentations. In finding Petitioner proved accident/causation, the Arbitrator found Petitioner's testimony credible and that the causation opinion of Petitioner's treating doctor, Dr. Choi, more persuasive than that of Respondent's IME, Dr. Sudekum.

However, even if Petitioner was completely accurate about her work activities, I do not believe she proved accident or causation. Even completely accepting her testimony, the activities do not appear to be of such a magnitude to cause the apparently extensive injury to her elbow. Specifically, her testimony about loading the projector is particularly unpersuasive because her symptoms appear to have begun at latest in 2008 or 2009, when she began to use

heat therapy. However, she testified she did not purchase the projector until 2010, a significant time after symptoms commenced.

In this case, I find the opinions of Dr. Sudekum very persuasive. Dr. Sudekum noted that repetitive activity in itself is not sufficient to cause epicondylitis. He explained there has to also be forceful gripping, grasping, or vibration. In particular, Dr. Sudekum makes an excellent point that if work activities indeed caused her condition one would expect it to improve while she was off work for more than a year; it did not. Dr. Choi made no mention that Petitioner was off work when he treated her and did not impose any work restrictions after his diagnosis. Dr. Sudekum also noted that Petitioner's diffuse symptoms other than her elbow, which are specified both in her patient questionnaire and in her Application for Adjustment of Claim, suggests a systemic problem not related to the relatively benign work activities in which she was engaged.

For these reasons I respectfully dissent from the majority.

Ruth W. White

Ruth W. White

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

JENKINS, CYNTHIA
Employee/Petitioner

Case# **11WC044692**

14IWCC0335

SOI/SOUTHERN ILLINOIS UNIVERSITY-CARBONDALE
Employer/Respondent

On 3/12/2013, 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:

0996 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

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

0558 ASSISTANT ATTORNEY GENERAL
MOLLY WILSON DEARING
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST
8 MAIN
SPRINGFIELD, IL 62794-9208

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

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

MAR 12 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Cynthia Jenkins
Employee/Petitioner

v.

State of Illinois/Southern Illinois University - Carbondale
Employer/Respondent

Case # 11 WC 44692

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 January 24, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

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

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

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident (manifestation), November 9, 2011, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $60,802.13; the average weekly wage was $1,169.27.

On the date of accident, Petitioner was 52 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 amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay for reasonable and necessary medical services as identified in Petitioner's Exhibit 1 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall authorize and make payment for prospective medical treatment including, but not limited to, the right arm surgery as recommended by Dr. Choi.

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)

March 8, 2013
Date

MAR 12 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of November 9, 2011, and that Petitioner sustained repetitive trauma to the right and left hands/wrists; right and left arms/elbows and right and left shoulders. At trial, the testimony of Petitioner was limited to the right arm and elbow and her claim was limited to that area of the anatomy. Respondent disputed liability on the basis of accident, notice and causal relationship.

Petitioner began her employment for Respondent in the Fall of 1998 and initially worked as a receptionist. As a receptionist, Petitioner testified that her job duties consisted of typing, filing and various clerical tasks. Petitioner estimated that she spent six and one-half hours on the computer out of a seven and one-half hour workday. After working as a receptionist for approximately one year, Petitioner moved to Career Services and held the position of Career Services Specialist for approximately seven and one-half years. Petitioner was then the Assistant Director of Career Services for approximately four and one-half years, and, during the last two and one-half years of that time the Petitioner was the Acting Director of Career Services. Following that time, Petitioner had to take a medical leave of absence because of a heart condition. At the time of trial, Petitioner was still on medical leave. This heart condition is not work–related.

While working as a Career Services Specialist, Petitioner's regular work day was seven and one-half hours; however, she would often take work home with her. Petitioner testified that the job required a significant amount of data inputting into computers and that she would use her arms and hands approximately five and one-half hours per day. Petitioner's job also required her to give various presentations to students for such things as job placement, interviewing, preparation of resumes, etc. This required Petitioner to pack projectors, laptop computers, various publications, etc., and then take them to wherever the presentation was to be given, unpack them and then reverse the entire process when the presentation was completed. Petitioner testified that she is right hand dominant and would use her right hand and arm to a much greater degree than her left when performing all of her job tasks.

Petitioner testified when she became the Assistant Director that her job duties actually increased due, in part, to the fact that the staffing was significantly cut because of budget issues. Petitioner continued to actively use her hands and arms and she usually took work home with her three to five days per week, performing typing and data entry, lifting materials and files, etc. Petitioner estimated her computer use as being approximately four hours per day and hand writing to be approximately one and one-half to two hours per day. Petitioner testified that when she became the Acting Director, there was no real change in the physical demands of her job again, due in part to the fact that there were staffing issues due to the budget being cut once again.

Petitioner testified that she gradually began to experience symptoms in her right arm and elbow stating that she first noticed them some time in either 2008 or 2009. Petitioner did not seek any medical treatment at that time, but simply applied a heated bean bag to her elbow to relieve her symptoms on an as needed basis.

At trial, Respondent tendered the testimony of Keri Young, who is presently the Director of Career Services for Respondent. Young began working for Respondent in October, 2011, shortly after Petitioner went on medical leave. Prior to trial, Young had never met or seen the Petitioner. Young testified that Petitioner would have had a number of assistants available to her when she worked for Respondent; however, Young (who was present when Petitioner testified) could not opine as to whether anything Petitioner testified to was accurate or inaccurate.

On November 9, 2011, Petitioner was seen and evaluated by Dr. Dan Phillips who performed nerve conduction studies. In the information sheet completed by the Petitioner, she indicated that she had persistent pain in the right hand, wrist, forearm and elbow as well as numbness and tingling in both hands. The Petitioner stated that the symptoms began in the Summer of 2011 and she attributed them to years of typing and computer work. Dr. Phillips' report (which indicated that the referring physician was Dr. Paletta) stated that the nerve conduction studies were normal and did not indicate either cubital or carpal tunnel syndrome. On November 21, 2011, Petitioner was seen by Dr. Luke Choi (who is in practice with Dr. George Paletta). At that time, Petitioner complained of a two to three month history of right elbow pain and numbness in the palm, thumb and index finger. Petitioner informed Dr. Choi of her work duties including the fact that she was required to perform extensive computer work, typing, lifting and carrying files and a laptop to and from various work sites and that the pain would get progressively worse throughout the day. Dr. Choi examined the Petitioner and reviewed the nerve conduction studies and diagnosed her with lateral epicondylitis. Dr. Choi prescribed a cortisone shot and some physical therapy. In regard to causality, Dr. Choi opined that Petitioner's complaints were causally related to her work environment and at the repetitive nature of the work was sufficient to aggravate her symptoms.

Subsequent to Petitioner's appointment with Dr. Choi, Petitioner completed a Workers' Compensation Employee Notice of Injury on November 30, 2011. In this report Petitioner stated that she was right handed and that she had noticed irritation in the right elbow, forearm, wrist and hand for the past two years and that she did work with a computer and engaged in typing and use of the mouse for approximately 18 years.

Dr. Choi saw Petitioner on January 17, 2012, and recommended continued conservative treatment. Unfortunately, Petitioner's symptoms did not improve and when Dr. Choi saw her on June 5, 2012, he recommended that an MRI be performed. An MRI was performed on June 11, 2012, which revealed lateral epicondylitis with tendinosis and a partial tear of the common extensor tendon; low grade changes of medial epicondylitis with tendinosis; sprains of the radial and ulnar collateral ligaments; and subluxation of the ulnar nerve at the cubital tunnel. Dr. Choi saw Petitioner on August 10, 2012, and opined that she had plateaued in terms of conservative treatment. At that time, Dr. Choi recommended surgery consisting of an open lateral epicondyle debridement.

Dr. Choi was deposed on August 29, 2012, and his deposition testimony was received into evidence at trial. Dr. Choi's testimony was consistent with his medical reports in regard to his diagnosis, treatment recommendations and causality. In regard to causality, Dr. Choi specifically stated that Petitioner's work environment could have been an aggravating or contributing factor

to her symptoms. On cross-examination, Dr. Choi stated that he was aware of the fact that Petitioner was not working at the time of his initial exam of November, 2011, but that he was not certain as to exactly when she had ceased working. When he was informed that Petitioner ceased working sometime in October, 2011, he opined that the ongoing nature of her complaints even after cessation of work at that time did not impact or modified his opinion as to causal relationship.

At the direction of Respondent, Petitioner was examined by Dr. Anthony Sudekum on October 1, 2012. Dr. Sudekum reviewed medical records and job descriptions in conjunction with his examination of Petitioner. Dr. Sudekum agreed with Dr. Choi's diagnosis in that surgery was appropriate; however, Dr. Sudekum opined that Petitioner's work activities did not cause or contribute to the condition of lateral epicondylitis. Dr. Sudekum opined that rheumatoid arthritis or another type of rheumatologic condition may have been the cause of Petitioner's condition and thought that it was significant that Petitioner's sister had rheumatoid arthritis (as was noted in the family medical history completed by Petitioner and contained in Dr. Phillips' records). Dr. Sudekum further opined that the MRI scan did indicate a rheumatological condition because the radiologist described the condition as being degenerative in his report.

Conclusions of Law

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

The Arbitrator finds Petitioner gave notice to Respondent within the time required by the Act.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds that the date of manifestation was November 9, 2011, the date alleged in the Application. Notice was given to Respondent on November 30, 2011, which is within the time limitation mandated by the Act. As noted herein, November 9, 2011, was the date that Petitioner had the nerve conduction studies performed by Dr. Phillips. It was at that time that Petitioner contributed the symptoms in her right upper extremity as being related to her work activities and it was the initial time that she sought medical care and treatment.

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

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to her right upper extremity as a result of her work activities.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator notes that Petitioner credibly testified at considerable length about her job duties. Petitioner's description of her job duties included a significant amount of data entry, typing, handwriting, packing and unpacking of various materials and taking work home with her on a regular basis, all of which required the repetitive use of her dominant right arm. Respondent's witness did not commence her employment with Respondent until after the Petitioner had ceased working there and could not testify about the accuracy or inaccuracy of Petitioner's testimony.

The Arbitrator finds the medical opinion of Dr. Choi regarding causality to be more credible than that of Dr. Sudekum. Dr. Choi testified that Petitioner's job duties were a causative and aggravating factor to the development of her right arm symptoms. The Arbitrator is not persuaded by Dr. Sudekum's opinion that Petitioner's condition is attributed to a rheumatologic condition.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of same.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Petitioner is entitled to prospective medical care including, but not limited to, the right arm surgery recommended by Dr. Choi.

In support of this conclusion the Arbitrator notes the following:

There was no dispute as to the reasonableness and necessity of this treatment because both Dr. Choi and Dr. Sudekum agreed that surgery is indicated in this case.

William R. Gallagher, Arbitrator

14IWCC0336

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Brandt,
Petitioner,
vs. NO: 07 WC 53512

Ellinger & Winfield, Co.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability/maintenance, permanent partial disability, vocational rehabilitation and §§19(k) and 19(l) penalties and §16 attorney fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 5, 2012 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

Ruth W. White

Ruth W. White

Charles J. DeVriendt

Charles J. DeVriendt

Daniel R. Donohoo

Daniel R. Donohoo

RWW:bjg
0-4/22/2014
046

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRANDT, JOHN
Employee/Petitioner

Case# **07WC053512**

14IWCC0336

ELLINGER & WINFIELD CO
Employer/Respondent

On 7/5/2012, 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 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5073 JOHNSTON LAW OFFICES PC
BENJAMIN T STEPHENS
420 S BUCHANAN
EDWARDSVILLE, IL 62025

0771 FEATHERSTUN GAUMER POSTLEWAIT
DANIEL L GAUMER
PO BOX 1760
DECATUR, IL 62525

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

John Brandt
Employee/Petitioner

v.

Ellinger & Winfield Co.
Employer/Respondent

Case # **07** WC **53512**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 23, 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. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Vocational Rehabilitation Benefits**

FINDINGS

On **11/8/07**, 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 $**47,857.16**; the average weekly wage was $**920.33.**

On the date of accident, Petitioner was **28** years of age, ***single*** with **2** dependent children.

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

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services. The parties stipulated that all medical bills have been paid.

Respondent shall be given a credit of $**60,909.94** for TTD, $**0** for TPD, $**0** for maintenance, and $**12,048.00 as a PPD advance** for other benefits, for a total credit of $**72,957.94**.

ORDER

SEE ATTACHED DECISION

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

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

Signature of Arbitrator

June 28, 2012
Date

JUL -5 2012

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN BRANDT,	)	**14IWCC0336**
	)	
Petitioner,	)	
	)	
vs.	)	**No. 07 WC 53512**
	)	
ELLINGER & WINFIELD CO.,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

Procedurally, this matter was previously tried on June 25, 2010 pursuant to Section 19(b) of the Act. The Arbitrator's award was entered July 30, 2010, and was appealed to the Commission for review. On July 20, 2011, the Commission modified his award in decision 11 IWCC 0713. Neither party appealed the Commission decision. The Commission's decision with the attached award of the Arbitrator was admitted as Arbitrator's Exhibit II as the law of the case to that point. See, e.g., *Help at Home vs. Illinois Workers' Compensation Commission*, 405 Ill.App.3d 1150 (4th Dist. 2010).

Prior to this hearing, the parties stipulated that in the event the Arbitrator did not find the petitioner should be awarded vocational maintenance, the Arbitrator would address permanent partial disability at this juncture rather than conduct an additional hearing on that issue. Furthermore, it was noted that under those circumstances, the petitioner requested an award under 8(d)2 and waived any claim to 8(d)1 benefits.

STATEMENT OF FACTS

This case involves an undisputed accident on November 8, 2007 causing low back injury with radiculopathy. The chronology of the medical treatment was laid out in detail in Arbitrator Nalefski's decision (Arb.II). The transcript of the prior proceedings was introduced as RX1. Briefly, the petitioner sought substantial conservative care and medication. When that did not produce relief, the petitioner underwent disc replacement surgery at L5-S1 performed by Dr. Raskas on August 12, 2008.

The petitioner thereafter underwent postoperative care with Dr. Raskas until February 9, 2009, when Dr. Raskas placed him at MMI and ceased treating him, noting subjective complaints in excess of the physical findings and noting the petitioner was apparently not taking the narcotic medication for which he was filling the prescriptions, based on a urinalysis which showed the medications were not in his system. The petitioner thereafter sought care with Dr. Shitut, who prescribed objective testing and

injections, which took place until August 14, 2009, at which time Dr. Shitut noted that the injection had not helped, and placed the petitioner at MMI. He did recommend a FCE, but no additional treatment.

The claimant was seen for a Section 12 examination with Dr. Daniel Kitchens on November 25, 2009. Dr. Kitchens opined the petitioner was capable of working full duty and required no further care.

The FCE was conducted on April 6, 2010. It placed the petitioner at the Light to Light-Medium Physical Demand Level. Multiple nonorganic signs were observed, however, and Dr. Kitchens' review of the FCE indicated that the FCE would not be deemed reliable.

Surveillance conducted on May 13, 2010, was introduced at the first trial, showing the claimant riding an ATV and moving without signs of impairment.

The original award of Arbitrator Nalefski found the petitioner to lack credibility, and noted multiple indications of symptom magnification and inappropriate drug seeking behavior based upon the medical treatment records. Arbitrator Nalefski ordered 86 & 2/7 weeks TTD, from 12-20-2007 through 8-14-2009, and denied vocational rehabilitation and maintenance benefits in favor of 30% man-as-a-whole disability. The Commission also noted credibility concerns, but modified the TTD award to extend through September 19, 2009 based on the trial stipulations and further vacated the permanency award, ordering the parties to secure a written vocational rehabilitation assessment pursuant to Rule 7110.10. See Arb. Ex. II. Following remand from the Commission, each party secured a vocational rehabilitation assessment.

Respondent's consultant, Bob Hammond, authored a report on September 12, 2011 which was introduced as RX4. Mr. Hammond concluded the petitioner was employable, but was not a good candidate for vocational assistance. Mr. Hammond reported that the claimant had not sought work on his own, that the claimant stated that he did not believe himself capable of employment, and had applied for Social Security Disability. Mr. Hammond also noted the documented drug seeking behavior, false statements to the physicians, and the petitioner's felony record.

Petitioner's vocational expert, June Blaine, met with the claimant on December 15, 2011 and thereafter authored a report on January 27, 2012, which was introduced as PX1. Ms. Blaine noted that he had not worked or sought work, and that the claimant was taking care of his young child at home. She concluded he could benefit from vocational services if he demonstrated a commitment to the process and recommended that he secure a GED and computer training courses. She made those recommendations to the petitioner at their original meeting, including delineating opportunities for GED classes beginning in January 2012 at a local community college.

At trial, the claimant noted he had checked in at his labor hall in 2010 and worked a day or two as a flagger on a road crew, but was laid off thereafter, asserting it was due

to the restrictions he was under. He had neither enrolled in the GED classes nor pursued the computer course. He asserted the January classes were full, but admitted he has not formally applied for admission to any other classes being offered. He has applied for Social Security Disability approximately 18-24 months prior to the date of trial in this matter and is presently awaiting a ruling; he testified that he had a doctor's evaluation pursuant to the directive of the SSDI administrative law judge scheduled for May 24, 2012, the day after this case went to hearing. He testified he had not applied for any jobs in the last six months and that during the day he is the primary caregiver for his two-year-old while his girlfriend works. He acknowledged a 2007 felony conviction.

OPINION AND ORDER

Temporary Total Disability and Maintenance

Regarding temporary total disability, the Commission's decision in 11 WC 0713 ordered 91 & 1/7 weeks of TTD, being the period of December 20, 2007 through September 19, 2009. That period is therefore ordered at the applicable rate of $613.55, for total liability of $56,082.93. The respondent has previously paid $72,957.94, and credit for the $16,875.01 excess paid will be assessed against further benefits ordered.

Regarding maintenance benefits, the claimant requested benefits from June 25, 2010, through the date of trial. The Arbitrator notes that maintenance was requested at the Commission level from the FCE through the date of the first trial. The Commission denied such, finding his effort lacking in light of the guidance of *Roper v. Industrial Commission*, 349 Ill.App.3d 500 (5th Dist. 2004).

Even taking the claimant's testimony at face value, there has been a clear continuation of this substandard effort since the original trial. The claimant has not sought to improve his educational status; while he did not have the formal guidance of Ms. Blaine until December 2011, the availability and potential usefulness of a GED is effectively common knowledge. He has not sought to avail himself of such despite not having worked for over four years, and not having sought substantial medical care since August 2009. He admitted not having applied for any job of any sort in at least six months prior to the trial date, and no evidence he applied for any job since the June 2010 hearing was introduced save for the one instance discussed. This is less than reassuring, given that the controlling case of *National Tea Co. v. Industrial Commission*, 97 Ill.2d 424 (1983) notes a lack of motivation is an appropriate factor to consider in determining if any formal vocational maintenance is warranted. Id. at 433, internally citing *Lancaster v. Cooper Industries* (Me. 1978), 387 A.2d 5, 9.

Furthermore, this claimant's testimony cannot be taken at face value. Arbitrator Nalefski noted serious concerns with the petitioner's behavior in his original decision, particularly the petitioner's actions on December 8, 2007, where he presented at four (4) different emergency rooms to secure pain medication. The Commission further acknowledged even though they felt Arbitrator Nalefski's permanency assessment was

premature, the petitioner's "pain behavior and use of prescription drugs raise questions concerning the validity of his pain complaints and ability to work." Two of the petitioner's own medical providers, Dr. Raskas and Dr. Crancer, refused to continue treating the petitioner based on the petitioner's behavior, and Dr. Raskas specifically noted evidence of dishonesty regarding the petitioner's pain complaints and use of medication. The petitioner is also a convicted felon. This Arbitrator concurs with the prior factfinders in observing the petitioner's credibility to be lacking.

Moreover, while the petitioner testified he has not worked, it should be noted this lack of employment is not a new pattern exclusively based on his injury. The petitioner's union records of those hours he worked over the years prior to this injury were introduced as RX5, indicating a history of sporadic work at best, with his highest annual total being 338.5 hours and several years where he did not work at all.

In light of the above facts and circumstances, the petitioner's claim for vocational rehabilitation and maintenance is denied.

Nature and Extent of the Injury

The Arbitrator finds the petitioner's work-related accident culminated in the disk replacement surgery at L5-S1. The precise limitations faced by the claimant were extensively discussed by the physicians and are a matter of some dispute, as the Commission noted "questions concerning the validity of his pain complaints and ability to work." However, the vocational assessments had to be reviewed prior to a conclusive permanency assessment.

Having reviewed the evidence adduced at the first hearing, the vocational assessments, the claimant's testimony, and the Commission's decision, the Arbitrator finds the totality of the record supports a finding that the injuries sustained caused permanent loss of use to the petitioner's whole body to the extent of 25% thereof, as provided in Section 8(d)2 of the Act. Accordingly, the respondent shall pay the petitioner the sum of $552.20/week for a further period of 125 weeks, producing overall liability of $69,025.00. Against this amount the respondent shall have credit for the $16,875.01 overpayment referenced above, for current liability of $52,149.99.

14IWCC0337

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN TAYLOR, JR.,

Petitioner,

vs. NO: 09 WC 5518, 09 WC 23141, & 10 WC 4829

CHICAGO TRANSIT AUTHORITY,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of fact and conclusions of law

1. Petitioner was employed as a bus operator for Respondent. The parties stipulated that on January 6, 2009, Petitioner sustained a work-related injury when an SUV driven by a supervisor ran over his right foot. Petitioner testified that the SUV remained on his foot "for two to three minutes."

2. Petitioner testified he felt an immediate throbbing pain and felt that his foot was swelling. He was told not to remove his boot and an ambulance was called. X-rays were taken at the emergency room and Petitioner was told to follow up with his general practitioner who referred him to Dr. French, a podiatrist

3. Dr. French diagnosed a crush injury and recommended an MRI. After the MRI, Dr. French made the additional diagnosis of partial tears of the Achilles tendon. Petitioner had physical therapy and returned to work on May 5th or 6th of 2009.

4. On May 26, 2009, Petitioner testified he was on his route and noticed that his right leg and foot cramped when he applied brakes. He called in and requested assistance. He transferred his passengers to the next bus and awaited assistance. He again treated with Dr. French who released him to full duty on July 24, 2009 even though he was still treating Petitioner.

5. Petitioner also testified he continued to work until January 25, 2010. He began to experience swelling and numbness in his foot and ankle. Respondent sent an ambulance and took him to the emergency room. X-rays were taken and it was recommended Petitioner see an "orthopedic or vascular surgeon." Petitioner continued to treat with Dr. French who recommended an EMG.

6. Petitioner was examined by Dr. Mohan who ordered a repeat MRI. Dr. Mohan then ordered a functional capacity evaluation, after which he recommended Petitioner not return to work as a bus driver. Petitioner was referred to Dr. Jain, a pain specialist, who prescribed a sympathetic nerve block injection, which was performed by Dr. Anwar on March 18, 2011. After another injection, Dr. Anwar recommended a trial spinal cord stimulator. Petitioner testified the nerve blocks relieved a lot of the pain and swelling and the spinal cord stimulator really helped. After the trial, Dr. Anwar recommended permanent implantation.

7. Petitioner testified that currently he has moderate pain (6-7/10), and has swelling if he walks or stands a lot. He can walk and drive short distances. He just started wearing a shoe and it is uncomfortable wearing it all day. Petitioner currently takes Vicodin and Oxycodone, but he would rather have the stimulator. He cannot take those medications and drive a bus. He wanted to return to work driving a bus for Respondent.

8. On cross, Petitioner testified he does not drive when he is on his medication. However he does drive and he has seen a video of himself driving and walking. It had been awhile since he talked with anybody at CTA about returning to work. Petitioner did not fill out accident reports for the incidents on May 26, 2009 or January 25, 2010. He was told to use the same claim number from the initial accident.

9. Petitioner agreed that he did not have surgery for his foot injury.

14IWCC0337

10. Medical records show that on January 6, 2009, Petitioner presented to the emergency room after an SUV ran over his right foot. He complained of 8/10 pain. X-rays showed only a tiny calcaneal spur but no fracture or dislocation. Petitioner was given Motrin and released.

11. On February 16, 2009, Petitioner presented to Dr. French with foot and ankle pain after crush injury. He was on crutches and had a cast boot. Besides the crush injury, Dr. French diagnosed Achilles and Peroneal tendonitis. He prescribed Vicodin, Narposyn, and ordered an MRI.

12. On March 5, 2009, Dr. French noted the MRI showed Achilles tendonitis or a partial tear. Dr. French included synovitis and capsulitis in his diagnoses.

13. On May 4, 2009, Dr. French released Petitioner to work full duty.

14. On May 28, 2009, Petitioner returned to Dr. French and reported some increased pain with activity. About three days earlier he experienced pain, swelling, and cramping to the right foot. He went to the emergency room where x-rays and Doppler were negative. Dr. French prescribed Ibuprofen, Medrol Dosepak, and Darvocet.

15. On September 10, 2009, Dr. French noted Petitioner was back to work and doing well and that the Achilles tendonitis was resolving.

16. On February 26, 2010, Petitioner reported to Dr. French that he had increased numbness with activity. Dr. French prescribed an EMG, which was normal.

17. On March 17, 2010, an EMG was taken for pain, swelling, and throbbing of his right foot and ankle. The EMG was normal.

18. On April 1, 2010, Petitioner still complained of numbness despite the normal EMG. Dr. French referred Petitioner to Dr. Mohan for a neurological consultation.

19. On May 4, 2010, Petitioner presented to Dr. Mohan for evaluation on referral from Dr. French. Dr. Mohan diagnosed crush injury to the peroneal nerve and possibly the tendon, and possible causalgia pain due to nerve and tissue injury. He ordered an MRI.

20. On May 13, 2010, an MRI of the right foot showed diffuse great toe cellulitis with small volume first MTP joint diffusion, forefoot bony dysplasia, but no acute bony defect or signs of internal derangement. An MRI of the ankle was normal.

21. On June 1, 2010, Dr. Mohan noted the MRI was essentially normal. However, because of the problem with his right foot, he could not foresee Petitioner continuing to work as a bus driver. Petitioner may need a pain specialist.

22. On June 21, 2010, Petitioner had a functional capacity evaluation ("FCE") at Athletex, where he previously had physical therapy. The test was determined to be valid. Petitioner showed he could only ambulate for four minutes before stopping due to cramping. He had limited mobility and tolerance to standing, squatting, and sitting which limits his ability to work as a bus driver, which involves a medium level of exertion. He would not qualify for sedentary work because of discomfort sitting.

23. On August 24, 2010, Petitioner had another FCE at Accelerated. The test was also determined to be valid. Petitioner was able to function at a light level of exertion and showed no difficulty in sitting for prolonged periods. He was capable of performing all the essential functions of a bus driver.

24. On November 24, 2010, Petitioner presented to Dr. Jain for evaluation of diagnoses of complex regional pain syndrome ("CRPS"), lumbosacral radiculopathy, and cervical radiculopathy. Petitioner reported significant burning and shooting pain in the leg and numbness below the knee. Symptoms were aggravated by prolonged sitting. Dr. Jain indicated he had discoloration, allodynia, and hyperpathia in the right foot. Dr. Jain thought the diagnosis of CRPS was "pretty obvious." He would administer sympathetic nerve blocks to relieve the symptoms of CRPS.

25. On December 17, 2010, Dr. Jain noted the MRIs showed a disc herniation at L5-S1 on the right and bulges throughout the cervical spine. "Endeavoring on any treatment for possible CRPS in the right" leg, Dr. Jain "would like to address radicular symptoms." He would administer injections to the lumbar and cervical spine. Petitioner would remain off work.

26. On July 21, 2011, Dr. Jain noted "based on the diagnosis of [CRPS], neuropathic pain, and his aggravation of pain in the right foot which has developed from multiple surgeries which were done after he had the accident, as well as melanoma excision as well as acupuncture which was also done on his right foot which have aggravated the symptoms of reflex sympathetic dystrophy ("RSD") from the crush injury which the patient suffered on January 6, 2009." Petitioner was cleared by the psychologist and was a good candidate for a trial spinal cord stimulator. It was implanted.

27. On September 1, 2011, Petitioner presented for removal of the temporary stimulator. Petitioner reported greater than 80% reduction in pain. Petitioner wanted to proceed with the permanent implantation.

28. On August 13, 2012, Dr. Anwar testified by evidence deposition. He is board certified in pain management and treats patients with neuropathic pain after injuries.

29. When Dr. Anwar first examined Petitioner on March 18, 2011, his right foot was discolored and painful to the touch. Petitioner had "extensive surgery" but the records were not available. Dr. Anwar noted that Dr. Jain's evaluation suggested CRPS. Dr. Anwar administered a sympathetic nerve block injection to decrease Petitioner's neuropathic pain. The injection was administered at the L2-3 level because that is where the plexus is. This is the first line of treatment when there is any doubt about the diagnosis of CRPS. After that he proceeded with radiofrequency neurolysis in which the nerves are also heated to decrease their sensitivity. The treatment provided significant relief, but it lasted only a few days.

30. Dr. Anwar recommended a spinal cord stimulator trial. If the patient gets more than 50% relief and improvement in function, the patient is a candidate for permanent implantation. Petitioner received greater than 80% relief, so Dr. Anwar thought he was a candidate for permanent implantation.

31. Dr. Anwar believed Petitioner has CRPS because "there's injuries, his history, his physical exam, everything tells us he has neuropathic pain which is CRPS." He further elaborated "when the patients have these crush injuries, it's not easy to diagnose this pain," but based on the physical complaints of the burning and sensitivity to touch as well the appearance of the foot, Dr. Anwar concluded he had CRPS. Dr. Anwar noted that Petitioner did not have the symptoms of late stage CRPS like mottling of the skin, nail problems, muscle atrophy, or bone loss.

32. Dr. Anwar opined that Petitioner's condition would worsen without treatment. He also opined that Petitioner's CRPS was causally related to his accident. He based that opinion on the initial trauma, which is a major cause of CRPS, the surgery on the ankle, and the removal of the melanoma on the ankle. These three multiple traumas to the foot contributed to his developing CRPS.

33. Dr. Anwar was not certain whether or not Petitioner could return to work as a bus driver. He might be able to work for a few hours and then rest with no lifting. However, Dr. Anwar would have to discontinue the opiate pain relievers. Petitioner is able to walk and drive despite his condition. His condition is at a very early stage. Dr. Anwar did not know why an EMG/NCV would be ordered to diagnose CRPS "because these are not nerves which are damaged."

34. On cross examination, Dr. Anwar he did not believe Petitioner received a fracture at the time of the accident. He was not aware if Petitioner had returned to work at some point prior to the time he first saw him more than two years after the accident. It appears that

Dr. Anwar did not review any prior medical records. He did not think it was unusual for Petitioner to be able to drive or walk because he was not at 3rd degree RSD.

35. On redirect, Dr. Anwar testified the crush injury alone would be sufficient to cause CRPS; crush injuries are one of the most common causes of the condition. Throughout his treatment of Petitioner, Dr. Anwar thought he was being truthful. He did not think Petitioner was malingering.

36. On March 8, 2010, Petitioner presented to Dr. Holmes for a Section 12 medical examination. Dr. Holmes reviewed treatment notes of Mercyworks, the emergency rooms, and Dr. French through February 4, 2010. His examination of Petitioner was benign with no swelling or atrophy indicating Petitioner was using both legs equally. "Therefore his physical examination does not correlate with the degree of symptoms and pain the patient reports, nor does it correlate with the medications that he is on this time in terms of being used for pain relief." Dr. Holmes recommended an EMG to rule out nerve damage and an FCE.

37. On July 26, 2010, Petitioner returned to Dr. Holmes for another Section 12 examination. Petitioner's chief complaint was swelling in the foot and numbness in the 2nd and 3rd toes, burning on the bottom of his foot and across the anterior aspect of the ankle, and some Achilles pain. Petitioner stated he walked with a limp. Dr. Holmes reviewed additional records from Dr. French through June 22, 2010. Upon examination, Dr. Holmes noted no significant swelling or atrophy indicating disuse or preferential use of the foot. "Therefore, his current condition is not supported by any objective parameters that [Dr. Holmes] from review of the records and examination today." If somebody had such pain, "it would almost obligatory that the person would have some atrophy on the affected side." He did not believe Petitioner needed any additional treatment and there was no reason why he could not return to work as a bus driver.

38. On September 9, 2010, Dr. Holmes reviewed an EMG, MRI, and FCE. He noted the EMG and MRI were essentially normal. He reiterated his opinion that Petitioner could return to work as a bus driver.

39. On April 5, 2012, Petitioner presented to Dr. Bello for another Section 12 examination. Petitioner continued to complain of constant mild to moderate right foot pain which was worse with activity. He reported excellent results with the spinal cord stimulator. Petitioner "denied any specific swelling, warmth, skin color changes, or difficulty wearing a shoe on the affected limb." Petitioner stated he could not currently perform his job as bus driver. Dr. Bello's examination appeared to be normal.

40. Dr. Bello opined that the signs and symptoms did not demonstrate and were not consistent with a diagnosis of RSD. He also found no evidence of an inflammatory process. He opined that Petitioner was at MMI, there was no evidence supporting a

diagnosis of CRPS, there was no need for a spinal cord stimulator, and Petitioner could return to full duty work. There was no evidence of malingering but the description of pain was out of proportion to the clinical examination.

41. Respondent submitted into evidence a surveillance video from March 22, 2012 and March 31, 2012. It shows Petitioner wearing dress shoes, walking, driving, and climbing stairs. He does not appear to be limping or being in any kind of distress.

In finding Petitioner proved causation of a current condition of ill being, the Arbitrator gave greater weight to Petitioner's treating doctors than Respondent's IMEs regarding his diagnosis and Petitioner's ability to work as a bus driver.

In this case, the Commission finds the opinions of the Section 12 medical examiners persuasive. Both Drs. Holmes and Bello found absolutely no objective evidence to support the diagnosis of CRPS such as discoloration, swelling, or atrophy. In addition, Drs. Jain and Anwar based their diagnosis of CRPS at least partially on the assumption that Petitioner had "extensive surgery" on his foot after the accident causing considerably greater trauma to the area. That assumption is simply not borne out in the medical records and was specifically contradicted by Petitioner's testimony. Finally, it is clear that Drs. Jain and Anwar accepted Petitioner's subjective complaints at face value. However, Petitioner's complaints are rebutted by the surveillance video which shows him walking, driving, and climbing comfortably in hard shoes.

Therefore, the Commission concludes Petitioner is not in need of prospective medical treatment and was able to return to work as a bus operator as of the date of Dr. Holmes second Section 12 medical report. Therefore, the Commission modifies the Decision of the Arbitrator and vacates the award of prospective medical treatment and terminates temporary total disability benefits after July 26, 2010.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $383.79 per week for a period of 40 3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses for Petitioner's treatment and care thus far incurred under §8(a) of the Act, pursuant to the applicable fee schedule.

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

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

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

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

DATED: MAY 0 5 2014

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

RWW/dw
O-9/19/13
46

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

TAYLOR, JOHN
Employee/Petitioner

Case# **09WC005518**

09WC023141
10WC004829

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

14IWCC0337

On 11/19/2012, 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:

4595 WHITESIDE & GOLDBERG LTD
JASON M WHITESIDE
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
J BARRETT LONG
567 W LAKE ST
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)

14IWCC0337

John Taylor
Employee/Petitioner

v.

Case # 09 WC 005518

Consolidated cases: 09 WC 23141
10 WC 4829

Chicago Transit Authority
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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **09/18/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, January 6, 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 $**29,935.36**; the average weekly wage was $**575.68**.

On the date of accident, Petitioner was **38** years of age, *single* with **1** dependent children.

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

Respondent shall be given a credit of $**28,392.78** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**28,392.78**.

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

ORDER

Petitioner was temporarily totally disabled for a period of 14-2/7 weeks commencing 1/26/09 through 5/5/09 and a further period of 137-6/7 weeks commencing 1/25/10 through 9/10/12 for a total of 152-1/7 weeks at the TTD rate of $383.79 per week

Respondent is to pay Petitioner's reasonable and necessary medical expenses incurred in the care and treatment of his condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay for the prospective medical care and treatment recommended and prescribed by Dr. Anwar pursuant to Section 8(a) of the Act.

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

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

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

Carolyn Doherty
Signature of Arbitrator

11/19/12
Date

ICArbDec19(b)

NOV 19 2012

FINDINGS OF FACT

Petitioner, John Taylor, Jr., testified that he began working for Respondent, C.T.A, on or about September 22, 2008, as a bus operator. On January 6, 2009, Petitioner indicated that he worked for Respondent as a bus operator and was assigned to work the evening shift. Petitioner arrived at work 30 minutes prior to his start time on the evening of January 6, 2009 at the bus garage to fill out his trip sheets prior to boarding a bus that would take him to the start of his route. Petitioner indicated that he was walking through the parking lot owned by the Respondent with a co-worker, Diane. One of Petitioner's supervisors, James Wilson, indicated that he would give a ride to Petitioner and Diane. Diane entered the back seat of the supervisor's vehicle, described by Petitioner as a Ford Escape, and Petitioner walked around to the other side of the supervisor's vehicle. Before Petitioner could enter the Ford Escape, James Wilson ran over Petitioner's right foot.

Petitioner testified that James Wilson backed up the Ford Escape onto his right foot, and upon hearing Petitioner scream, Mr. Wilson stopped the vehicle on top of Petitioner's right foot. After a few minutes, Mr. Wilson removed the vehicle from on top of Petitioner's foot. Petitioner indicated that he felt immediate pain and swelling in his right foot. Mr. Wilson called his supervisor who arrived and contacted Chicago Fire Department to send an ambulance for Petitioner.

Petitioner was taken by ambulance to Holy Cross Hospital with complaints of right foot swelling and pain. PX 2. A history was taken at Holy Cross Hospital of a crush injury to the right foot of Petitioner. PX 3, pg. 18. Petitioner complained of a burning sensation to his foot. PX 3, p. 21. X-rays were performed, which were negative for fractures or dislocations. PX 3, pg. 27. Petitioner was prescribed Motrin, crutches, discharged and instructed to follow-up with his physician. PX 3, pp. 20, 23.

Upon being discharged, Petitioner continued his medical care with Dr. Brian French, a podiatrist. PX 4. An initial examination was held on February 16, 2009, whereby Dr. French recorded a history of a crush injury on January 6, 2009, which produced pain and swelling to the right foot. PX 4, p. 6. Petitioner complained of pain with weight bearing to the right foot. Dr. French performed a physical examination, which revealed pain to the Achilles tendon, as well as pain to the lateral aspect of the heel and lateral calcaneal cuboid joint. (PX 4, p. 6) Dr. French diagnosed Petitioner with Achilles tendonitis, Peroneal Tendonitis and status post right foot and ankle crush injury. (PX 4, p. 6) Dr. French also prescribed Vicodin, Naprosyn, and MRI of the right foot and ankle, and a follow-up in 1 week. (PX 4, p. 6)

On March 5, 2009, Respondent sent Petitioner to Section 12 examination with Dr. Benjamin Goldberg. (RX 4) Dr. Goldberg took a consistent history from Petitioner, in that his foot was crushed during a work-related injury on January 6, 2009 and that it was difficult to walk but that he could "hobble along" using a CAM boot. Dr. Goldberg reviewed the treatment records and performed a physical examination, whereby mild swelling about the mid and hind foot was noted along with tenderness over the metatarsal head and the heel. Dr. Goldberg recommended Petitioner take off the CAM boot and start walking in a regular shoe. Pending new x-rays showing no fractures and the results of the MRI, he indicated that Petitioner should be at MMI in

two months and that he should be able to tolerate weight bearing on the foot. Dr. Goldberg diagnosed Petitioner as status post crush injury and indicated that Petitioner was not in need of further treatment pending the x-ray results. RX 4. He further noted that Petitioner could not drive a bus at that time due to the fact that he needed his right foot to drive and that his foot was "clearly abnormal" at that point. RX 4.

Petitioner also saw Dr. French on March 5, 2009. Dr. French reviewed the MRI of the right foot, which was performed on March 3, 2009 at MRI of River North. (PX 4, p. 40) Dr. French interpreted the MRI to show Achilles tendonitis or partial tear on the right Achilles tendon area. PX 4, p. 7. Dr. French recommended physical therapy, medication, functional orthotics and for Petitioner to remain in a cast walker pending physical therapy results. PX 4, p. 7. On March 16, 2009, DR. French noted that Petitioner was undergoing physical therapy and that he related a decrease in pain to his right foot and ankle and right Achilles area. On exam, he noted a decrease in edema and mild pain over the Achilles tendon area. Petitioner was diagnosed with Achilles tendonitis and synovitis and told to continue PT. PX 4, p. 8.

Dr. French continued to treat Petitioner for his right foot injury, eventually prescribing orthotics for Petitioner. On April 20, 2009 and May 2, 2009, Dr. French noted that Petitioner had finished physical therapy and was using an orthotic to his right foot. On April 20, 2009, Dr. French noted Petitioner's complaint of increased pain and swelling to his right foot. PX 4, p. 10. On examination, pain was mild and edema was minimal. Petitioner was released to return to work on 5/4/09. PX 4, p. 10. On May 2, 2009, Petitioner again noted mild pain and minimal edema along with a decrease in pain and swelling to the right foot. PX 4, p. 11. Petitioner was again released to return to work as of 5/4/09.

Petitioner testified that he returned to work for Respondent in May of 2009, and that on May 26, 2009, he was operating a bus for the Respondent when he felt immense pain and swelling in his right foot. Petitioner contacted the Respondent, and indicated that he would need to have a replacement driver sent to continue his bus route. Respondent sent a substitute bus driver, and Petitioner was taken to University of Illinois Hospital. PX 5. Petitioner presented with complaints of right foot and ankle injury following a crush injury earlier that year. PX 5. p. 7. X-rays were taken of the right knee, tibia/fibula and ankle, which were all negative. PX 5, p. 8. Petitioner was released with a diagnosis of a foot injury and an ankle sprain. PX 5, p. 8.

Petitioner returned to see Dr. French on May 28, 2009, and related an increase in pain complaints related to the right foot following his return to work 3 weeks earlier. Petitioner also reported an increase in pain, swelling and cramping to the right foot around May 26, 2009. (PX 4, p. 12). Dr. French noted mild edema and pain to the foot along with mild heat to the right ankle area. Petitioner was prescribed pain medication including a Medrol dose pak and Darvocet. He was also prescribed additional physical therapy, which was performed at Athletex. (PX 6) According to the Athletex medical records, Petitioner began physical therapy on June 10, 2009, and received approximately 8 therapy sessions until June 22, 2009. (PX 6, p. 11) On 7/16/09, Petitioner was released to full-duty work by Dr. French as of 7/24/09. PX 4, p. 16. He was to continued PT and the pain medications. Petitioner then completed a physical therapy program with Athletex on August 12, 2009. PX 6, p. 15.

In September 2009, Dr. French noted that Petitioner had returned to work and was "doing well." Dr. French noted no edema, erythema, or joint effusions and no pain to the Achilles tendon with palpation. There was no pain noted to the ankle, subtalar or mid-tarsal joint at that time. Petitioner was to return "as needed." PX 4, p. 18.

Petitioner testified that he returned to work, but continued to have pain and swelling intermittently with his right foot, right ankle and right leg. By December 31, 2009, Petitioner began to experience an increase of pain to the arch and heel of his right foot. (PX 4, p. 19). By this point, Petitioner had been back to work, frequently using his right foot to operate the gas pedal of his bus throughout the work day. Dr. French performed an injection of Kenalog into Petitioner's right heel at the December 31, 2009 visit for pain management. (PX 4, p. 19)

Petitioner testified that on January 25, 2010, he was again operating a bus for the Respondent, on 55th street when he felt numbness and tingling in his right foot. Petitioner contacted the control department for Respondent, who in turn contacted Petitioner's supervisor, who called an ambulance, and took Petitioner to Jackson Park Hospital. Petitioner reported a history of accident about one year prior when Petitioner sustained a crush injury to his right foot. (PX 7, p. 9) Petitioner was treated and then instructed to follow-up with an orthopedic and/or a vascular surgeon. (PX 7, p. 6).

Petitioner returned to see Dr. French on January 28, 2010 and February 4, 2010, who indicated that Petitioner's pain had decreased since he was taken off-work following the January 25, 2010 incident. (PX 4, p. 22) Dr. French provided Petitioner an injection into his foot and recommended an EMG. (PX 4, p. 22 & 23).

Petitioner was sent for a Section 12 examination with Dr. George Holmes, which occurred on March 8, 2010. Dr. Holmes concluded that Petitioner sustained a crush injury to the right foot. RX 5. Dr. Holmes indicated that Petitioner's "physical examination was benign demonstrating no swelling or atrophy indicating that both lower extremities are being used equally. Therefore, his physical examination does not correlate with the degree of symptoms and pain the patient reports, nor does it correlate with the medications that he is on at this time in terms of being used for pain relief. The onset of pain appears to be cause-related to the incident of January 2009. However, the patient's current condition is essentially benign demonstrating a normal examination. I am having a difficult time correlating of his current symptoms with the original injury based upon the objective studies thus far." Dr. Holmes also recommended an EMG to determine underlying nerve damage as well as an FCE to determine a function level.

The EMG was performed at Holy Cross Hospital on March 17, 2010 and reviewed by Dr. French on April 1, 2010. (PX 3, p. 12) Dr. French interpreted the EMG as normal and referred Petitioner to Dr. Mohan for a consultation based on Petitioner's continued complaints of pain and numbness to the right foot and lower right extremity with activity and driving for an extended length of time. (PX 4, p. 29)

Dr. Mohan examined Petitioner on May 4, 2010, and noted Petitioner had weak and painful range of motion of his flexors and extensor of the right foot. (PX 8, p. 6) Dr. Mohan diagnosed Petitioner as having a crush injury of the distal part of the peroneal nerve and possibly involving

the peroneal tendon, as well as causalgia pain due to nerve and tissue injury. (PX 8, p. 6) Dr. Mohan recommended an MRI of the right foot and ankle and reviewed the MRI with Petitioner on June 1, 2010. (PX 8, p. 4) Dr. Mohan indicated that the MRI was normal, but that Petitioner was having difficulty putting weight on the right foot and painful range of motion of the right foot. (PX 8, p. 4) Dr. Mohan indicated that Petitioner would not be able to return to work as a bus driver given the condition of his foot and may need to see a pain specialist. (PX 8, p. 5)

An FCE was performed on June 21, 2010, at Athletex. (PX 9) The FCE summary indicated that the test was valid and that Petitioner gave good effort throughout the two-day exam. (PX 9) Throughout the exam Petitioner demonstrated deficits on the right ankle and foot and was only able to ambulate for 4 minutes due to cramping of the right calf. (PX 9, p. 5) The results of the FCE indicated that Petitioner does not qualify to return to work at the sedentary level because of the discomfort that occurs when sitting, which would make it difficult to drive a bus. (PX 9, p. 5)

On July 26, 2010, Respondent sent Petitioner to see Dr. George Holmes for a second Section 12 evaluation. (RX 5) Dr. Holmes reviewed medical records generated from the time of the initial exam on March 8, 2010 and the second exam. Dr. Holmes examined the Petitioner and concluded that Petitioner's objective findings did not match his subjective complaints and that Petitioner could return back to work as a bus driver. Dr. Holmes noted that the MRI and the EMG did not show structural damage to the right foot and that the exam did not show any swelling or atrophy that would be consistent with disuse of the foot or preferential use of the right foot. Dr. Holmes did not see a justification for ongoing treatment based up a lack of any objective measures. Specifically, he did not recommend pain blocks or cortisone injections. Again, he recommended an FCE and determined that he had no basis to restrict Petitioner from working at his normal job of bus driving. Dr. Holmes did not have the June 21, 2010 FCE results at this visit. (RX 5)

Petitioner was examined by his treating physician, Dr. French, on July 27, 2010, and reviewed the FCE report. (PX 4, p. 35) Based on the report, Dr. French referred Petitioner to Dr. Jain for pain management. (PX 4, p. 35) Petitioner testified that in the interim he attended another FCE scheduled by Respondent at Accelerated Rehabilitation Centers. (PX 10). Petitioner attended this examination on August 24, 2010, and the summary indicated that Petitioner gave maximum performance and that the examination was valid. (PX 10, p. 2) The report indicates that Petitioner was capable of functioning at the light category of work and could return to work as a bus operator. (PX 10, p. 2-3)

On September 9, 2010, Dr. George Holmes issued a third report and reviewed only the August 24, 2010 FCE. (RX 5) Based strictly on this report, Dr. Holmes recommended Petitioner return to work full-duty as a CTA bus driver. (RX 5). Dr. Holmes did not mention a review of the June 21, 2010 FCE.

Petitioner continued to treat with Dr. French, who documented pain complaints to the distal forefoot, 3rd 4th and 5th metatarsal area. (PX 4, p. 37) Dr. French reiterated his recommendation that Petitioner treat with a pain specialist and diagnosed Petitioner with neuropathy. (PX 4, p. 37) Dr. French's last examination of Petitioner was on October 28, 2010, which documented the

same pain complaints and a recommendation for continued use of Vicodin and a referral for a pain specialist. (PX 4, p. 38)

Petitioner firs saw Dr. Jain on November 24, 2010, for an initial consultation. (PX 11, p. 4) Dr. Jain took a history of a crush injury to the right foot on January 6, 2009, when a Ford Escape ran over his right foot. (PX 11, p. 4) Dr. noted Petitioner to have burning, throbbing and shooting type pain with some aching and tingling in his right foot. (PX 11, p. 4) Dr. Jain examined Petitioner and noted discoloration in the fight foot, hyperpathia and a disparity when compared with the left foot. (PX 11, p. 4) Dr. Jain noted that Petitioner was not working and had not worked since January 24, 2010. Dr. Jain diagnosed Petitioner with "a pretty obvious case" of chronic regional pain syndrome (CRPS) and recommended aggressive treatment, particularly right lumbar paravertebral sympathetic blocks. (PX 11, p. 6) Dr. Jain indicated that Petitioner's current complaints were directly related to the January 6, 2009 accident, and instructed Petitioner to remain off-work. (PX 11, p. 6)

Petitioner's next appointment with Dr. Jain was on December 17, 2010, whereby Dr. Jain recommended therapy be re-instated, and that Petitioner undergo a series of injections. (PX 11, p. 9) Petitioner began therapy at Rapid Rehab of Illinois on December 27, 2010, and attended about four physical therapy visits. (PX 13) Petitioner was then referred by Dr. Jain to his colleague, Dr. Zaki Anwar, for further pain management. (PX 15)

Dr. Anwar initially examined Petitioner on March 18, 2011, and took a consistent history of an accident on January 6, 2009, whereby Petitioner's right foot was crushed and run over by a Ford Escape. (PX 15, p. 3) Dr. Anwar performed a physical examination and noted discoloration of the right foot, allodynia and diminished pin prick in the L5 distribution compared with the left side. (PX 15, p. 4) Dr. Anwar diagnosed Petitioner with neuropathic pain syndrome of the right lower extremity, CRPS, and reflex sympathetic dystrophy. (PX 15, p. 4) Dr. Anwar also performed a lumbar sympathetic plexus block at L2 and L3 at that office visit and instructed Petitioner to remain off-work. (PX 15, p. 5)

Another sympathetic block was performed on April 1, 2011. (PX 19, p. 19) Petitioner returned to see Dr. Anwar on April 7, 2011 and reported significant relief from the previous injections, in that the burning, aching and throbbing pain in the right side of his leg subsided somewhat. (PX 15, p.5) Dr. Anwar indicated that based upon Petitioner's development of CRPS over the course of the past two years (since the accident on January 6, 2009) and the neuropathic pain in his right lower extremity, Petitioner was a candidate for a trial spinal cord stimulator. (PX 15, p. 9) Dr. Anwar felt that rather than continue to perform injections, which provided Petitioner with a significant relief, Petitioner would receive a more than 50% relief from a spinal cord stimulator. (PX 15, p. 9) Petitioner was also instructed to remain off-work. (PX 15, p. 10)

Dr. Anwar performed a third radiofrequency ablation at L2 and L3 on July 8, 2011. (PX 15, p. 15) Petitioner was then referred to Dr. Khan for psychiatric evaluation prior to performing a trial spinal cord stimulator implantation. (PX 15, p. 17-18) Dr. Khan indicated that there were no psychological issues for Petitioner and that Dr. Anwar could proceed with the trial spinal cord stimulator. (PX 15, p. 18) Dr. Anwar reviewed the psychiatric assessment with Petitioner on

July 13, 2011 and scheduled the trial spinal cord stimulator implantation for August 25, 2011. (PX 15, p. 17)

Dr. Anwar performed the implantation of the trial spinal cord stimulator on Petitioner as planned on August 25, 2011. (PX 15, p. 23). Dr. Anwar indicated that during this procedure, two electrodes or leads are inserted into the spinal cord in such a way as to provide an electrical stimulation from the spinal cord in the leg. (PX 19, p. 28) This will provide Petitioner with relief from the pain, in that it changes the pain from a burning or throbbing pain sensation to some other altered sensation that is acceptable to Petitioner. (PX 19, p. 29)

Petitioner returned to see Dr. Anwar for removal of the trial spinal cord stimulator on September 1, 2011, and reported an 80% reduction in his symptoms of throbbing, burning and aching pain in his right foot and leg. (PX 15, p. 25) Based upon the reduction in pain complaints, Dr. Anwar recommended a permanent spinal cord stimulator be implanted. (PX 15, p. 25) By the next appointment with Dr. Anwar on December 14, 2011, the permanent implantation of the spinal cord stimulator had not been approved by Respondent. (PX 19, p. 32) Dr. Anwar recommended continuation of radiofrequency ablations to relieve Petitioner's pain while awaiting approval of the trial cord stimulator. (PX 19, p. 33) A radiofrequency neurolysis with sympathetic block was performed on December 16, 2011, February 3, 2012, April 20, 2012 and May 30, 2012. (PX 15, p. 33-48) Petitioner continued to report relief from his pain complaints to Dr. Anwar following the injections and expressed a desire to undergo the spinal cord stimulator permanent implantation. (PX 15)

RX 7 is a video offered by Respondent with surveillance of Petitioner on March 22, 2012 and March 31, 2012. The Arbitrator notes Petitioner is walking and driving without apparent difficulty.

Dr. Anwar gave his deposition in this matter on August 13, 2012. Dr. Anwar indicated that he is board certified in pain management, and treats clients with crush injuries and RSD, or neuropathic pain following an injury. (PX 19, p. 6). Dr. Anwar reviewed Petitioner's history, and indicated that Petitioner was suffering from CRPS as a result of the January 6, 2009 accident. (PX 19, p. 39-40). Dr Anwar based his opinion upon his physical examination of Petitioner, Petitioner's complaints of pain, his physical presentation of discoloration and allodynia as well as the history of injury on January 6, 2009. (PX 19, p. 40). Petitioner's pain complaints were valid in that the damaged nerves can cause sympathetic mediated pain because the blood supply is not there for the nerves. (PX 19, p. 14). Dr. Anwar determined that Petitioner was in the early stage of RSD and that aggressive treatment could stop the progression. PX 19, p. 41. Petitioner was able to walk on his right foot and drive. The video surveillance was reviewed by Dr. Anwar and he noted that CRPS patients can walk and do all normal activities but they do it with pain in the affected extremity. PX 19, p. 45,55.

Dr. Anwar was asked how Petitioner could have a normal EMG/NCV study and still have CRPS. Dr. Anwar indicated that CRPS is difficult to diagnose with objective tests because after a crush injury such as Petitioner suffered, the smaller nerves can be damaged and these smaller nerves will not be visible on an EMG or nerve conduction study. (PX 19, p. 14) That is why it is not recommended that an EMG/NCV test be performed on CRPS patients such as Petitioner. (PX

19, p. 46) Also, the EMG itself can aggravate the pain associated with the CRPS. (PX 19, p. 48) Dr. Anwar again testified that he does not recommend an EMG for RSD testing. PX 19, p. 48. The subjective complaints of the patient must be considered in order to diagnose CRPS and treat the condition appropriately. Dr. Anwar felt Petitioner's subjective pain complaints were valid and that they supported a diagnosis of CRPS. Dr. Anwar also felt that Petitioner was not malingering. (PX 19, p. 68).

Respondent sent Petitioner to one final examination by Dr. Alfonso E. Bello on April 5, 2012. (RX 6) Dr. Bello specializes in Rheumatology and is Board Certified. (RX 6) Dr. Bello performed a physical examination and noted right midfoot tenderness. Dr. Bello disagreed with the diagnosis of reflex sympathetic dystrophy stating there are only subjective symptoms of foot pain and no clinical evidence for a specific diagnosis or CRPS. Dr. Bello further disagreed with the spinal cord stimulator recommendation stating that it was not necessary treatment "as all noninvasive pain management strategies have not been tried." RX 6. Dr. Bello placed Petitioner at maximum medical improvement. Dr. Bello further opined that Petitioner could return to work full-duty. Finally, Dr. Bello did not assess Petitioner a malingerer but rather stated that the "description of pain was out of proportion to the clinical examination." RX 6.

Petitioner testified at Arbitration that he wants the implantation of the permanent spinal cord stimulator. Petitioner testified that he continues to have swelling in the right foot and leg, and continues to take Vicodin and Oxycotin. Petitioner acknowledged that he is able to drive and walk for short distances, and that he would like to eventually return to work for Respondent.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? F. Is the Petitioner's current condition of ill-being causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

The parties stipulated that Petitioner sustained an accident that arose out of and in the course of Petitioner's employment with the Respondent on January 6, 2009. Respondent does, however, dispute the accident dates of March 26, 2009 and January 25, 2010, which Petitioner alleges to be aggravations of the original injury of January 6, 2009.

Petitioner's ultimate diagnosis for which he continues to receive treatment is RSD. His treating physicians, Drs. French, Mohan, Jain and Anwar each relate his condition to the accident on January 6, 2009 when a co-worker drove over Petitioner's right foot resulting in a crush injury. Petitioner's treating physicians all concurred in their assessment and treatment of Petitioner, in that Petitioner required additional medical care, pain management, and was to remain off-work. Petitioner testified that he did not suffer a right foot injury or condition prior to the accident of January 6, 2009 and that his symptoms developed upon onset of that injury. Although Petitioner returned to work at intermittent periods after January 6, 2009, it is clear from the record that he returned for additional medical care due to flare ups of his right foot condition while driving the bus for Respondent. The alleged accident dates of March 26, 2009 and January 25, 2010 are two

such flare up dates. The Arbitrator finds that Petitioner sustained accidental injuries on January 6, 2009, with subsequent flare ups of his condition and that Petitioner's current and continued condition of ill-being is causally related to the accident and injury date of January 6, 2009.

The Arbitrator notes that Drs. Holmes and Bellos each determined that Petitioner did not have objective correlation of his subjective complaints to support any additional treatment. However, Petitioner responded favorably to the treatment rendered by his treating physicians, including the injections and trial stimulator. Furthermore, Dr. Holmes did not review the FCE of June 21, 2010, with valid results concluding that Petitioner could not return to work as a bus driver. Rather, Dr. Holmes relied only on the FCE of August 2010 in opining that Petitioner could return to work. In further finding causal connection for Petitioner's RSD, the Arbitrator places greater weight on the opinions of Petitioner's treating physicians as buttressed by Petitioner's positive treatment results, than on the opinions of Drs. Holmes and Bellos.

Based on the finding of causal connection and on the opinion of Dr. Anwar, the Arbitrator further finds that Petitioner is entitled to the prospective medical care prescribed by Dr. Anwar in the form of a spinal cord stimulator implant and to its attendant care pursuant to Section 8(a) of the Act.

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? N. Is Respondent due any credit?

Based upon the Arbitrator's finding that Petitioner's current condition of ill-being is causally related to the accident of January 6, 2009, the Arbitrator further finds that Respondent is to pay all reasonable and necessary medical expenses incurred by Petitioner in the care and treatment of his condition. Respondent is entitled to a credit for medical expenses paid.

L. Is Petitioner entitled to temporary total disability benefits?

Petitioner testified that he was off-work from January 26, 2009 through May 1, 2009, and then again from January 25, 2010 through the date of arbitration, September 18, 2012. Petitioner indicated that he was taken off-work by his treating physician, Dr. French, on January 25, 2010, and has not been released to return to work yet by Dr. Anwar, his current treating physician. This testimony is supported by the medical records of Dr. French, Dr. Jain and Dr. Anwar.

Based upon the Arbitrator's finding of causal connection and on the medical records of Petitioner's treating physicians, the Arbitrator further finds that Petitioner is entitled to temporary total disability benefits commencing January 26, 2009 through May 1, 2009, and commencing again January 25, 2010 through September 18, 2012. Respondent shall receive credit for amounts paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Vanderveen,

Petitioner,

14IWCC0338

vs. NO: 11 WC 09662

Barr Trans Network, Inc. i/s/a Barr Trans,

Respondent.

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 accident, medical expenses, causal connection, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 3, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

DLG/gal
O: 5/1/14
45

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VAMDERVEEN, WILLIAM
Employee/Petitioner

Case# **11WC009662**

12WC005481

14IWCC0338

BARR TRANS NETWORK INC I/S/A BARR TRANS
Employer/Respondent

On 9/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

INMAN & FITZGIBBONS LTD
COLIN MILLS
201 W SPRINGFIELD AVE STE 1002
CHAMPAIGN, IL 61820

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

14IWCC0338

William Vanderveen
Employee/Petitioner

v.

Barr Trans Network, Inc. i/s/a Barr Trans
Employer/Respondent

Case # **11** WC **09662**

Consolidated cases: **12 WC 054811**

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 **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 6, 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. [x] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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 _____

[1] Separate decisions are issued.

FINDINGS

On **10/30/2009**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**36,986.56**; the average weekly wage was $**711.28**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**1,083.86** for TTD benefits, for a total credit of $**1,083.86**.

Respondent is entitled to a credit of $**12,436.86** under Section 8(j) of the Act.

ORDER

No benefits are awarded. Although Petitioner proved a compensable accident, he failed to prove his condition of ill-being for which he seeks compensation is causally connected to the accident.

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

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

Signature of Arbitrator

8/30/2013
Date

SEP 3 - 2013

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 15, 2011, Petitioner filed an application for adjustment of claim, alleging that on or about December 1, 2009, he sustained accidental injuries to his right wrist when he slipped and fell. On February 7, 2012, Petitioner amended his application for adjustment of claim to allege the injury occurred while he was pulling a handle on trailer wheels.

Petitioner, a right hand dominant truck driver, testified that his job duties included driving, loading and unloading the truck. Petitioner denied any prior problems with his right wrist or hand. On December 1, 2009, Petitioner was making a delivery to Citgo Oil, which required delivery drivers to slide the back wheels of the trailer to the rear. Petitioner's trailer was old and rusted. He asked someone to rock the trailer while he pulled the pin to slide the back wheels to the rear. In the process, his right hand and wrist became "jammed."

Petitioner further testified that he reported the accident to Respondent's owner and completed an accident report. The accident report in evidence gives states the injury occurred "A.M. – 12-1" and Petitioner returned to work on "12-3." The report describes the accident as follows: "Pulling handle on trailer wheels attempting to slide tandems." The date of the report is listed as "12-." Petitioner testified that he sought treatment at Concentra in Bridgeview on December 1, 2009.

The medical records from Concentra show that at 6:55 a.m. on December 1, 2009, Petitioner presented at the clinic, complaining of injury to his right index finger and wrist as a result of pulling tandems on a trailer at 1 p.m. on October 30, 2009. Petitioner complained of persistent pain and denied receiving any treatment for the injury. The attending physician diagnosed finger and wrist sprain, prescribed wrist support and Aleve, and released Petitioner to return to work full duty.

The medical records from Dr. Joshi, Petitioner's primary care physician, indicate that on December 3, 2009, Petitioner complained of pain in the right upper extremity and was diagnosed with thumb sprain. The medical records from Dr. Joshi further show that Petitioner developed symptoms indicative of a stroke before January 6, 2010.

Petitioner testified that he continued to work until December 30, 2009, when he suffered another work accident, which is subject of the companion case No. 12WC05481. Petitioner further testified that he treated with Dr. Fakhouri for the injury to the right index finger and wrist.

The medical records from Midwest Orthopaedic Consultants show that on January 6, 2010, Petitioner saw Dr. Perez-Sanz, complaining of persistent pain in the right wrist and index finger after a work injury in October, while he was pulling a trailer pin. Dr. Perez-Sanz ordered an MRI. The MRI, performed January 18, 2010, showed a possible small ganglion cyst along the dorsal aspect of the carpal tunnel at the level of the trapezoid second metacarpal junction, erosion involving the dorsal medial aspect of the trapezoid, possible thickening of the distal median nerve, effusion within the distal radioulnar joint, and fluid along the ventral aspect of the radial styloid. On January 20, 2010, Dr. Perez-Sanz recommended consulting a hand and wrist

specialist, and Petitioner indicated her would see Dr. Fakhouri. On January 21, 2010, Petitioner saw Dr. Fakhouri, giving a history of pain in the right wrist and index finger since the beginning of December, after "pulling on a level of his tractor trailer." Dr. Fakhouri performed X-rays and diagnosed osteophyte formation and degenerative joint disease of the right wrist, including the lunate and the capitate, and PIP joint arthrosis with mucous cyst of the right index finger. Dr. Fakhouri opined the accident aggravated the degenerative conditions, and performed cortisone injections into the right wrist and index finger. He expected the symptoms to subside in four to six weeks and instructed Petitioner to follow up as needed.

Petitioner testified that he suffered a stroke in January of 2010, and did not return to Dr. Dr. Fakhouri until February 10, 2011. When he returned to Dr. Fakhouri, his right hand was extremely weak. Petitioner denied sustaining an intervening injury to his right hand or wrist. The medical records from Dr. Fakhouri show that on February 10, 2011, Petitioner complained that the wrist was severely painful, with limited range of motion. Dr. Fakhouri diagnosed chronic scapholunate disassociation that progressed to advanced scapholunate collapse. He recommended surgery. On March 3, 2011, Petitioner followed up, attributing the right wrist pain to an injury in December of 2009. Dr. Fakhouri opined that Petitioner's chronic scapholunate dissociation "is related to his December 2009 injury." On April 6, 2011, Dr. Fakhouri performed a proximal carpectomy, partial radial styloidectomy, and post interosseous neurectomy. Postoperatively, Petitioner underwent physical therapy.

On April 27, 2011, Dr. Carroll, an orthopedic surgeon, examined Petitioner at Respondent's request. Petitioner gave a history consistent with his testimony. Dr. Carroll opined the accident caused strain to the right thumb, index finger and possibly the wrist. Dr. Carroll did not think the accident caused or accelerated the advanced scapholunate collapse.

On June 20, 2011, Petitioner followed up with Dr. Fakhouri, reporting almost complete resolution of the wrist pain. On July 25, 2011, Petitioner reported the wrist was doing well. On physical examination, the strength was normal, with decreased flexion and extension due to the surgery. X-rays showed the radial capitate joint to be congruent. Dr. Fakhouri released Petitioner to return to work full duty and discharged him from care.

Petitioner testified that he retired from Respondent's employ because of the stroke. Currently, Petitioner is receiving Social Security disability benefits and veterans' benefits. Petitioner testified that the right wrist is weak and does not bend. He uses his left hand to perform the activities of daily living he used to do with his right hand. Petitioner feels the right hand "is not functioning" and he has "no movement in the wrist at all."

On cross-examination, Petitioner testified the accident might have occurred on November 30, 2009, but not on October 30, 2009. Petitioner recalled the accident occurred at 1 or 1:30 p.m., and he sought treatment at Concentra the following day. Petitioner further testified that the stroke affected his memory of the events. On redirect examination, Petitioner testified that the accident must have occurred on December 1, 2009, because "they would not let [him] work any time after an accident." On re-cross examination, Petitioner testified that "once an accident is reported to your boss or to anybody with authority in the company, you're done. You stop

working. They send you [for treatment]." Petitioner denied sustaining a work accident in October of 2009.

In support of the Arbitrator's decision regarding (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (D), what was the date of the accident, the Arbitrator finds as follows:

The Arbitrator notes that Petitioner has poor memory of the events because he suffered a stroke in early January of 2010. Furthermore, the stoke affected the histories he gave to his medical providers after early January of 2010. Based on the documentary evidence and the opinion of Dr. Carroll, the Arbitrator finds that Petitioner sustained a work accident on or about October 30, 2009, spraining or straining his right index finger and right wrist. Petitioner did not initially report the accident and continued working. On or about December 1, 2009, Petitioner reported the accident and was sent to Concentra.

In support of the Arbitrator's decision regarding (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator notes that on January 21, 2010, Dr. Fakhouri diagnosed osteophyte formation and degenerative joint disease of the right wrist, and PIP joint arthrosis with mucous cyst of the right index finger. Dr. Fakhouri performed cortisone injections into the right wrist and index finger and instructed Petitioner to follow up as needed. Dr. Fakhouri thought the accident aggravated the symptoms of the underlying degenerative conditions, and expected the symptoms to subside in four to six weeks. The Arbitrator does not find credible Dr. Fakhouri's subsequent opinion on March 3, 2011, that Petitioner's chronic scapholunate dissociation "is related to his December 2009 injury." The Arbitrator notes that Dr. Fakhouri did not explain the basis for his opinion, especially in light of X-ray and MRI findings showing no scapholunate dissociation or collapse in January of 2010. The Arbitrator relies on the opinion of Dr. Carroll that the accident caused strain to the right thumb, index finger and possibly the wrist, but did not cause or accelerate the advanced scapholunate collapse. At the arbitration hearing, Petitioner did not testify to any residual symptoms in his right index finger or thumb. The Arbitrator finds the surgery on April 6, 2011, for non-work related advanced scapholunate collapse constitutes an independent intervening cause, precluding a determination of any residual disability from the wrist sprain or strain.

In support of the Arbitrator's decision regarding (J), were the medical services that were provided to Petitioner reasonable and necessary, and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner seeks an award of the medical bills he incurred for treatment of the advanced scapholunate collapse. The Arbitrator denies these medical bills as not causally related to the work accident.

14IWCC0838

In support of the Arbitrator's decision regarding (L), what is the nature and extent of the injury, the Arbitrator finds as follows:

As discussed, the surgery on April 6, 2011, for non-work related advanced scapholunate collapse constitutes an independent intervening cause, precluding a determination of any residual disability from the wrist sprain or strain. Accordingly, no permanent disability benefits are awarded.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gerardo Mendoza,

Petitioner,

14IWCC0339

vs. NO: 11 WC 19340

Andy Frain Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, vocational rehabilitation assessment, maintenance, 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 October 18, 2013 is hereby affirmed and adopted.

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

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

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

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

DATED: MAY 0 5 2014

David L. Gore

DLG/gal
O: 5/1/14
45

Stephen Mathis

Mario Basurto

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

MENDOZA, GERARDO
Employee/Petitioner

Case# **11WC019340**

14IWCC0339

ANDY FRAIN SERVICES
Employer/Respondent

On 10/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0140 CORTI ALEKSY & CASTANEDA
RICHARD ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

14IWCC0339

GERARDO MENDOZA
Employee/Petitioner

v.

ANDY FRAIN SERVICES
Employer/Respondent

Case # **11** WC **19340**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **8/19/2013**. 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

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

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

N. [ ] Is Respondent due any credit?

O. [X] Other **Vocational Rehabilitation Assessment**

FINDINGS

On the date of accident, **5/10/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

See attached conclusions of law for the Arbitrator's causation-related findings.

In the year preceding the injury, Petitioner earned $**20,368.40**; the average weekly wage was $**391.70**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $**8,882.19** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**8,882.19**.

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

ORDER

The parties agree Petitioner was temporarily totally disabled from May 10, 2011 through May 18, 2011 and from June 8, 2011 through November 28, 2011. These two periods total 26 1/7 weeks. They further agree that Respondent paid $8,882.19 in temporary total disability benefits prior to trial. Arb Exh 1.

The Arbitrator finds that Petitioner failed to establish a causal connection between the undisputed work accident of May 10, 2011 and the restrictions that Dr. Lorenz re-instituted on November 28, 2011. Based on that finding, the Arbitrator denies Petitioner's claim for maintenance from November 29, 2011 through the hearing of August 19, 2013.

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that Respondent was obligated to prepare a written assessment pursuant to Rule 7110.10 of the Rules Governing Practice Before the Workers' Compensation Commission. Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191 (1st Dist. 2009).

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

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

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

Molly C. Mason
Signature of Arbitrator

10/18/13
Date

OCT 18 2013

Arbitrator's Findings of Fact

The parties agree that Petitioner, an unarmed security officer, sustained an accident while working at a FedEx facility for Respondent on May 10, 2011. Petitioner testified his duties included checking employee I.D. cards, searching employees for weapons and recording information concerning the trailers that went in and out of Respondent's facility. T. 13-14, 17. Petitioner testified he was not required to get into a tractor to talk with a driver but sometimes had to open the rear door of an exiting trailer to make sure it was empty. The rear doors were of the roll-up type. Petitioner would open the door to the point where he could see the interior of the trailer. T. 15. Petitioner testified he was not required to perform any lifting. T. 15-16.

Petitioner testified he started working for Respondent in March or April of 2010, at which point he underwent training at a FedEx facility in Summit for about a month. At the time of the accident, he worked at a FedEx facility in McCook. T. 18-19.

Petitioner testified he worked the night shift, from 10 PM to 6 AM. To his recollection, he was working Monday through Friday as of the accident. T. 20-21.

Petitioner testified that, on May 10, 2011, he was on his motorcycle, exiting the FedEx facility, when another worker struck him head on, causing him to fly off of his bike and land on the concrete. His supervisor, Veronica Zenner, came to his aid and took him to the Emergency Room at LaGrange Memorial Hospital. T. 23-24.

The Emergency Room records reflect that Petitioner complained of back and bilateral leg pain after being struck by a car while he was operating his motorcycle. The attending physician, Dr. Phillips, noted a past history of a spinal fusion. He also noted leg abrasions and a laceration below Petitioner's right knee. He described Petitioner as cooperative and exhibiting an "appropriate mood and affect."

Dr. Phillips ordered X-rays of the lumbar spine, right knee and left tibia/fibula. The lumbar spine X-rays showed post-surgical changes from the previous fusion of L4-L5 and L5-S1. [Dr. Lorenz of Hinsdale Orthopaedics performed this fusion on May 2, 2008. The need for the fusion stemmed from a work accident of January 30, 2008 involving a different employer. RX 4.] The right knee X-ray showed a small effusion but no fracture. The left tibia/fibula X-ray showed no acute fracture or dislocation. Petitioner was given Motrin and Vicodin for pain. Dr. Phillips released Petitioner to light duty, with no lifting over 5 pounds. He instructed Petitioner to follow up with Dr. Khan the next day. PX 1. T. 24-25.

The Emergency Room records (PX 1) describe Petitioner as "alert and oriented." They contain no reference to drug testing.

Petitioner testified he went to the LaGrange Medical Center the following day, May 11, 2011, but saw Dr. Dugar instead of Dr. Khan. T. 25. Dr. Dugar noted that, the previous morning, Petitioner was on his motorcycle, stopped at a stop sign, when a FedEx employee driving a station wagon struck him, causing him to be thrown off of the motorcycle. Dr. Dugar noted that Petitioner landed on his right side.

Petitioner complained to Dr. Dugar of pain in his lower back, right shoulder and left shin, as well as a "pulling sensation" in his right knee after walking that day. Petitioner indicated he had undergone a lumbar fusion in 2008.

On examination, Dr. Dugar noted tenderness but a full range of motion in the right shoulder, mild muscle spasm in the lumbar area, a scrape and minimal swelling of the right knee and bruising/minimal swelling of the left shin.

Dr. Dugar diagnosed muscle strains and contusions. He recommended that Petitioner begin physical therapy "after Ibuprofen and rest." He directed Petitioner to refrain from working and return in two days. PX 2.

Petitioner returned to LaGrange Medical Center on May 13, 2011 and saw Dr. Khan. The doctor's note sets forth a consistent history of the accident of May 10, 2011. Dr. Khan noted that Petitioner injured his lower back, right shoulder, right knee and left shin. He also noted that Petitioner complained of 3/10 lower back pain despite taking Hydrocodone. On examination, Dr. Khan noted spasm in the right trapezius area, mild tenderness to palpation of the lumbar spine and a mild right knee abrasion. He diagnosed a trapezius muscle spasm and a cervical strain with right-sided radicular symptoms. He instructed Petitioner to continue the Vicodin (but only when at home), start Naproxen after finishing the Ibuprofen, begin therapy and return on May 17th. He directed Petitioner to stay off work.

On May 16, 2011, Petitioner underwent a physical therapy evaluation at LaGrange Medical Center. T. 26. The evaluating therapist noted complaints of pain in the neck, back, right shoulder and right knee. PX 2.

Petitioner returned to Dr. Khan on May 17, 2011, as directed. Petitioner reported some right trapezius and lower back improvement secondary to therapy but described his neck pain as unchanged. On cervical spine examination, Dr. Khan noted a reduced range of motion to the right, paracervical tenderness on the right and mild trapezius tenderness. He refilled the Naproxen and instructed Petitioner to continue therapy and return in ten days. He released Petitioner to non-specific "light duty" as of May 19, 2011. PX 2. T. 26-27.

Petitioner testified he did not return to work on May 19, 2011 because Respondent did not offer light duty. T. 27. He delivered Dr. Khan's light duty note to his supervisor, Veronica Zenner. On receipt of the note, Zenner told him, "I'll get back to you." Zenner did not schedule him for work thereafter. T. 36-37.

RX 1 reflects that Respondent terminated Petitioner on May 23, 2011 because Petitioner "failed drug test." RX 1 also reflects that Petitioner was "warned before discharge." No drug test records are in evidence. Petitioner testified that, at some point after he delivered the light duty note to Zenner, Brian Rayzicks, Respondent's branch manager, called him and informed him he was being terminated. T. 33-34, 37. He never heard from Respondent again. T. 47.

Petitioner attended therapy at LaGrange Medical Center on May 24, 25 and 26, 2011. On May 26, 2011, the therapist noted that Petitioner complained of neck pain, especially when looking up and to the right. She recommended that Petitioner continue therapy. PX 2.

On June 8, 2011, Petitioner saw Dr. Lorenz of Hinsdale Orthopaedics. Petitioner testified he selected Dr. Lorenz because the doctor had previously operated on his lower back. T. 28.

Dr. Lorenz's note of June 8, 2011 reflects that Petitioner previously underwent a lumbar fusion, returned to work following the fusion and was "doing fine" until the accident of May 10, 2011. The note also reflects that Petitioner had "multiple areas of complaints" following this accident and was "taken to occupational therapy," where, according to Petitioner, a drug test was "slightly positive for marijuana."

Dr. Lorenz noted that Petitioner complained of neck pain radiating toward the right scapular area and right shoulder.

On cervical spine examination, Dr. Lorenz noted a positive Spurling maneuver to the right and a decreased range of motion. On lumbar spine examination, Dr. Lorenz noted some mild tenderness in the paraspinous musculature, a "sensation of tightness" and passive forward flexion of 50 to 60 degrees.

Dr. Lorenz obtained cervical and lumbar spine X-rays. The cervical spine X-rays showed no fractures. The lumbar spine X-rays showed "a well-healed fusion with no abnormality."

With respect to the cervical spine, Dr. Lorenz diagnosed C4-C5 radicular irritation and a possible disc herniation. With respect to the lumbar spine, he diagnosed a strain.

Dr. Lorenz started Petitioner on a Medrol Dosepak. He prescribed Norco for severe pain and a cervical spine MRI. He took Petitioner off work and instructed him to continue therapy. PX 3.

The cervical spine MRI, performed on June 9, 2011, showed mild spondylotic changes with reversal of normal lordosis, a mild disc bulge without significant stenosis at C4-C5 and a disc bulge and mild stenosis at C5-C6, greater on the right. PX 3.

Petitioner returned to Dr. Lorenz on June 22, 2011. Petitioner again complained of neck pain, especially when extending his neck or turning his head to the right.

On examination, Dr. Lorenz noted 5/5 strength, decreased rotation to the right, full rotation to the left, some pain on flexion and extension, tenderness over the right trapezius, some focal trigger point and tenderness in the right occiput.

Dr. Lorenz interpreted the MRI as showing diffuse bulging at C4-C5 and C5-C6, with no signs of herniation, and a high intensity signal in the posterior annulus at C5-C6, "consistent with what looks like a partial tear." He started Petitioner on Naprelan, an anti-inflammatory, and instructed him to stay off work. He referred Petitioner to Dr. Gruft for therapy and to Dr. Lipov for possible occipital trigger point and/or facet injections. PX 3.

Petitioner underwent therapy at Dr. Gruft's facility, From Pain to Wellness, from July 14, 2011 through August 26, 2011. PX 3. T. 29-31. Petitioner testified he never saw Dr. Lipov. T. 30.

Petitioner returned to Dr. Lorenz on November 28, 2011. In his note of that date, Dr. Lorenz indicated Petitioner reported improvement secondary to the therapy and complained only of "a little trigger point on the right" and some low back achiness with excessive activity. Dr. Lorenz obtained lumbar spine X-rays, which showed an "L4 to S1 fusion with the hardware removed." Dr. Lorenz assessed the following: 1) resolved cervical strain; 2) cervical spondylosis; and 3) L4 to S1 fusion." He released Petitioner to "permanent light duty" in accordance with a functional capacity evaluation performed in 2009, i.e., no lifting over 17 pounds frequently, no lifting over 50 pounds occasionally, sitting limited to 60-minute intervals, standing limited to 30-minute intervals and occasional bending. He found Petitioner to have reached maximum medical improvement. PX 3.

At the hearing, the parties stipulated that Petitioner was temporarily totally disabled from May 10, 2011 through May 18, 2011 and from June 8, 2011 through November 28, 2011. These two intervals total 26 1/7 weeks. They also stipulated that Respondent paid temporary total disability benefits totaling $8,882.19. Arb Exh 1.

The dispute in this case centers on Petitioner's claim for maintenance benefits from November 29, 2011 through August 19, 2013, the date of hearing. Arb Exh 1.

Petitioner testified he did not resume working for Respondent at any time after his last visit to Dr. Lorenz on November 28, 2011. T. 37. Petitioner also testified he stopped receiving benefits as of that date. T. 38, 47. After Dr. Lorenz released him to restricted duty, he began looking for work. On about May 15, 2012, he began working as a pizza delivery driver. He was still working in this capacity as of the hearing. He testified he does not receive paychecks or benefits. His pay consists of $2.50 per delivery plus tips. He receives his pay at the end of each workday. T. 39-40. He uses his own vehicle to make the deliveries. He is responsible for paying for gas, insurance and any necessary repairs. As of the hearing, he was working from 5:00 PM

to midnight, typically five nights per week. T. 41, 44. The pizza parlor stops delivering at midnight. If an order comes in at 11:59 PM, he has to pay the business for the pizza upfront with the understanding he will collect from the customer on delivery. T. 42. He averages about $300 per week, before deducting gas and other expenses. T. 44. He pays about $400 in child support per month. T. 46. He is continuing to look for work. He receives job leads from friends but the leads are typically for jobs that involve heavy lifting. T. 47-48. In the last six months, a business called Polar Ice offered him a job but the job exceeded his work restrictions. T. 46.

Petitioner denied re-injuring his neck or back after May 10, 2011. T. 48. The lumbar spine surgery that Dr. Lorenz performed before that date stemmed from a work accident. It was after he recovered from this surgery that he began working for Respondent. T. 48-49.

Under cross-examination, Petitioner testified he began working for Respondent in approximately May 2010. He worked from 10:00 to 6:00. He did not work overtime. T. 51. The accident of May 10, 2011 occurred at about 6:05 AM, right after he left work. T. 52. He was in FedEx's parking lot when a FedEx employee struck him. T. 52. Before he returned to Dr. Lorenz in June of 2011, he had last seen the doctor in early 2010, at which point the doctor had him on permanent restrictions. T. 55. The job he accepted at Respondent was within those restrictions. T. 60. Otherwise, he would not have been able to accept the job. T. 60. He told Respondent about the restrictions when he was hired. T. 61. The job allowed him to sit and stand. He was not required to exceed Dr. Lorenz's restrictions. T. 61. After the May 10, 2011 accident, he underwent drug testing. T. 63. His understanding is that the testing was positive for marijuana. T. 64. When Respondent's regional manager called him, he asked the manager why he was being terminated and was told that it was because the drug test "came out positive." T. 64. Respondent had never reprimanded him for not performing his job correctly. T. 65. He cannot remember whether the restrictions Dr. Lorenz imposed in November of 2011 were different from the previous restrictions. T. 65. The job he performed for Respondent was within Dr. Lorenz's lifting and sit/stand restrictions. The job did not require him to bend frequently. T. 71. When he looked for work, he went through agencies. He does not have proof of the job applications he has submitted. T. 73-74. He writes down information concerning his pizza delivery earnings. He did not bring any of this information to the hearing. T. 73. When he worked for Respondent, he was not reimbursed for gas or vehicle repairs. T. 73. He applied online for the job with Respondent. T. 74.

On redirect, Petitioner testified he wanted to return to work for Respondent when he presented Dr. Khan's light duty note to Veronica Zenner. Zenner did not tell him he would be put back to work. He next had contact with Respondent when the regional manager called him and told him he had been terminated. T. 81-82. No one provided him with any drug test results. His belief that the test was positive was based on what Respondent told him. T. 83.

Respondent did not call any witnesses. In addition to the exhibits previously discussed, Respondent offered into evidence an undated "return to work job description" completed by Dr. Phillips concerning Petitioner's security officer job. This description describes the job as sedentary and involving no lifting over 5 pounds. RX 2. Respondent also offered into evidence

a print-out of the temporary total disability and medical payments it made in this case. RX 3. Respondent also offered into evidence records concerning the treatment Petitioner underwent with Dr. Lorenz prior to May 10, 2011. RX 3.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed work accident of May 10, 2011 and his current condition of ill-being?

The Arbitrator finds that Petitioner's undisputed work accident resulted in a new cervical spine condition of ill-being, as diagnosed by Dr. Lorenz, and an aggravation of his pre-existing lumbar spine condition of ill-being. In so finding, the Arbitrator relies on the "chain of events" and the treatment records. The records from LaGrange Memorial Hospital and LaGrange Medical Center reflect that Petitioner was on a motorcycle, stopped at a stop sign, when another worker driving a station wagon struck him, causing him to be thrown off the motorcycle. The records also reflect that Petitioner experienced an abrupt onset of right-sided spine and bilateral leg pain after this collision. Within a couple of days of the collision, Petitioner was also complaining of right-sided trapezius and neck pain. Dr. Khan diagnosed cervical, right trapezius and lumbar strains on May 13, 2011. When Dr. Lorenz saw Petitioner on June 8, 2011, having last seen him about fifteen months earlier, he noted that Petitioner had returned to work following the 2008 lumbar fusion and had been doing relatively well until the May 10, 2011 accident. Based on Petitioner's presentation on June 8, 2011, Dr. Lorenz diagnosed a lumbar strain and a possible cervical disc herniation. He ordered a cervical spine MRI, which he later interpreted as showing bulges and what appeared to be a partial tear at C5-C6. He recommended a course of conservative care with two different physicians, only one of whom Petitioner saw. When Dr. Lorenz last saw Petitioner, on November 28, 2011, he noted that Petitioner was still experiencing some right-sided "trigger point" pain in his upper back and some lower back achiness. PX 3.

The Arbitrator further finds that Petitioner failed to establish a connection between the undisputed work accident of May 10, 2011 and the permanent restrictions that Dr. Lorenz re-instituted on November 28, 2011. Those restrictions were based on a functional capacity evaluation performed on December 10, 2009 in connection with the January 30, 2008 work accident. RX 4.

Is Petitioner entitled to maintenance?

The parties agree that Petitioner was temporarily totally disabled during two intervals, with the last interval ending on November 28, 2011, the date of Petitioner's last visit to Dr. Lorenz. Arb Exh 1. The dispute centers on whether Petitioner is entitled to maintenance from November 29, 2011 through the August 19, 2013 hearing.

Section 8(a) of the Act provides that an "employer shall * * * pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the

employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a). The courts have construed the term "rehabilitation" broadly to include an injured worker's self-directed job search. See, e.g., Greaney v. Industrial Commission, 358 Ill.App.3d 1002, 1019 (2005). A claimant is generally entitled to vocational rehabilitation when he sustains an injury which causes a reduction in earning power. National Tea Co. v. Industrial Commission, 97 Ill.2d 424, 432 (1983).

Petitioner argues that the injuries he sustained on May 10, 2011 caused a reduction in earning power. In advancing this argument, Petitioner relies in part on RX 2, a return to work job description completed by Dr. Phillips. Petitioner asserts that RX 2 memorializes work restrictions [including a 5-pound lifting restriction] imposed on Petitioner by Dr. Phillips after the May 10, 2011 accident. The Arbitrator does not view RX 2 as such. RX 2 bears no date and no reference to the accident.

Petitioner also relies on McHatton v. Manchester Tank, 08 WC 43131, a decision in which the Commission affirmed an award of maintenance to a claimant who conducted a self-directed job search after being terminated while subject to permanent restrictions. The Arbitrator views McHatton as factually distinguishable from the instant case. The claimant in McHatton acquired permanent restrictions as a result of the work accident at issue in his claim whereas Petitioner was subject to permanent restrictions before Respondent hired him. Petitioner testified he made Respondent aware of the restrictions at hiring. Petitioner also testified that the security job he performed for Respondent was within those restrictions. When Dr. Lorenz released Petitioner from care on November 28, 2011, he relied on a functional capacity evaluation performed in 2009 and imposed the same restrictions that Petitioner brought to Respondent's door. There is no indication that Dr. Lorenz linked any of the November 28, 2011 restrictions to the injuries Petitioner sustained on May 10, 2011.

Having found that Petitioner failed to establish causation as to the restrictions Dr. Lorenz re-instituted on November 28, 2011, the Arbitrator declines to award maintenance benefits in this case.

Was Respondent obligated to prepare an assessment pursuant to Rule 7110.10?

Rule 7110.10 of the Rules Governing Practice Before the Workers' Compensation Commission requires an employer, in consultation with an injured employee and his representative, to prepare a "written assessment of the course of medical care and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injuries be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity of work exceeds 120 continuous days, **whichever first occurs.**" [emphasis added] In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207-8 (1st Dist. 2009), the Appellate Court held that "Rule 7110.10 requires the preparation of a written assessment even in circumstances where no plan or program of vocational rehabilitation is necessary or appropriate."

In the instant case, Respondent stipulated to two intervals of temporary total disability, with the second interval consisting of 174 consecutive days. Arb Exh 1. At no point did Respondent prepare an assessment. Based on the wording of Rule 7110.10 and Ameritech Services, the Arbitrator finds that Respondent was obligated to prepare an assessment at the 120-day point, regardless of any other factors.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lee Walker,

Petitioner,

14IWCC0340

vs. NO: 08 WC 03203

United Airlines,

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 temporary total disability, causal connection, medical expenses, prospective medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby adopts the Arbitrator's findings of fact and conclusions of law. 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 October 11, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $49,000.00. 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: MAY 0 5 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 5/1/14
45

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

WALKER, LEE
Employee/Petitioner

Case# **08WC003203**

14IWCC0340

UNITED AIRLINES
Employer/Respondent

On 10/11/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 DONALD W FOHRMAN & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60654

0560 WIEDNER & McAULIFFE LTD
MARK P MATRANGA
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CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b) & 8(a)

14IWCC0340

Lee Walker
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **08** WC **3203**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **July 23 & 25, 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. [ ] 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, **November 2, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$29,334.24**; the average weekly wage was **$564.12**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$63,192.51** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$63,192.51**.

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 $376.08/week for 298 & 4/7th weeks, commencing November 3, 2007 through July 23, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 2, 2007 through July 23, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $63,192.51 for temporary total disability benefits that have been paid.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care requested pursuant to Section 8(a) of the Act in the form of the recommended left knee surgery prescribed by Dr. Nenno as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

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

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

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

Signature of Arbitrator

October 10, 2013
Date

ICArbDec19(b)

OCT 11 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Lee Walker
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **08** WC **3203**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute are causal connection, a period of temporary total disability benefits, and Petitioner's entitlement to prospective medical care. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he was employed by Respondent on November 2, 2007 as a flight attendant and had been so employed since October of 1997. Petitioner described that he was on his feet up to 15 hours at a time and that his job required constant walking, lifting, bending, squatting, and ability to lift doors weighing over 50 lbs. in case of an emergency. Petitioner was living in Ohio at the time of the injury and subsequently moved to New York.

On November 2, 2007, Petitioner was flying from Richmond, Virginia to Washington Dulles airport. He testified that about 10-15 minutes before landing, the crew was making final preparations and he was picking up trash and walking toward the rear of the aircraft when he tripped over a piece of carpeting that was not secured in front of the rear lavatory. Petitioner testified that he fell and hit the wall opposite the washroom door and fell into the washroom door and then landed hard on his knees. He testified that he injured his left knee and experiencing "striking pain" immediately following the occurrence. He notified two other flight attendants and later completed accident reports.

Prior to this incident, Petitioner testified that he had a left knee injury approximately six years earlier during an annual training exercise for re-certification. He testified that his treatment included an arthroscopic surgery and debridement. He missed approximately 6-8 weeks of work and then returned to work. Petitioner testified that he has had no left knee problems until November 2, 2007.

Medical Treatment

Petitioner testified that he went to Mercy Medical in Canton, Ohio. He was examined and placed off work. He testified that he followed up over the next few weeks while he was kept off work and moved to Buffalo, New York before Thanksgiving of 2007. The medical records reflect that a Dr. Hensley ordered a left knee MRI which was performed on November 20, 2007 and revealed no evidence of a meniscal tear, a minimal medial collateral ligament injury most likely remote in nature, and chondromalacia patella. PX2 at 142-43.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

14IWCC0840

Petitioner testified that he then went to Knee Center of Western New York and saw Dr. Stube as referred by Gallaher Bassett. The medical records reflect that Keith Stube, M.D. ("Dr. Stube") at The Knee Center of Western New York on December 24, 2007. PX1 at 1-2. He provided a history of injury while working, primarily anterior medial knee pain, and that he had been using ice and heat without relief. *Id.* He also reported a twisting injury six years prior which required an arthroscopy. *Id.* After an examination noting medial joint line tenderness with a positive McMurray's test, Dr. Stube diagnosed Petitioner with left medial knee pain and possible medial meniscal tear. *Id.* He ordered a left knee MRI. *Id.*

On January 21, 2008, Petitioner returned to the Knee Center and saw a certified physician's assistant, Jeffrey Rassman, PA-C ("Mr. Rassman") reporting continued symptomatology. PX1 at 3. Mr. Rassman noted that Petitioner appeared to have exacerbated mild patellar chondromalacia and administered a cortisone injection. *Id.* He provided a patellar stabilizing knee brace, recommended riding a stationary bike at home, and released him to sedentary work until his next follow up visit. *Id.* On March 17, 2008, Petitioner reported continued pain along the medial aspect of the knee. PX1 at 4-5. Mr. Rassman reviewed Petitioner's recent MRI noting that it showed a fissure along the medial aspect of the patella. *Id.* He noted that Petitioner had not improved after physical therapy, his injection did not benefit Petitioner, and he requested authorization for Visco supplementation for the fissure in the patella. *Id.*

First Section 12 Examination – Dr. Zoellick

On April 8, 2008, Petitioner underwent an independent medical examination with David Zoellick, M.D. ("Dr. Zoellick") at Respondent's request. PX8 at 1-5. Petitioner reported continued pain on the inside of his left knee with no change, swelling and increase in pain with any activity. *Id.* Dr. Zoellick examined Petitioner, took a history from him, reviewed various medical records, and issued a report of the same date. *Id.* He diagnosed Petitioner with a left knee strain/contusion with aggravation of underlying chondromalacia of the left knee following the accident at work. *Id.* He recommended either repeat steroid injections with therapy, hyaluronic acid supplementations such as Supartz or Synvisc, or repeat arthroscopy. *Id.*

Continued Medical Treatment

Petitioner received three Euflexxa injections on May 15, 22, and 29, 2008. PX1 at 5-11. He then came under the care of Donald Nenno, II, M.D. ("Dr. Nenno") on July 20, 2008, when he presented with complaints of swelling, locking and giving way of the left knee. PX2 at 100-101. On examination, Dr. Nenno noted tenderness over the left knee generally, but especially along the medial joint line and medial patellar area. *Id.* He diagnosed Petitioner with chronic left knee pain of an unclear etiology, but most likely on the basis of chondromalacia. *Id.* He ordered Neurontin and scheduled a follow up in one month. *Id.*

On August 17, 2008, Petitioner reported that the Neurontin did not help him significantly and that he continued to have some swelling, giving way sensations, and pseudo-locking with the knee in extension. PX2 at 98. Dr. Nenno diagnosed Petitioner with classic patellofemoral signs, ordered physical therapy for patellar mobilization and strengthening, and a follow up visit. *Id.*

On September 14, 2008, Petitioner returned to Dr. Nenno reporting no improvement with physical therapy, decreased range of motion, feeling that his knee was "full" and gave way at times, and that squatting bothers

him significant. PX2 at 96. Dr. Nenno noted Petitioner's lack of improvement despite ten months of conservative treatment and recommended an arthroscopy to diagnose and debride the knee. *Id.*

Petitioner underwent the recommended surgery on October 6, 2008. PX2 at 93-94. Pre-operatively, Dr. Nenno diagnosed Petitioner with chondromalacia of the left knee. *Id.* He performed an arthroscopy, debridement and excision of plica left knee. *Id.* Intra-operatively, Dr. Nenno noted significant chondromalacia of the medial facet of the patella and significant cartilaginous loose fragments within the knee, a significant plica formation along the medial femoral condyle, and fairly well-maintained medial and lateral compartments and anterior and posterior cruciate ligaments. *Id.* He also debrided synovitis anteriorly and medially and removed plica from the superior lateral aspect of the suprapatellar pouch, across the suprapatellar pouch, and down the medial gutter. *Id.* Post-operatively, Dr. Nenno diagnosed Petitioner with chondromalacia of the left knee plus plica. *Id.*

Petitioner followed up with Dr. Nenno post-operatively from October 20, 2008 through December 2, 2008 at which time he ordered additional physical therapy. PX2 at 87, 89, 91. At his initial physical therapy session on December 12, 2008, the physical therapist noted a positive Clarke's sign for chondromalacia patella on the left. PX4 at 8-10.

As of January 6, 2009, Dr. Nenno noted that Petitioner was making slow but continued progress. PX2 at 85. Petitioner was standing and walking fairly well, but was cautious with weight bearing. *Id.* The knee was stable and had full range of motion, although there was some tenderness but no effusion. *Id.* Dr. Nenno ordered continued physical therapy and scheduled a follow up in six weeks. *Id.* On February 13, 2009, Petitioner reported stiffness aggravated by stair climbing or squatting, inability to kneel, and significant swelling in the knee. PX2 at 83. Dr. Nenno requested authorization for Synvisc injections to improve function. *Id.*

Second Section 12 Examination – Dr. Zoellick

Petitioner saw Dr. Zoellick a second time on February 24, 2009. PX8 at 6-9. At that time, Petitioner reported continued pain under the kneecap and pain with bending, kneeling, squatting, and ascending/descending stairs. *Id.* He also reported only a 20% improvement since his surgery in October. *Id.* On examination, Dr. Zoellick noted no crepitus or instability, minimal swelling, and full range of motion. *Id.* Lachman and anterior Drawer tests were negative, but there was pain with patellofemoral compression, and Petitioner had tenderness medially and laterally as well as on extremes of motion. *Id.*

Dr. Zoellick diagnosed Petitioner with left knee chondromalacia that was aggravated or caused by his injury at work. *Id.* He noted that Petitioner's examination findings were objectively consistent with his reported symptoms of pain with patellofemoral compression (i.e., pain going up and down stairs). *Id.* He agreed with the recommendation for Synvisc injections and a trial return to work thereafter. *Id.* He opined that Petitioner was not yet at maximum medical improvement. *Id.*

Continued Medical Treatment

Petitioner continued to follow up with Dr. Nenno from March 13, 2009 through May of 2009. PX2 at 72-81. Petitioner received the recommended series of three Synvisc injections through May 12, 2009. PX2 at 75, 77. Petitioner testified that these injections did not change his pain level.

At his next follow up visit on July 9, 2009, Petitioner reported really having no change in his knee condition, difficulty with walking/stairs/kneeling and pain at rest. PX2 at 72. Dr. Nenno's examination revealed no

swelling or deformity, normal gait, full range of motion, and tenderness about the patellofemoral joint. *Id.* Dr. Nenno prescribed Celebrex to see if that helped improve Petitioner's function. PX2 at 72.

On July 21, 2009, Petitioner underwent a functional capacity evaluation at Niagara Physical Therapy. PX2 at 110-119. The evaluation report indicated that Petitioner could perform very light duty with no lifting over 10 lbs. and no standing for more than 6 hours. PX2 at 113. Petitioner testified that Respondent remained unable to accommodate his work restrictions at this time.

Petitioner returned to Dr. Nenno on August 14, 2009, but noted that the functional capacity evaluation results did not indicate what Petitioner's restrictions would be. PX2 at 68. He scheduled a follow up visit in six weeks. *Id.* On September 25, 2009, Petitioner reported that he was not doing very well regarding his knee. PX2 at 65. He reported pain, limping, swelling, inability to walk over one block or kneel, and that stairs were almost impossible to do. *Id.* Dr. Nenno diagnosed Petitioner with chronic left knee pain status post arthroscopy one year earlier and now showing significant patellofemoral chondromalacia. *Id.* He recommended an arthroscopy or perhaps some form of a partial knee replacement depending on the intraoperative findings at that time. *Id.*

Third Section 12 Examination – Dr. Zoellick

Petitioner saw Dr. Zoellick a third time on February 9, 2010. PX8 at 10-13. At that time, he reported constant pain, pain with walking/bending/twisting/going down stairs, and no instability or weakness, but incapacitation due to the pain. *Id.* On examination, Dr. Zoellick noted a slight antalgic gait, mild swelling of the left knee with tenderness along the medial joint line, and mild pain on patellofemoral compression. *Id.* X-rays revealed slight medial joint space narrowing. *Id.*

Dr. Zoellick reviewed additional treating medical records and Petitioner's functional capacity evaluation test results. *Id.* He opined that Petitioner's left knee complaints were due to chondromalacia patella and that a third arthroscopy would not do much to change Petitioner's condition. *Id.* Instead, Dr. Zoellick recommended one month of work conditioning and then to increase Petitioner's activity level. *Id.* He noted that if Petitioner was unable to undergo the work conditioning, then surgery would be the only remaining option. *Id.* In those circumstances, Dr. Zoellick recommended a patellofemoral resurfacing procedure instead of any type of knee replacement given that Dr. Nenno's last operative note reflects that the articular cartilage in Petitioner's medial and lateral joints looked good. *Id.* He also opined that Petitioner could return to work based on the functional capacity evaluation results. *Id.*

Continued Medical Treatment

Petitioner returned to Dr. Nenno on May 4, 2010 at which time he commented on Dr. Zoellick's report. PX2 at 56-57. Petitioner reported that he had constant pain in his whole knee, ability to walk about a block, and difficulty with stairs. *Id.* On examination, Petitioner had both medial and patellofemoral tenderness. *Id.* Dr. Nenno indicated that Petitioner had left knee arthritis as a result of a work related injury, which was significantly limiting his functions and causing him to be unable to work. *Id.* Dr. Nenno considered the patellofemoral resurfacing Dr. Zoellick recommended to be "a fairly aggressive approach," and doubted that it would solve Petitioner's problems. *Id.* He indicated that this type of surgery was performed in the late 1970's and fell out of favor, and have now resurfaced as a partial knee replacement solution similar to a unicompartmental knee for medial or lateral joint arthritis. *Id.* Dr. Nenno further indicated that the arthroscopic surgery that he recommended was also to evaluate whether there is significant arthritis in the rest of the knee,

which would render the patellofemoral resurfacing [recommended by Dr. Zoellick] unsuccessful. *Id.* He reiterated his request for authorization. *Id.*

Petitioner saw Dr. Nenno again on June 18, 2010 at which time he changed his opinion regarding the propriety of patellofemoral arthroplasty somewhat. PX2 at 53. He continued to request an arthroscopy to assess the other compartments of Petitioner's knee, but indicated that if this was not authorized he would propose to undertake the patellofemoral arthroplasty and stated that a complete knee replacement might be required if the other compartments in the knee showed significant changes. *Id.*

Petitioner testified that he moved back to Ohio before October of 2010 and saw a new physician, Dr. London, who did not recommend surgery.

Petitioner resumed his medical care with Dr. Nenno on February 25, 2011 with continued complaints. PX2 at 44. Dr. Nenno noted a loss of extension, a very slightly altered gait, and tenderness over the medial joint line and the patellofemoral area. *Id.* He noted his concern that Petitioner was now developing changes in the medial aspect of the knee. *Id.* He noted also Petitioner's report that he had been terminated from his employment based on having an extended period of disability. *Id.* Dr. Nenno reiterated the recommendation for surgery: a patellofemoral [resurfacing] or total knee replacement. *Id.*

Petitioner testified that his benefits were discontinued in March of 2011 and that no vocational rehabilitation or retraining was offered to him. He also testified on cross examination that he did not look for work since his functional capacity evaluation test results within his limitations. Petitioner testified that he applied for, and was placed on, social security disability and began receiving benefits in 2010 based on a cluster headaches condition. He testified that his ssdi payments were offset by the temporary total disability benefits that he received during the period of time that these two sources of income overlapped.

Fourth Section 12 Examination – Dr. D'Silva

On June 29, 2011, Petitioner underwent a fourth independent medical examination with a new evaluator, Joseph D'Silva, M.D. ("Dr. D'Silva"), at Respondent's request. RX1. Dr. D'Silva examined Petitioner, took a history from him, reviewed various medical records, and issued a report of the same date. *Id.*

Petitioner reported experiencing daily pain while awake and at night. *Id.* He also reported worsening pain with attempting to bend/stoop/kneel or walk over one block. *Id.* Petitioner further reported that the pain was underneath the patella and peripatellar in nature. *Id.* On examination, Dr. D'Silva noted a non-antalgic gait with no effusion in either knee, a positive Hoover sign when asked to extend the lower extremity reporting too much pain to do that and no pressure on the contralateral leg (which he noted was in contraindication when asked to lift the right leg and forcibly pushing down with the left lower extremity), pain on compression to either side of the patella and pain to light touch over the skin of the patella, and diffuse pain medially, greater than laterally, and along the femoral condyles. *Id.* Petitioner also reported pain with varus/valgus stress testing and an attempted anterior Drawer maneuver. *Id.* Dr. D'Silva further noted active bending to 70 degrees with full extension compared to 0-130 degrees on the right. *Id.*

Before rendering his opinions, Dr. D'Silva qualified them by noting that they were limited secondary to the fact that he noted significant inconsistencies during Petitioner's physical exam which suggested symptom magnification and less than full effort. Specifically, Dr. D'Silva noted that Petitioner's complaints of pain were out of proportion to his examination; that is, Petitioner's subjective complaints were inconsistent with Dr.

14IWCC0340

D'Silva's objective findings. He noted discrepancies during range of motion testing and a positive Hoover sign which was significant for lack of full effort. *Id.*

In light of these qualifications, Dr. D'Silva opined that Petitioner had non-specific left knee pain and that his (Dr. D'Silva's) findings did not correlate with Petitioner's subjective complaints as he explained and the symmetry in Petitioner's thigh and calf despite a four-year history of pain after his injury at work. *Id.* He recommended no further diagnostic testing, indicated that no further surgery was medically necessary based on the October 2008 operative report (although his opinion might change if he could view intraoperative pictures), and he recommended a "qualified" functional capacity evaluation based on his inconsistent examination and symptom magnification so that validity could be determined. *Id.* Ultimately, Dr. D'Silva opined that Petitioner magnified his symptoms and that they were unrelated to the injury at work, Petitioner was at maximum medical improvement, and he could return to unrestricted work at any time. *Id.*

Dr. D'Silva later reviewed the intraoperative photographs and provided a supplemental report dated November 27, 2012. RX2. He indicated that the pictures were grainy, but grossly still identifiable. *Id.* The first picture portrayed the undersurface of the patella, followed by the medial compartment, including identification of the medial meniscus. *Id.* The second page of photographs portrayed the anterior notch and the anterior cruciate ligament, as well as what appeared to be shaving of the undersurface of the patella, the medial femoral condyle, and the trochlear groove. *Id.* He indicated that nothing in those intraoperative pictures would change his prior opinions as stated in his original June 29, 2011 report. *Id.*

Continued Medical Treatment

Petitioner testified that he returned to Dr. Nenno on February 5, 2013, at which time he again recommended surgery, but now indicated that it should be a full knee replacement. The medical records reflect that Petitioner presented at that visit reporting increasing problems, medial and anterior left knee pain, swelling, ability to walk only a short distance without discomfort, and that stairs were "awful." PX2 at 40-41. Dr. Nenno diagnosed with chronic left knee pain and noted that his prior arthroscopy showed significant chondromalacia in the knee in the patellofemoral joint. *Id.* He administered a cortisone injection and indicated that Petitioner was now in need of more aggressive treatment to relieve his complaints, a total knee replacement. *Id.*

Additional Information

Petitioner testified that he wants the recommended surgery because he needs to regain his health. He explained that in the past 5 ½ years he gained about 60 lbs., has experienced bouts of depression related to the pain, and has been unable to bend down to do things or perform activities like gardening, mowing the lawn, or housekeeping.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being in the left knee is causally related to the injury sustained at work on November 2, 2007. In so concluding, the Arbitrator relies on the credible testimony of Petitioner, the opinions of Dr. Nenno as reflected in Petitioner's treating medical records, and the first three Section 12 examination reports authored by Dr. Zoellick at Respondent's request.

While Petitioner had prior left knee surgery, he worked without need for medical treatment or time off work for years before November 2, 2007. On that date, Petitioner fell causing an aggravating injury to his left knee resulting in the need for arthroscopic surgery in October 6, 2008. Dr. Nenno and Respondent's first Section 12 examiner, Dr. Zoellick, agree on this point. After a period of post-operative physical therapy, Petitioner's left knee condition failed to improve. Dr. Nenno recommended Synvisc injections, a treatment option with which Dr. Zoellick agreed. Petitioner underwent these injections in May of 2009 to little avail. He continued to report knee pain that was localized to the patellofemoral region through August 14, 2009 at which time Dr. Nenno first recommended a second diagnostic arthroscopy or some form of a partial knee replacement depending on the intraoperative findings during that recommended surgery. Dr. Zoellick examined Petitioner a third time on February 9, 2010 and agreed that Petitioner had chondromalacia patella, but disagreed with the particular surgery recommended by Dr. Nenno opining that, instead, Petitioner would benefit from patellofemoral resurfacing.

When Petitioner returned to Dr. Nenno on May 4, 2010—one year and seven months after his first surgery, which showed intraoperative findings of significant chondromalacia of the medial facet of the patella, significant cartilaginous loose fragments within the knee, a significant plica formation along the medial femoral condyle, but otherwise fairly well-maintained medial and lateral compartments and anterior and posterior cruciate ligaments at the time—his complaints were broader and encompassed the whole knee. Dr. Nenno disagreed with the recommendation for patellofemoral resurfacing offering what appears to be a conservative approach explanation for his surgical recommendation. That is, Dr. Nenno noted that the purpose of the recommended arthroscopy was to evaluate whether Petitioner had significant arthritis in the rest of the knee, which would render the patellofemoral resurfacing recommended by Dr. Zoellick unsuccessful, and would then require the partial knee replacement he alternatively recommended.

By June 18, 2010, Dr. Nenno adjusted his surgical recommendation somewhat and indicated that, if his proposed exploratory arthroscopy was not approved, he would undertake Dr. Zoellick's approach with a patellofemoral arthroplasty and stated that a complete knee replacement might be required if the other compartments in Petitioner's left knee showed significant changes. In the Arbitrator's view, the difference of opinion between these two physicians regarding the method of treating Petitioner's complaints lies in their expertise, but supports a finding that Petitioner indeed had a continuing problem that was causally related to his injury at work.

Then Respondent selected another Section 12 examiner, Dr. D'Silva, and sent Petitioner for a fourth evaluation on June 29, 2011. Dr. D'Silva disagreed with both Dr. Nenno and Dr. Zoellick's assessments and noted that his examination showed symptom magnification by Petitioner and a mismatch between his objective findings on examination and Petitioner's subjective reports. He opined that Petitioner had non-specific left knee pain and attributed all of Petitioner's complaints (to the extent that he found them to align with his findings) to be unrelated to any injury at work.

In addition to finding Petitioner to be credible at trial (based on the consistency of his testimony at trial with the reports that he made to Dr. Nenno and Dr. Zoellick), the Arbitrator finds that Dr. D'Silva's opinions in this case are not persuasive. She declines to assign any weight to Dr. D'Silva's opinions given that he only examined Petitioner on one date, whereas his treating physician and even Respondent's first Section 12 examiner had the opportunity to examine Petitioner on at least three occasions over a period of years during which time their clinical and objective findings corroborated Petitioner's subjectively reported symptoms. Indeed, Dr. Nenno and Dr. Zoellick's consistently indicated that Petitioner required continued medical treatment even when they disagreed on exactly which medical approach to take to help resolve Petitioner's symptomatology. In light of the record as a whole, Dr. D'Silva's opinions are simply not persuasive.

Finally, the Arbitrator notes that the initial surgical approach recommended by Dr. Nenno and that recommended by Dr. Zoellick seem to carve apart Petitioner's knee. That is, Dr. Nenno and Dr. Zoellick agree that Petitioner's 2008 intraoperative findings suggest patellofemoral deterioration that is attributable, in part, to his injury at work. Their medical approaches diverge when Dr. Nenno suggests exploration of the remainder of Petitioner's knee and Dr. Zoellick indicates that Petitioner's symptoms would likely only be resolved by a resurfacing, but he does not address the other compartments of Petitioner's knee. Dr. Nenno does not specifically opine that Petitioner's deteriorating left knee condition outside of the patellofemoral region is causally related to the aggravating injury that he sustained at work. However, the Arbitrator finds that this is not dispositive in finding that Petitioner's left knee condition is causally related to his 2007 injury at work.

Again, the Arbitrator finds Petitioner's testimony at trial to be credible and it is notable that he spent almost five years since his first surgery (closer to six years since his injury) undergoing various conservative treatments to alleviate his left knee pain, he moved from one state to another and back again, and he underwent no less than four Section 12 examinations at Respondent's request in two different states over those years before any advanced medical treatment (i.e., Synvisc injections, surgery) recommended was approved. The Arbitrator finds it to be a reasonable proposition given the facts in this case that Petitioner's entire left knee condition has deteriorated significantly during that period of time, and notes that no evidence was produced that any degenerative condition in any other compartments beyond the patellofemoral region were caused solely by Petitioner's pre-existing left knee condition or any intervening injury. Indeed, while parsing out a body part in this manner is entirely appropriate, particularly given the divergence in medical approaches for how to best treat the area of concern on which both doctors agree (i.e., the patellofemoral region), there is no evidence in the record to support the proposition that Petitioner's symptoms manifesting elsewhere in the knee are due to anything other than deterioration attributable at least in part to the *sequelae* of Petitioner's 2007 injury at work. A deterioration that, Dr. Nenno now opines, will hopefully resolve through an even more aggressive surgery than he originally recommended: a total knee replacement.

Thus, based on the totality of the evidence, the Arbitrator finds that Petitioner has established by a preponderance of credible evidence that his current left knee condition of ill-being is causally related to his accident at work on November 2, 2007.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained in the foregoing causation analysis, the Arbitrator finds that Petitioner's claimed current left knee condition of ill-being is related to the accident sustained at work on November 2, 2007. Again, while Dr. Nenno and Dr. Zoellick disagree on the exact surgery that should be performed, the Arbitrator finds the opinions and treatment recommendations of Dr. Nenno to be reasonable given the record as a whole. Thus, the Arbitrator awards the prospective medical care requested by pursuant to Section 8(a) of the Act in the form of the recommended total left knee replacement surgery prescribed by Dr. Nenno as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

In support of the Arbitrator's decision relating to Issue (L), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The parties have stipulated that Petitioner was temporarily and totally disabled from November 3, 2007 through March 6, 2011. Thus, the Arbitrator awards this period of temporary total disability benefits. However, Respondent disputes that Petitioner was disabled from March 7, 2011 through July 23, 2013. As explained in detail above, the Arbitrator finds that Petitioner has established a causal connection between his current left knee condition and his injury at work. Moreover, Petitioner's treating medical records reflect that Petitioner was placed off work by Dr. Nenno pending approval of surgery and there is no indication that Petitioner has yet reached maximum medical improvement with regard to his left knee condition from Dr. Nenno. Thus, the Arbitrator finds that Petitioner is entitled to additional temporary total disability benefits from March 7, 2011 through July 23, 2013.

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

Virginia "Jenny" Gietl,

Petitioner,

14IWCC0341

vs. NO: 10 WC 27060

Lincoln Land Community College,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 5, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GIETL, VIRGINIA "JENNY"
Employee/Petitioner

Case# **10WC027060**

14IWCC0341

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

On 7/5/2013, 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:

1590 SGRO HANRAHAN & BLUE LLP
ALEX B RABIN
1119 S 6TH ST
SPRINGFIELD, IL 62703

0075 POWER & CRONIN LTD
ANDREW M LUTHER
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0341

VIRGINIA "JENNY" GIETL
Employee/Petitioner

Case # 10 WC 27060

v.

Consolidated cases:

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 10, 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] 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 **January 27, 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 **$44,746.64**; the average weekly wage was **$860.51**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$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 **$32,683.54** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibits 5, 8, 11 and 12, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act. Respondent is entitled to a credit for medical bills paid by its group carrier under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $573.67/week for 26 4/7 weeks, commencing 07/30/2010 through 09/13/2010, 09/20/2010 through 11/01/2010, 09/27/2011 through 11/19/2011, and 01/23/2012 through 03/05/2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $516.31/week for a further period of 82 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the 20% loss of use to each hand.

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

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

Signature of Arbitrator

06/25/2013
Date

JUL 5 - 2013

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

14IWCC0341

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VIRGINIA "JENNY" GIETL
Employee/Petitioner

v. Case # 10 WC 27060

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDING OF FACT

On January 27, 2010, Petitioner, Virginia "Jenny" Gietl, was employed by Respondent, Lincoln Land Community College, as a Veterans Financial Aid Advisor. Petitioner was 63 years of age at the time of the claimed repetitive trauma accident. She worked for Respondent for approximately 27 years. Petitioner was originally hired to work in the Respondent's book store for two and a half years before being transferred to the Veterans' Affairs department. Petitioner testified that she served Veterans Affairs from that time until her retirement on May 31, 2012.

Evidence submitted at trial showed that Petitioner's position required repetitive hand motions. The job description submitted by both parties requires "computer competency." (Petitioner's Exhibit (PX) 2; Respondent's Exhibit (RX) 5). Petitioner testified that she worked on the computer for approximately seven and a half hours out of a nine hour day. This included, but was not limited to, answering e-mails from students or other college employees and entering data into the computer for financial aid. She also used a calculator alongside the computer frequently. Additionally, Petitioner would be on the phone often. She testified that she would often have the phone tucked into her neck while on the computer during most of the work day. She also had to enter data into the computer for student records or financial aid.

On February 26, 2010, Petitioner was referred to neurologist Dr. M.L. Mehra, for symptoms that resembled that of carpal tunnel syndrome, by her family physician, Dr. Daniel O'Brien. (PX 3). Starting in 2009, Petitioner testified that her hands would get numb and tingle regularly, and she would drop things. She had lost grip strength in both hands. Petitioner told Dr. Mehra that she was experiencing these symptoms for a year or two. Dr. Mehra noted that Petitioner had "[m]arked atrophy of the right and to some extent the left thenar muscle." (PX 3). During his deposition, Dr. Mehra testified that the median nerve was compressed. (PX 4, pp. 8-9). Dr. Mehra's clinical impression was severe denervating, right worse than left, carpal tunnel syndrome. He then recommended a surgical decompression. (PX 3). In a letter dated July 6, 2010, Dr. Mehra wrote a work restriction letter for Petitioner. In the letter, Dr. Mehra stated that

Petitioner's carpal tunnel syndrome "is directly related to the repetitive hand movements she does at her work at Lincoln Land [Community] College." (PX 3).

Petitioner then presented to Dr. Reuben Bueno's office on March 30, 2010, and was seen by Dr. Brian Derby. Dr. Derby noted that certain activities Petitioner performed, like typing most of the day, exacerbated her symptoms. Dr. Derby recommended surgery, and reported that the proposed surgery would be "workmen's comp." (PX 6).

Petitioner returned to Dr. Bueno's office on July 15, 2010, and saw another doctor in that office, Dr. Ryan Diederich. He noted that a right carpal tunnel surgery would be scheduled first, and then a month later, they would perform a left carpal tunnel release. Petitioner agreed to all procedures and verbalized understanding of all the risks involved with carpal tunnel release surgery. (PX 6).

Petitioner underwent surgery for her right hand on July 30, 2010. She was discharged home and returned for a check-up visit on August 17, 2010. Petitioner complained of stiffness and some discomfort with movement, mostly in her thumb. Dr. Bueno recommended that she discontinue the use of the splints because it was causing persistent redness. He then referred Petitioner to the hand therapy department to start motion exercises. Petitioner was kept off work at this time. (PX 6).

Petitioner returned to Dr. Bueno on August 24, 2010, complaining of pain and achiness in her right palm. Worried about hampering her ability to perform daily activities without the use of both hands, Dr. Bueno rescheduled her left carpal tunnel release surgery. Additionally, he gave her a compression glove to suppress the swelling in her thenar area and wrist. On September 7, 2010, Petitioner returned for a follow-up visit. She still experienced some pillar pain and achiness. Dr. Bueno told Petitioner that she would have to start on an anti-inflammatory sooner rather than later to combat potential swelling. Petitioner had been off work since the July 30 surgery, and at the September 7, 2010 evaluation, Dr. Bueno released Petitioner to return to work regular duty effective September 13, 2010. (PX 6).

Petitioner underwent left carpal tunnel release surgery on September 20, 2010. Dr. Bueno then prescribed Norco for her pain and scheduled a follow-up visit. This visit occurred on September 28, 2010, and Petitioner's chief complaint described that day was pain in the forearm. Petitioner was not yet released to return to work from her left carpal tunnel surgery on this date. Petitioner had her sutures removed on October 12, 2010. Dr. Bueno also noted that he would keep Petitioner off work at this time until November 1, 2010. (PX 6).

Petitioner returned to Dr. Bueno for another follow-up evaluation on October 26, 2010. Dr. Bueno noted that Petitioner may "be in that group of patients who is predisposed to getting carpal tunnel, and repetitive activities may have played a role in the development of the carpal tunnel..." Additionally, Dr. Bueno told Petitioner that if she returned to performing the repetitive activities that caused her carpal tunnel syndrome, "she may demonstrate signs of recurrence." Dr. Bueno reported that Petitioner's repetitive activities may have played a role in the development of her condition. (PX 6).

On her eight week post-operative visit on November 18, 2010, Petitioner returned to Dr. Bueno with complaints of persistent pain and swelling. Additionally, she stated that she returned to work, but she still had continuing throbbing pain that radiated up her arm. Dr. Bueno was concerned that Petitioner was developing complex regional pain syndrome. He recommended that Petitioner attend hand therapy three times per week, and that she use her hand as much as possible. When she returned on December 2, 2010, Petitioner had made significant improvement with the pain and swelling in her left hand, thereby ruling out complex regional pain syndrome. (PX 6).

Petitioner returned to Dr. Bueno's office on February 3, 2011. She continued to have pillar pain and swelling in her left hand despite continued therapy. She was also experiencing a recurrence of the symptoms she had prior to her left carpal tunnel release. Dr. Bueno noted that Petitioner's " return to work at the same workstation that she had been at before, leaving her hands in an extended position and pressure on the carpal tunnel, may be exacerbating these symptoms." Petitioner returned on February 17, 2011, and Dr. Bueno again noted that her work may have exacerbated her symptoms. He noted that Petitioner was continually working with a computer and mouse throughout the day, and with that amount of time at the computer, her wrist and hands could have been in a position which could have exacerbated some of her symptoms. (PX 6).

On May 11, 2011, Petitioner returned to Dr. Mehra with complaints of continued pain in her hands. Dr. Mehra noted that she still had atrophy of both thenar muscles. Her Tinel and Phalen signs were positive for carpal tunnel syndrome. He then diagnosed Petitioner with post carpal tunnel syndrome with incomplete recovery. Dr. Mehra noted that her carpal readings were not within normal limits but recommended that they wait a year before re-exploration. (PX 3).

On August 3, 2011, Petitioner sought a second opinion from Dr. Mark Greatting. When asked on the intake form whether her symptoms interfered with or were aggravated by her job, Petitioner indicated "yes." Dr. Greatting, noting that Petitioner had recurrent bilateral carpal tunnel syndrome, reported that it would be reasonable to proceed with another right carpal tunnel release. If that surgery relieved her pain, they would proceed with another left carpal tunnel release. She underwent this surgery on September 27, 2011. (PX 9).

Petitioner returned to Dr. Greatting for a follow-up visit on October 12, 2011. She reported that her hand felt much better and the numbness has improved. Dr. Greatting recommended that she not lift anything over five pounds, but she could increase her activities as tolerated. He kept her off work at this time (she had been off work since the September 27, 2011 surgery at this point). (PX 9).

On November 23, 2011, Petitioner's symptoms had markedly improved. Dr. Greatting released Petitioner to return to work the following Monday. (PX 9). However, Petitioner is only claiming temporary total disability (TTD) benefits for this particular time off commencing with the September 27, 2011 surgery until November 19, 2011. (See Arbitrator's Exhibit 1). It was determined at the November 23, 2011 evaluation that if Petitioner did well with the right hand while at work, Dr. Greatting would proceed with left carpal tunnel release surgery. (PX 9).

When Petitioner returned to Dr. Greatting's office on January 5, 2012, she stated that she could use her right hand without restrictions. Noting the success of the surgery on her right hand, Dr. Greatting scheduled a carpal tunnel release on her left hand. This surgery was performed on January 23, 2012. When Petitioner returned for follow-up evaluation on February 7, 2012, her pain and numbness had significantly improved and was almost resolved. Dr. Greatting kept Petitioner off work from her surgery on January 23, 2012 until March 5, 2012. (PX 9).

When asked during his deposition whether Petitioner's job duties caused or contributed to her bilateral carpal tunnel syndrome, based on his review and understanding of Petitioner's job description and his understanding of her job duties, Dr. Mehra testified that professions requiring repetitive hand movement, like typing, contribute to carpal tunnel syndrome. He further testified that Petitioner informed him she performed a lot of repetitive hand movement with her job. (PX 4, p. 14). As stated, *supra*, Dr. Mehra reported in his July 6, 2010 letter that Petitioner's carpal tunnel syndrome "is directly related to the repetitive hand movements she does at her work at Lincoln Land [Community] College." (PX 3).

Dr. Bueno testified during his deposition that, based on Petitioner's job history provided to him, and her resulting medical problems, that Petitioner's duties on a keyboard most of the work day may have contributed to her carpal tunnel syndrome. (PX 7, p. 9).

Dr. Greatting testified during his deposition that he did not discuss Petitioner's job activities with her much during the course of his treatment of her. He did, however, review Petitioner's job description. (PX 10, p. 11). When asked whether he had an opinion as to whether prolonged office work with keyboarding, writing and telephone use could cause or contribute to carpal tunnel syndrome, Dr. Greatting testified that if a patient's symptoms are "a lot worse or aggravated while doing their work activities" then he generally believes that the patient's work activities at least aggravate the problem. (PX 10, p. 12). As stated *supra*, when asked on Dr. Greatting's intake form whether her symptoms interfered with or were aggravated by her job, Petitioner indicated "yes." (PX 9).

Petitioner presented for evaluation at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act") with Dr. Henry Ollinger on June 17, 2010. Dr. Ollinger reviewed Petitioner's job description and took an oral history of her job duties. (RX 1). Dr. Ollinger diagnosed Petitioner with osteoarthritis at the bases of both thumbs and bilateral carpal tunnel syndrome. (RX 2, p. 14). Dr. Ollinger did not believe that Petitioner's job duties with Respondent caused or aggravated her bilateral carpal tunnel syndrome. (RX 2, pp. 15-16). Dr. Ollinger testified that Petitioner's work was clerical in nature and did not have any of the clear factors he looks for when diagnosing repetitive trauma injuries like carpal tunnel syndrome. The doctor noted that Petitioner's job was not high force and did not require lifting of heavy weights. He also noted that Petitioner's job did not require prolonged flexion or extension of her wrists. (PX 2, pp. 16-17). Dr. Ollinger testified that he believed Petitioner's bilateral carpal tunnel syndrome was caused by her innate lifestyle and the medical risks associated with her age and gender, in addition to the osteoarthritis in her thumbs. (RX 2, pp. 18-19).

In his report, Dr. Ollinger reported that Petitioner's keyboarding was not "hand intensive" and followed this statement with a parenthetical that stated, "as would be for a persons (sic) doing continued prolonged medical or legal transcription or pure data entry as the only job requirement." Dr. Ollinger testified that if there is "prolonged, continued and...high volume keying, which by nature would be text keying because it is two-handed, it can be a factor in a carpal tunnel case." (RX 2, pp. 31-32).

On May 7, 2013, Dr. Ramsey Ellis conducted a medical records review at the request of Respondent. Dr. Ellis' diagnosis of Petitioner, based on the records review, was that of post right and left carpal tunnel release for recurrent carpal tunnel syndrome, as well as bilateral thumb osteoarthritis. Dr. Ellis did not believe that Petitioner's conditions were related to her work duties, specifically because "carpal tunnel syndrome has only been linked to highly repetitive flexion and extension of the wrists coupled with forceful grasping or the prolonged use of hand-held vibratory tools." Dr. Ellis believed that Petitioner's bilateral carpal tunnel syndrome was related to her age and gender. (RX 3).

On cross-examination, Petitioner testified that she starting noticing her symptoms "more and more" in 2009, but that she did not know at the time that she was indeed suffering from carpal tunnel syndrome. When asked if she had come to recognize that she suffered these symptoms for twenty years, Petitioner testified that she could have had some symptoms over this period, but not nearly as severe as the symptoms she reported in 2009-2010. She also testified that during the period asked about, she did not even know what carpal tunnel syndrome was.

Petitioner testified she was initially reluctant to return to work after her second surgeries but did so anyway. Petitioner testified that she retired shortly thereafter because she believed she needed to retire, despite wanting to work longer. Petitioner testified that she enjoyed her job. She testified that her hands and wrists today are "good," and that if she would have known they would have felt this good she would have reconsidered retirement.

Petitioner offered into evidence a series of medical bills she claims she incurred as a result of the treatment received for the injuries claimed at bar. (See PX 5, 8, 11, & 12).

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that Petitioner's bilateral carpal tunnel syndrome, and the subsequent recurrent bilateral carpal tunnel syndrome, arose out of and in the course of her employment by Respondent based on the medical records and deposition testimony of Drs. Mehra, Bueno, and Greatting, as well as the credible testimony of Petitioner. Dr. Mehra's letter of July 6, 2010 demonstrates this connection based on discussions with Respondent. Dr. Bueno and Dr. Greatting also testified that, within a reasonable degree of medical certainty, the repetitive motions that Petitioner performed while at work as described to them may have brought on the

pain and numbness in her hands, which in turn exacerbated her bilateral carpal tunnel syndrome to the point of necessitating surgical releases.

Respondent has tendered two expert witnesses. The Arbitrator does not find these witnesses to be as persuasive as the doctors that treated and interacted with Petitioner. Dr. Ollinger testified that he believed Petitioner suffered from bilateral carpal tunnel syndrome; he just did not believe her job duties caused or aggravated it. Dr. Ollinger did concede that "prolonged, continued and...high volume keying, which by nature would be text keying because it is two-handed...can be a factor in a carpal tunnel case." (RX 2, pp. 31-32). While Dr. Ollinger did not believe Petitioner's duties brought her to the level of repetitive typing that could cause carpal tunnel syndrome, the Arbitrator finds that the majority of evidence, including Petitioner's credible testimony, indicate that she did in fact spend most of her time using a keyboard. The records of Dr. Bueno and Dr. Derby further indicate that certain activities Petitioner performed, like typing most of the day, exacerbated her symptoms. (See PX 6). Additionally, the Arbitrator finds the opinion contained in the records review by Dr. Ellis is not as persuasive, as Dr. Ellis did not meet with Petitioner and looked only at the records submitted to him.

Further, the Arbitrator finds that Petitioner was a credible witness at trial. On direct examination, Petitioner testified in great detail as to her job duties and the process by which her position and her overall department operates. On cross-examination, when repeatedly asked if Petitioner had carpal tunnel symptoms over the past several years, she calmly and in a forthcoming manner testified that she has had various hand and wrist symptoms over the years, but did not even know what carpal tunnel syndrome was until around 2009-2010, when her symptoms progressed to the point of requiring treatment. Petitioner worked for Respondent for approximately 27 years, and performed the same repetitive duties for 25 of those years until her retirement in May 2012. Petitioner was open and forthcoming, and endeavored to be truthful during her entire testimony, and great weight is placed in this regard.

Based on the testimony and medical evidence submitted at trial, the injuries arose from and are causally connected to Petitioner's employment.

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

Petitioner is claiming Respondent is liable for the following medical bills:

- Dr. Mehra: $3,201.00 (PX 5)
- SIU Healthcare (Dr. Bueno and Hand Therapy): $10,729.88 (PX 8)
- Springfield Clinic (Dr. Greatting): $12,818.00 (PX 11)
- Clinical Radiologist: $51.00 (PX 12)

The treatments for Petitioner's injuries are reasonable and necessary. Therefore, Respondent shall pay the aforementioned amounts which represent the reasonable expenses in the treatment of Petitioner's injuries, subject to the medical fee schedule, Section 8.2 of the Act.

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

Petitioner was temporarily and totally disabled for various periods throughout the course of her treatment, totaling 26 4/7 weeks of benefits. Petitioner was off work from her first right carpal tunnel release from July 30, 2010 (the date of surgery) through September 13, 2010 (when she was released by Dr. Bueno). She was next off work due to her first left carpal tunnel release from September 20, 2010 (the date of surgery) through November 1, 2010 (when she was released by Dr. Bueno). Petitioner suffered a recurrence of her carpal tunnel syndrome, and underwent two more surgical releases to each side. She was off work from the second right carpal tunnel release from September 27, 2011 (the date of surgery) through November 19, 2011 (the date Petitioner claims she returns, despite a formal subsequent release by Dr. Greatting on November 28, 2011). She was next off work due to her second left carpal tunnel release from January 23, 2012 (the date of surgery) through March 5, 2012 (when she was released by Dr. Greatting). Respondent shall pay Petitioner the amount of compensation representing her total TTD benefits for the aforementioned periods, pursuant to Section 8(b) of the Act.

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

As stated, *supra*, Petitioner's bilateral carpal tunnel syndrome was at the very least aggravated by her repetitive work duties. This necessitated bilateral carpal tunnel surgical releases. When Petitioner's symptoms persisted following these surgeries, it was established that she then suffered from recurrent bilateral carpal tunnel syndrome, for which she underwent two more surgical releases to each side.

Petitioner testified that currently, her hands and wrists are "good." She testified that she believed she needed to retire a couple months after returning to work following her final surgery. Dr. Bueno in fact warned Petitioner following her first two surgeries that continued repetitive duties like the ones she was performing could cause a recurrence of her bilateral carpal tunnel syndrome, which did in fact happen after the first two surgeries. However, her symptoms eventually alleviated some time after the second surgeries and her retirement, and she testified that she would not have retired had she known how good the results would have been. Therefore, her decision to retire, while not recommended by a physician, is also not entirely unreasonable given the circumstances.

Based on the foregoing, the Arbitrator finds that Petitioner has suffered the 20% loss of use to each hand pursuant to Section 8(e) of the Act, and she is awarded permanent partial disability benefits accordingly.

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

Darryl Lamb,

Petitioner,

14IWCC0342

vs. NO: 13 WC 16892

Westaff/ Select Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 29, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,000.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen Mathis

Mario Basurto

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

LAMB, DARRYL
Employee/Petitioner

Case# **13WC016892**

14IWCC0342

WESTSTAFF/SELECT STAFFING
Employer/Respondent

On 10/29/2013, 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:

2046 BERG & ROBESON PC
STEVE W BERG
1217 S 6TH ST PO BOX 2485
SPRINGFIELD, IL 62705

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0342

DARRYL LAMB
Employee/Petitioner

Case # 13 WC 16892

v.

WESTAFF/SELECT STAFFING
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **September 16, 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. [ ] Is Petitioner entitled to any prospective medical care?

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

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

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On **March 24, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$17,160.00**; the average weekly wage was **$330.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of **$1,100.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,100.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 2 and as delineated in the Memorandum of Decision of Arbitrator, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $220.00/week for 22 weeks, commencing 04/16/2013 through 09/16/2013, as provided in Section 8(b) of the Act.

Penalties and attorney's fees are not imposed upon Respondent.

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.

B. Zt

Signature of Arbitrator

10/25/2013
Date

ICArbDec19(b)

OCT 29 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

14IWCC0342

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DARRYL LAMB
Employee/Petitioner

v. Case # 13 WC 16892

WESTAFF/SELECT STAFFING
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Darryl Lamb, testified that on March 24, 2013, he was working for Respondent, Westaff/Select Staffing. Respondent is a temporary employment agency, and Petitioner was working for a cleaning company called New Air at the Caterpillar, Inc. (CAT) plant in Decatur, Illinois. New Air had a contract with CAT. Petitioner noted he had been working about seven months at the CAT facility through New Air. During his entire tenure with Respondent, Petitioner worked through New Air. His job duties from Monday to Thursday were general "clean up." On Sunday, his job was "maintenance" and he would be scraping paint off windows in the primer booth. Petitioner indicated he worked seven hours per day, Monday through Thursday, and then a 12 hour shift on Sunday, starting at 7:00 a.m.

On March 24, 2013 (a Sunday), Petitioner testified he was scraping paint off of the glass windows. Petitioner was using a seven inch scraper to scrape the paint off the glass, as well as a water-Windex solution to help break down the paint. He testified that it was very difficult to scrape the paint. At trial, Petitioner demonstrated the arm motions of scraping the paint in question, and it was noted that considerable arm effort was involved in performing the scraping motions. At about 9:30-10:00 a.m., Petitioner testified that he felt a "pull" in his left shoulder. He had been scraping paint since his shift began at 7:00 a.m. He indicated that he stopped scraping and told his manager, Kenny Cox with New Air, that he pulled something in his shoulder. Petitioner stated that his instructions were to report any injury to the New Air supervisor, which was Mr. Cox. Petitioner testified that upon telling Mr. Cox of his injury, Mr. Cox replied that Petitioner would be "ok" and then he left on his golf cart. Petitioner testified that Mr. Cox did not write anything down concerning his reporting of an accident, nor did Mr. Cox provide Petitioner any forms or paperwork concerning the reporting of a work accident.

On approximately the following Monday, Petitioner testified that he telephoned Respondent, and left several messages with a gentleman there about calling him back regarding his work accident. He testified he never indeed spoke with his supervisor with Respondent, Bonnie Knuth. After he never received any phone responses, Petitioner testified that he sent Ms. Knuth a letter via certified mail on April 12, 2013, informing her of his work accident. (See Petitioner's Exhibit (PX) 1).

Petitioner completed the day at work on March 24, 2013, but he used his right arm instead of his left arm the rest of the day in performing his work duties. Petitioner stated that he worked the following week after March 24, 2013. Petitioner testified that he believed he suffered from a simple strain-type injury, and therefore did not seek immediate medical care and continued to work. Petitioner was subsequently laid off from employment. When the pain persisted, Petitioner testified that he then sought treatment at St. Mary's Hospital on April 13, 2013. At St. Mary's, Petitioner gave a history of the March 24, 2013 incident at work, in that he felt a pulling sensation in his left shoulder when scraping paint off of a window. X-rays were taken that day, and a diagnosis was made of shoulder sprain. (PX 3). Petitioner denied any intervening injury to his shoulder between the claimed date of accident and the date he sought care at St. Mary's. Petitioner also denied any prior symptoms or injuries to his left shoulder prior to the claimed date of accident. Petitioner is left hand dominant.

Dr. Steven Taller from St. Mary's referred Petitioner to his primary care provider, Family Nurse Practitioner (FNP) Jessica Sullivan, at Community Health Improvement Center. (PX 3; PX 4). On April 16, 2013, FNP Sullivan recommended an MRI, prescribed pain medication, and took Petitioner off of work. (PX 4). Petitioner underwent the MRI on April 19, 2013 at Decatur Memorial Hospital, which revealed a full thickness rotator cuff tear. (PX 4). Petitioner was again evaluated by FNP Sullivan on May 22, 2013. (PX 4). FNP Sullivan referred Petitioner to Dr. John Britt, an orthopedic surgeon. Dr. Britt performed surgery to Petitioner's left shoulder on June 14, 2013, consisting of an open left rotator cuff repair, an arthroscopic left Neer acromioplasty, and an arthroscopic exam to the left glenohumeral joint. The post-operative diagnosis was a focal full-thickness non-retracted small left rotator cuff tear (supraspinatus) and focal stable anterior labral tear to the left shoulder joint. (PX 7). Petitioner was kept off of work or given modified duty restrictions of no lifting with the left arm per Dr. Britt, and as of the date of trial, those restrictions were still in place. (PX 5; PX 7). Petitioner returned to FNP Sullivan's office on August 12, 2013, and further pain medication was prescribed. (PX 4). Petitioner is currently in post-operative physical therapy, and attends therapy sessions four times per week. (PX 8). Petitioner denied any subsequent injury to his left shoulder following the surgery.

Petitioner testified that he has received a payment from Respondent in the amount of $1,100.00, but that no other benefits have been provided to him. He further testified that none of the medical bills incurred have been paid. He denied having health insurance through Respondent when he was employed there. Petitioner offered a series of medical bills into evidence that he claims he incurred as a result of the injury. (PX 2). Petitioner testified that the medical bills from St. Mary's are not itemized. He testified that the bill from service date June 10, 2013 was for pre-operative blood and lab work. He also noted an emergency room bill, and believed said charge was due to an episode where his therapist believed she saw puss in his arm and had to make sure it was not infected.

Bonnie Knuth testified at Respondent's request. She works for Respondent as a supervisor. She confirmed that Respondent is a temporary agency. She noted that Petitioner was one of the individuals that she supervised and placed in a job. Ms. Knuth indicated that there was policy and

procedure with regard to reporting a workers' compensation injury. She indicated that the safety examination sheet was filled out by Petitioner at the time he applied for employment. (See RX 1). She indicated that paragraph 7A on that sheet notes that if a work injury occurs, it should be reported to the client's supervisor on duty, and then to immediately call the staffing supervisor. Ms. Knuth indicated that she was the staffing supervisor. She noted on the form that Petitioner indicated that he understood 7A to be correct. Ms. Knuth testified that she never received a message that Petitioner tried to call her. The first indication she had that Petitioner was claiming a workers' compensation injury was with receipt of the April 12, 2013 letter he sent to her. (See PX 1). After receiving that letter, she testified that she tried to contact Petitioner on a number of occasions and left a message on one occasion. She testified that she never received a return call. She testified that she also never heard from New Air that Petitioner was claiming an injury.

Petitioner testified that he lives with his mother, and that he asked his mother when he was out during the dates in question whether he received a phone call from Ms. Knuth, and his mother replied that he did not. Concerning Respondent's Exhibit 1, Petitioner testified that when he initially met with Ms. Knuth about the job with Respondent, he was required to sign numerous forms, and that said forms were not explained in detail. He confirmed that his signature was on Respondent's Exhibit 1, but that he does not recall that particular form, as there were many forms he had to complete.

CONCLUSIONS OF LAW

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

On March 24, 2013, Petitioner was an employee of Respondent, who was working for an organization called New Air at the CAT plant located in Decatur, Illinois. On that date, Petitioner was using a scraper to scrape paint off of equipment glass. He testified that the paint was difficult to remove and it took considerable effort to scrape the paint off of the glass. Petitioner demonstrated the scraping motion at trial, and the Arbitrator made note of the arm movements of which Petitioner was engaged when scraping. As Petitioner was scraping the paint, he felt a pain and pulling sensation in his left shoulder. Corroborating history of Petitioner's injury appears in the medical records at St. Mary's Hospital, Community Health Improvement Center (FNP Sullivan), and records from the treating orthopedic surgeon, Dr. John Britt. Petitioner also submitted a written accident report to Respondent since his supervisor did not initiate any kind of report when the accident occurred. Mr. Cox was not called as a witness to refute Petitioner's testimony. Further, both Petitioner and Ms. Knuth acknowledged that the first person to whom an injury should be reported would have been the supervisor with New Air, which was Mr. Cox. Ms. Knuth testified that the next reporting step would have been to report the injury to her, and that she did not receive notice until Petitioner sent his letter of April 12, 2013. (See PX 1). Petitioner testified that he tried calling Ms. Knuth before he sent the letter, and left messages with a male employee to return his call. Petitioner testified that the messages were never returned. The letter from Petitioner gives a detailed and corroborating account of his accident, as well as Petitioner's statement that Mr. Cox did nothing when notified of the injury. Further, that letter corroborates Petitioner's believable and reasonable testimony that he initially thought he suffered nothing more than a strain-type injury, and continued working until the pain progressed to the point where he sought medical care.

Petitioner testified that he had pain contemporaneously with the scraping incident and that he had no prior injuries to or problems with his left shoulder before his accident of March 24, 2013. The Arbitrator

found Petitioner to be a credible witness at trial. He testified in an open and forthcoming manner, including on cross-examination. He appeared to be endeavoring to give the full truth during his testimony. Great weight is placed on Petitioner's credibility when determining the conclusions concerning the issue of accident. Therefore, the Arbitrator finds that Petitioner suffered an accident on March 24, 2013 that arose out of and in the course of his employment by Respondent.

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

As indicated above, Petitioner credibly testified that prior to his accident of March 24, 2013, he was not experiencing any difficulty with, nor had he had any injuries to, his left shoulder. Petitioner explained in his accident report submitted to Respondent that he had originally thought he had just pulled a muscle and was hoping that the condition would improve on its own. Petitioner was reluctant to obtain medical care because he had no health insurance. (See PX 1).

When Petitioner's condition did not improve and actually continued to worsen, Petitioner initially sought treatment at St. Mary's Hospital, where he was diagnosed with a shoulder sprain. Those records indicate that the medical condition was associated with Petitioner's accident at work on March 24, 2013.

Petitioner treated at Community Health Improvement Center, where his condition was associated with his work injury of March 24, 2013. After an MRI of his left shoulder revealed a torn rotator cuff, Petitioner was referred on to an orthopedic specialist. Petitioner's treating orthopedic surgeon, Dr. Britt, related Petitioner's complaints to his work injury where he was scraping windows. Dr. Britt performed surgery on Petitioner's shoulder on June 14, 2013, and at the time of trial, Petitioner was still undergoing post-operative treatment for his condition.

The Arbitrator finds Petitioner's testimony to be credible that he felt immediate pain while scraping the paint on the window at work on March 24, 2013, and further finds that Petitioner did not have any intervening injuries involving his left shoulder between that incident and his date of surgery, as well as the date of trial. The Arbitrator thus finds that Petitioner's current condition of ill-being is causally related to his March 24, 2013 accident.

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

Petitioner's Exhibit 2 consists of various medical bills that have previously been provided to Respondent. The Arbitrator finds the following bills to be reasonable and necessary and related to Petitioner's accident of March 24, 2013. Respondent is ordered to pay these bills pursuant to the medical fee schedule set forth in Section 8.2 of the Illinois Workers' Compensation Act, 820 ILCS 305/8.2. The awarded medical bills (set forth in Petitioner's Exhibit 2) are as follows:

PROVIDER	DATE	AMOUNT	DESCRIPTION
Central Illinois Emergency Physicians	4-13-13	$243.00	Emergency room visit
Decatur Memorial Hospital	4-19-13	$2,549.57	MRI related charge
Decatur Radiology	4-19-13	$ 368.00	MRI related charge
Community Health Improvement	4-15-13	$ 15.00	FNP Sullivan visit

(this payment was made by Petitioner and should be reimbursed to Petitioner)

Wal-Mart	4-16-13	$ 18.17	Prescribed medication
	4-16-13	$ 4.00	Prescribed medication

(these amounts were paid by Petitioner and should be reimbursed to Petitioner)

Wal-Mart	5-22-13	$ 18.17	Prescribed medication
		$ 4.00	Prescribed medication

(these amounts were paid by Petitioner and should be reimbursed to Petitioner)

Community Health Improvement Ctr.	4-16-13	$ 104.00	FNP Sullivan
	5-22-13	$ 104.00	FNP Sullivan
St. Mary's Hospital	4-13-13	$1,230.56	X-rays
St. Mary's Hospital Clinic	6-10-13	$ 76.57	Pre-surgery work-up
Clinical Radiologist	6-10-13	$ 56.50	Pre-surgery x-ray
St. Mary's Hospital	6-14-13	$ 66.99	Pre-surgery work-up
St. Mary's Hospital	6-14-13	$36,522.28	Surgery
Central Illinois Assoc.	6-14-13	$ 3,100.00	Anesthesia for surgery
Community Health Improvement	5-22-13	$ 53.00	FNP Sullivan
St. Mary's Hospital	6-10-13	$ 974.01	Pre-surgery lab work
Community Health Improvement	8-12-13	$ 104.00	FNP Sullivan

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

As a result of his injury of March 24, 2013, Petitioner was taken off work by FNP Sullivan at Community Health Improvement Center effective April 16, 2013. Petitioner was continued off work through his visit with orthopedic specialist, Dr. Britt. Petitioner was off work per Dr. Britt following surgery, and as of the date of trial, was on modified restrictions of no lifting of the left arm. Petitioner was laid off from Respondent in April 2013. Petitioner credibly testified that he has not been released to full duty work and is still undergoing treatment following his shoulder surgery. He is presently undergoing physical therapy for his shoulder.

Therefore, the Arbitrator finds that Petitioner is temporarily and totally disabled as a result of his injury of March 24, 2013, from the dates of April 16, 2013 through September 16, 2013, the date of trial. Temporary total disability (TTD) benefits are accordingly awarded for this period. Respondent shall be allowed credit for TTD benefits paid in the amount of $1,100.00. (See Arbitrator's Exhibit 1).

Issue (M): Should penalties or fees be imposed upon Respondent?

The Arbitrator does not find Respondent's denial of this claim to be unreasonable or vexatious, and therefore does not award penalties or attorney's fees against Respondent.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0343

vs. NO: 10 WC 22752

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,200.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **10WC022752**

08WC008037
11WC037713

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0343

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0343

BEVERLY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # 10 WC 22752

v.

Consolidated cases: 08WC8037&11WC37713

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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] 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 December 18, 2007, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,091.23**; the average weekly wage was $**653.69**.

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

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

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

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 435.79/week for 10-3/7 weeks, from July 23, 2010 through October 3, 2010, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $392.21/week for a further period of 99.45 weeks, as provided in Sections 8(e)(9) and 8(e)(10) of the Act, because the injuries sustained caused 15% loss of the left arm, 15% loss of the right hand, and 15% loss of the left hand, subject to a credit of 47.5 weeks of permanent partial disability under Section 8(e)(17) of for Petitioner's previous settlements for her left and right hands.
- The respondent shall pay Petitioner the sum of $2,643.00 for medical expense.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.
- The respondent shall further hold Petitioner harmless with respect to payments made by BlueCross BlueShield to Petitioner's medical providers for treatment related to her accidental injury and with respect to payments made by its non-occupational disability carrier pursuant to Section (j) of the Act.

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

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

Gerald A. Granada
Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0343

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. For 19 of those years, she worked as a parts inspector. Petitioner is diabetic, and has been for twenty-five years, though she testified that her diabetes is well-controlled through medication. Additionally, she also has taken medication for a thyroid problem for a long time.

Petitioner described her job in detail. As a receiving inspector, she would start by getting a box of parts which had been delivered, open it up, take the parts out and take them back to her desk. Petitioner's job was to check 32 parts in every delivery. She did this for either eight hours or ten hours per day. She testified that she did not have to rush while performing her job. Some of the parts she inspected had threaded holes and she would have to test the size and depth of these with a thread gauge. As a right-handed individual, she would do this by holding the part in her left hand with her wrist bent inwards and inserting the thread gauge with her right hand and twisting the thread gauge with her right hand in a rotating fashion. The thread gauge had two ends, one a "go" end and the other a "no go" end; she would first insert and twist the "go" end and then twist it out and insert and twist the "no go" end for each part. This process would take approximately two minutes to check each part. She demonstrated that her elbows would be bent while she performed this work.

Some of the parts she would inspect were small plastic pieces, and she would use calipers to measure them. There were different sizes of calipers, some of them six inches, some twelve inches, and some of them fourteen inches. She would hold the caliper in her right hand with her four fingers wrapped around the bottom and she extends her right thumb to slide the gauge to measure the outer dimension of the part. She would bend her right wrist back and forth in order to get the caliper to fit into the hole. Her left hand would pinch the part between her index finger and thumb and hold her hand and wrist steady. This process would take her approximately 30 seconds to adjust the caliper and get the measurement.of the part.

Other parts were inspected using a height gauge and an indicator. A height gauge is a large hand tool that she usually operated with her right hand and only seldomly with her left hand. While measuring with the height gauge, she would move her wrist back and forth to move her hand up and down to make sure that she measured the correct height.

After checking one box of parts, she would get the next box and then check 32 parts out of that. She testified that after checking 32 pumps, her right hand would get tired and she sometimes would use her left hand to turn the thread gauge.

Petitioner acknowledged that she did not do just one thing all day long when working as a receiving inspector. He job duties consisted of getting the boxes of parts she needed to inspect, opening it, selecting 32 parts to inspect, and inspecting them either with a thread gauge, a caliper, or a height gauge, depending upon the part. She would then return the parts to the box and decide whether or not to accept them or reject them.

Petitioner testified that she had previously developed carpal tunnel syndrome in both hands in approximately the year 2000. She had surgery to correct carpal tunnel syndrome in both hands at that time, but did not have any medical treatment for her left elbow. The medical records reflect that these surgeries were performed in 1994. (Px#7). She filed a workers' compensation claim for this and did receive a settlement for that claim. The amount of permanent disability in the settlement was 15% loss of use of the right hand and 10% loss of use of the left hand.

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In 2010, she began to develop a severe burning sensation in her left hand and her left pinky finger was numb, and she also felt pain in her right hand. PA Locey referred for an EMG which was performed on March 3, 2010 by neurologist Dr. Thomasz Kosierkiewicz. Dr. Kosierkiewicz interpreted the study as positive for recurrent carpal tunnel syndrome bilaterally and also positive for cubital tunnel syndrome at the left elbow. (Px#7). On June 2, 2010, she sought medical treatment with Dr. Frank Lee at the Bonutti Clinic, who recommended surgery for bilateral carpal tunnel syndrome and cubital tunnel syndrome in her left elbow. (Px#7).

Respondent had Petitioner examined by Dr. Evan Crandall on June 30, 2010. Dr. Crandall felt that Petitioner's exam was negative for carpal tunnel syndrome on the right and positive only for an ulnar Tinel's sign on the left. He performed another EMG, which he reported was consistent only with previously treated carpal tunnel syndrome and no evidence of ulnar neuropathy at the elbow or wrist. He concluded that because the Petitioner had diabetes, thyroid disease, fibromyalgia, previous thoracic outlet syndrome surgery, and previous carpal tunnel syndrome, that she could not possibly benefit from an additional surgery. (Rx#2).

On July 23, 2010, Dr. Lee performed a left carpal tunnel re-release with external neurolysis and a left cubital tunnel release. On August 19, 2010, Dr. Lee performed a right re-current carpal tunnel re-release with external neurolysis. On November 12, 2010, Petitioner saw Dr. Lee again, and he noted that she had increased grip which was continuing to improve. She reported ongoing numbness in her left small finger and expressed concern that her grip was getting worse. Dr. Lee felt she had done well with her releases and had minimal numbness in her fingers and felt the weakness in her grip was very slight. (Px#7).

Petitioner obtained a separate examination with Orthopedist Dr. Corey Solman on June 12, 2013. Dr. Solman examined Petitioner and noted that her Tinel's signs over her left elbow and both wrists were negative with the exception of a mild Tinel's sign over the superficial radial nerve at the left wrist. He also noted no numbness or tingling to light touch in the left hand except for the fifth digit. (Px#9).

Dr. Solman concluded that Petitioner did develop carpal tunnel syndrome again in both hands as a result of her work related duties and also left cubital syndrome. He acknowledged that her work duties were not the only factors which led to the development of these conditions but opined that despite her diabetes that her work duties were an aggravating factor. He also opined that the residual numbness she had in her left small finger was related to chronic nerve damage from her cubital tunnel syndrome. (Px#9).

Petitioner testified that her right hand has improved following the surgery. At the present time, however, she testified that her pinky on her left hand feels dead, her other fingers go to sleep when she rubs them, and she still feels burning in her left hand. She drops things from her left hand that will just slide right out.

CONCLUSIONS OF LAW

1. With regard to the issues of whether the Petitioner sustained an injury which arose out of and in the course of her employment with Respondent and whether her current condition of ill-being is causally connected to this injury, the Arbitrator finds that the Petitioner has met her burden of proof. Petitioner worked as a parts inspector for Respondent for many years and there is no dispute that this job required frequent movement of her hands and frequent gripping with her hands. The bulk of her work day was spent inspecting parts by using either a thread gauge, a caliper, or a height gauge, and each tool required repetitive motions with her hands.

The thread gauge required rapid twisting of her hands while gripping the parts. The caliper required gripping and extension of the thumb and also bending of the wrist. The height gauge also required bending of her wrist to move her hand back and forth. Petitioner developed carpal tunnel syndrome in 1994 and had surgical releases bilaterally. Respondent's examining physician, Dr. Crandall, does not dispute that Petitioner's job required repetitive hand motions, but rather opined that Petitioner's symptoms were residual from her previous carpal tunnel syndrome. His conclusion, however, ignores the fact that Petitioner returned to her job following her surgical releases and worked at a job which required frequent gripping and repetitive hand motions for sixteen years before she again began to experience symptoms from carpal tunnel syndrome. The Arbitrator is persuaded by the opinion of Dr. Solman that Petitioner's job duties served to contribute to the development of the recurrence of her bilateral carpal tunnel syndrome and also to the development of her cubital tunnel syndrome in the left elbow. The Arbitrator therefore finds that Petitioner did sustain an accident which arose out of and in the course of her employment and that her current condition of ill-being with respect to her hands and left elbow are causally connected to this injury.

2. With regard to the issue of temporary total disability, the Arbitrator finds that Petitioner was temporarily totally disabled from July 23, 2010 through October 3, 2010, a period of 10-3/7 weeks. Petitioner underwent surgery on her left hand and elbow on July 23, 2010 and on her right hand on August 19, 2010. On September 21, 2010, Dr. Lee released her to return to work on October 4th. Respondent shall therefore pay to the Petitioner the sum of $435.79 per week for a period of 10-3/7 weeks, pursuant to Section 8(b) of the Act.

3. With regard to the issue of medical expense, the Arbitrator finds that the Petitioner's medical care was reasonable and necessary to relieve the effects of her injury. Petitioner submitted the bills from her medical treatment and these show that the following providers have unpaid balances in the following amounts:

1) Anesthesia Care of Effingham (DOS:7/23/10 & 8/19/10):	$2,160.00
2) Bonutti Orthopedic Clinic (DOS: 8/19/10):	$ 400.00
3) Marshall Clinic (DOS: 7/21/10):	$ 83.00
Total:	$2,643.00

The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $ 2,643.00 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

4. With regards to the nature and extent of the disability, the Arbitrator finds that the Petitioner has sustained a loss of 15% of her right hand, 15% of her left hand, and 15% of her left elbow, pursuant to Sections 8(e)(9) and 8(e)(10) of the Act. Petitioner sustained recurrent bilateral carpal tunnel syndrome and cubital tunnel syndrome in her left elbow. She is right hand dominant. She testified that she has significant pain and numbness in her left hand, especially her 5th finger, and will occasionally drop things. Dr. Lee's records confirm that she has lost some strength in her left hand. Dr. Solman concluded that the ongoing numbness in her left 5th finger is a result of the cubital tunnel syndrome at her left elbow. Respondent shall receive a credit for the amount of weeks paid for her previous settlements. Petitioner had previously settled a claim for bilateral carpal tunnel syndrome with Respondent for 15% of the right hand and 10% of the left hand.

14IWCC0343

Respondent shall therefore pay to the Petitioner the sum of $392.21 per week for a period of 99.45 weeks, pursuant to Sections 8(e)(9) and 8(e)(10) of the Act, less the Respondent's credit for the prior settlement of 15% of the right hand (28.5 weeks of PPD) and 10% of the left hand (19 weeks of PPD), leaving the Petitioner 51.95 weeks of permanent partial disability benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0344

vs. NO: 08 WC 08037

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **08WC008037**

10WC022752
11WC037713

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0344

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0344

BEVERLEY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # **08** WC **8037**

v.

Consolidated cases: **10WC22752/11WC37713**

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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 December 18, 2007, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**32,558.53**; the average weekly wage was $**656.42**.

On the date of accident, Petitioner was **64** years of age, married with **0** dependent children.

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

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

Respondent shall be given a credit of $**8,032.39** for TTD, $**0** for TPD, $**0** for maintenance, and $ **0** for other benefits, for a total credit of $**8,032.39**.

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 437.61/week for 22-6/7 weeks, from December 21, 2007 – January 7, 2008; February 21, 2008 – April 28, 2008; June 11, 2008 – June 26, 2008 and from February 11, 2009- April 9, 2009, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $393.85/week for a further period of 107.5 weeks, as provided in Section 8(e)(12) of the Act, because the injuries sustained caused 50% loss of the right leg.
- The respondent shall pay Petitioner the sum of $ 6,176.29 for medical expense.
- Respondent shall be given a credit of 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.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.

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

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

Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0344

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. On December 18, 2007 she was going in to work when she slipped on ice and slipped on ice and slid into a steel pole, striking her right knee on the pole. She described that she struck her knee hard and felt pain and burning in her knee.

Petitioner testified that before this injury, she had not received any medical attention for her right knee. She did not have any problems with respect to her right knee at the time of the injury. She did recall an incident which occurred where she struck her right knee while she was at work in January 2006. She recalled that she tripped on a bolt sticking out of the floor and fell to her knees, but this resolved without medical treatment.

She went to the emergency room on December 20, 2007 (Px#1) and later went to Crossroads Family Medicine, where she saw a physician's assistant, Ms. Sherry Locey, who referred her to an orthopedic specialist, Dr. Behrooz Heshmatpour. The records from PA Locey's office show that she restricted Petitioner to light duty on December 20, 2007 and on January 7, 2008 she released her to work without restrictions.(Px#2).

When Petitioner saw Dr. Heshmatpour, he recommended surgery, which was performed on February 21, 2008. (Px#3). According to Dr. Heshmatpour's operative report, he observed generalized chondromalacia of the patella, fairly advanced loss of cartilage and chondromalacia of the medial femoral condyle, significant loss of cartilage and chonromalacia of the lateral tibial plateau and lateral femoral condyle, and a complex tear of the lateral meniscus. He debrided the torn section of the meniscus, performed a chondroplasty of the lateral tibial plateau and lateral femoral condyle, and a lateral release of the patella. (Px#5).

Two weeks after her surgery, on March 6, 2008, Petitioner called Dr. Heshmatpour and expressed concern about swelling in her leg and foot with pain in her calf. The doctor recommended she go to an emergency room at St. Anthony's Hospital. (Px#2). At the emergency room, it was noted that she had pain and swelling in her leg, but a Doppler study was negative for blood clots. (Px#5). On March 31, 2008, Dr. Heshmatpour recommended that Petitioner could gradually go back to work with a cane. On April 28, 2008, she again saw Dr. Heshmatpour and reported residual pain though she was doing great. He noted that she would have residual pain and would eventually need a knee replacement but that she was doing well enough that she could go back to work, though she should not walk or stand for protracted periods of time and should interrupt standing or walking to sit down and rest. (Px#3).

Respondent had Petitioner examined by Dr. Christopher Kostman, of Orthopedic & Sports Medicine Clinic, on April 29, 2008. Dr. Kostman's reported that since Petitioner's injury she reported her right knee had catching, popping with no true locking, and also giving way. After her arthroscopy, she had improvement of popping and catching but no improvement of her pain or giving way symptoms. Dr. Kostman concluded that Petitioner sustained a lateral meniscus tear as a result of her injury on December 18, 2007 and that arthroscopy to repair meniscus was reasonable and necessary. He concluded, however, that her patellofemoral arthritis, lateral joint line arthritis and chondromalacia were unrelated to her injury, and the surgical procedure related to these conditions (chondroplasty of the lateral femoral condyle, tibial plateau, medial femoral condyle and lateral retinacular release) was also unrelated. (Rx#1).

On June 11, 2008, Petitioner phoned Dr. Heshmatpour's office and complained that she was still having a significant amount of swelling and pain in the calf and that her knee pain was unchanged and she was also having swelling in the knee. Dr. Heshmatpour told Petitioner to contact her family physician to make sure that

14IWCC0344

she hasn't developed a blood clot. (Px#3) Petitioner went to see her physicians' assistant, Sherry Locey who recommended she go to the emergency room and restricted her from working. (Px#2).

At the emergency room at St. Mary's Good Samaritan Hospital, a Doppler study did not detect any blood clots. An MRI of Petitioner's right leg showed a large amount of edema throughout her gastrocnemius muscle with two well-circumscribed fluid collections and also moderate edema within subcutaneous tissues. (Px#6). PA Locey continued to see Petitioner and restrict Petitioner from work through June 30th due to pain and swelling in her right leg. (Px#2).

Petitioner sought additional treatment from Dr. Peter Bonutti for her right knee on November 11, 2008. She testified that she did this because her knee continued to be in pain; after the first surgery by Dr. Heshmatpour the back part of her knee stopped hurting but the front part continued to be in pain.

The records of Dr. Bonutti show that he saw Petitioner on November 11, 2008 for pain in her right knee that has become progressively worse since February 2008. He noted that she had two traumas in the past, a direct blow to the patella in January 2006 when she fell on both knees and a direct blow to both knees in December 2007 when she fell on both knees, and that she also developed a blood clot following surgery performed by Dr. Heshmatpour. He recommended she undergo a total knee replacement. (Px#7).

At Respondent's request, Dr. Kostman performed a second exam which occurred on January 7, 2009. Dr. Kostman, concluded that none of Petitioner's medical treatment which occurred after his first exam on April 29, 2008 was related to her work injury, that she was at maximum medical improvement with respect to the injury and did not need any work restrictions. (Rx#1).

Dr. Bonutti performed surgery to provide her with a total knee replacement on February 11, 2009. On April 2, 2009, he recommended that she could return to work in one week without restrictions but she should limit repetitive squatting and lifting. (Px#7). Petitioner returned to work on April 10, 2009. Petitioner had a one year follow-up exam with Dr. Bonutti on February 16, 2010, where he stated that she had excellent results from the knee replacement. (Px#7).

Petitioner sought an evaluation from Orthopedist Dr. Corey Solman on June 12, 2013. Dr. Solman. Dr. Solman noted that Petitioner reported that after she injured her right knee on December 18, 2007 that she experienced pain, catching, and popping in the knee. His exam revealed a range of motion in her right knee of 0 to 125 degrees, no signs of instability, good strength, and mild tenderness over the anteromedial and anterolateral joint lines and retropatellar tendon area. He opined that Petitioner had pre-existing osteoarthritis changes and chondromalacia in the right knee but she her injury could have caused or advanced the changes in chondromalacia which accelerated the osteoarthritis which led to the need for a total knee replacement. He further explained that Petitioner's pains in the retropatellar tendon area are common for people who undergo total knee replacements, and can be the result of a buildup of scar tissue around the patellofemoral joint and the retropatellar fat pad which causes tightness and some popping and some catching. (Px#9).

At the present time, Petitioner testified that she experiences pain in the front of her right knee when going up and down stairs, and therefore goes one step at a time. She also experiences a similar pain when she squats or kneels to pray, and can only kneel for about five minutes before she has to stand. She can walk without pain on a level surface, but testified that after twenty minutes she starts to feel some weakness in her knee and must stop.

14IWCC0344

CONCLUSIONS OF LAW

1. With regard to the issue of whether Petitioner's current complaints are causally connected to her injury, the Arbitrator finds the Petitioner sustained her burden of proof. There is no dispute that Petitioner sustained an accident which arose out of and in the course of her employment when she slipped on ice and struck a steel pole with her right knee, or that the surgery performed by Dr. Heshmatpour to repair the lateral meniscus tear was caused by this injury. The facts demonstrate that Petitioner was in a condition of good health prior to her injury and did not have any pain or other symptoms related to her right knee. After the injury, however, she consistently had pain in her knee which was not relieved by her surgery by Dr. Heshmatpout. The Arbitrator is persuaded by the opinion of Dr. Kostman that Petitioner's pre-existing condition of chondromalacia and osteoarthritis in her right knee was aggravated by her injury when she struck her right knee on a steel pole. The aggravation of this condition led to the need for her total knee replacement.

2. With regard to the issue of Temporary Total Disability, the Arbitrator finds that the Petitioner was temporarily and totally disabled from December 21, 2007 through January 7, 2008, and again from February 21, 2008 through April 28, 2008, and again from June 11, 2008 through June 26, 2008, and again from February 11, 2009 through April 9, 2009, a combined period of 22-6/7 weeks. Petitioner was restricted to light duty by PA Locey on December 20, 2007 and released to return to work on January 8, 2008. Thereafter, she underwent surgery on February 21, 2008 and was released to return to work full duty – with limits on her walking and standing – on April 28, 2008. She was again restricted from work on June 11, 2008 through June 30, 2008, by PA Locey while she was experiencing pain and swelling in her right leg, though by the parties' stipulation Petitioner actually returned to work on June 27, 2008. Petitioner was restricted from working again by Dr. Bonutti after her total knee replacement on February 11, 2009 and later returned to work on April 10, 2009. Accordingly, Respondent shall pay to the Petitioner the sum of $437.62 per week for a period of 22-6/7 weeks.

3. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment was reasonable and necessary to relieve the effects of her work injury. In addition, the Arbitrator also concludes that Petitioner's medical treatment in March and June 2008 for pain and swelling in her right leg is causally related to her injury. On March 6th and again on June 11th, Petitioner developed pain and swelling in her leg, sought medical treatment, and was directed to go to the emergency room to be evaluated for blood clots. Though no blood clots were ever confirmed, the condition was felt to be related to her prior surgery and the treatment was ordered to evaluate her for post-operative clotting. Petitioner submitted the bills for her medical treatment and these reveal that the following providers have unpaid balances for the treatment of her right knee in the following amounts:

1)	Amsol Anesthesia (DOS: 2/11/09):	$ 700.00
2)	Anesthesia Care of Effingham (DOS: 2/11/09)	$ 2,590.00
3)	Bonutti Orthopedic Clinic (DOS: 2/11/09):	$ 727.00
4)	Fairfield Memorial Hospital (DOS: 2/18-3/27/09):	$ 266.56
5)	Marshall Clinic (DOS: 2/4/09 – 3/9/09):	$ 210.00
6)	St. Anthony's Memorial Hosp. (DOS: 3/6/08):	$ 239.00
7)	St. Anthony's Memorial Hosp. (DOS: 2/4 – 2/11/09):	$ 467.21
8)	St. Mary's Good Samaritan Hosp (DOS: 6/11/08 & 8/4/08:	$ 976.52

14IWCC0844

These bills total $6,176.29. The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $6,176.29 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

4. With regards to the nature and extent of the disability, the Arbitrator finds that Petitioner has sustained an injury which has resulted in a loss of 50% of her right leg, pursuant to Section 8(e)(12) of the Act. Petitioner sustained an injury to her right knee which resulted in a tear of her lateral meniscus which was repaired by arthroscopic surgery and which also aggravated her pre-existing osteoarthritis and led to a total knee replacement. Respondent shall therefore pay to the Petitioner the sum of $393.85 per week for a period of 107.5 weeks, as provided in Section 8(e)(12) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0345

vs. NO: 11 WC 37713

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,400.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **11WC037713**

10WC022752
08WC008037

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0345

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0345

BEVERLY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # 11 WC 37713

v.

Consolidated cases: 08WC8037&10WC22752

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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] 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 July 27, 2011, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,180.12**; the average weekly wage was $**657.31**.

On the date of accident, Petitioner was **67** years of age, married with **0** dependent children.

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

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

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 438.21/week for 17 weeks, from August 8, 2011 through November 21, 2011 and again from November 29, 2011 through December 11, 2011, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $394.39/week for a further period of 50 weeks, as provided in Sections 8(d)(2) of the Act, because the injuries sustained 10% loss of a person as a whole.
- The respondent shall pay Petitioner the sum of $1,262.80 for medical expense.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.
- The respondent shall further hold Petitioner harmless with respect to payments made by BlueCross BlueShield to Petitioner's medical providers for treatment related to her accidental injury and with respect to payments made by its non-occupational disability carrier pursuant to Section (j) of the Act.

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

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

Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0345

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. As a parts inspector, she would start by getting a box of parts which had been delivered, open it up, take the parts out and take them back to her desk. Petitioner's job was to check 32 parts in each delivery and she did this for the bulk of her day. Petitioner recalled that in approximately 2000 she underwent surgery on her right shoulder to repair a torn rotator cuff. She testified that this surgery resolved her complaints in her right shoulder. In the early part of 2011, however, she began to experience pain in her right shoulder that went down her right arm.

Petitioner sought medical treatment from Dr. Frank Lee of the Bonutti Clinic on March 8, 2011 because of pain in her right shoulder radiating down her arm for several months. The records of the Bonutti Clinic show that Petitioner sought treatment there on March 08, 2011 for right shoulder pain which had been radiating down her arm for four months and was worse with usage. She had previously undergone a rotator cuff repair several years prior in 2000 and had done well following that, but was not having pain. Dr. Lee provided her with a cortisone injection into her right shoulder, which provided partial relief. Dr. Lee ordered an MRI and arthrogram and this was performed on March 30, 2011. It showed through and through tears of both the supraspinatus and infraspinatus tendons. (Px#7).

On April 27, 2011, Petitioner again saw Dr. Lee. He provided a second injection for what he termed a chronic tear of the rotator cuff and felt that she may need surgery if the injection failed to help her pain. Petitioner testified that the first one helped for a little while but the second injection only helped until she got home. She testified that she was experiencing burning pain in her right shoulder and she could feel her heart beating in her whole arm. She was able to work, however, though her arm was hurting.

On June 6, 2011, Petitioner again saw Dr. Lee for her right shoulder. She expressed her desire to avoid surgery if possible, and the doctor provided her with another injection into her shoulder and told her to schedule another appointment once she determined how the injection did. (Px#7).

Petitioner testified that on July 27, 2011, she was using a pallet jack to move skids that contained boxes of parts. She was trying to get to a particular box of parts that was in the middle of a group of skids. She was pulling one skid out but it caught onto another skid, and she jerked it to try to free it when her shoulder popped and began to hurt worse. After this incident, Petitioner testified that she left the pallet just like it was so she could show her foreman. She recalled that after she got home from work that afternoon, she Dr. Lee for an appointment and went to see him the next day.

The records from the Bonutti Clinic show that at 10:26 a.m. on July 27, 2011, Petitioner phoned the clinic and stated that she is now having a lot of pain and redness in the shoulder and wanted to know what she should do. They further show that a nurse informed Dr. Lee at 3:06 p.m. that she wanted to schedule an appointment for Petitioner to see him the next day. Dr. Lee responded in the affirmative at 5:12 p.m. (Px#7).

When Petitioner saw Dr. Lee on July 28, 2011, she reported that she was doing well until yesterday when she injured her right shoulder at work trying to move a skid that was stuck; she pulled on the skid that was caught on another skid. Dr. Lee gave her a prescription for Tylenol and Ultram because of the recent flare up and restricted her from working through August 2, 2011. He asked Petitioner to call the next week and advise him whether her shoulder was better or not, and if not he would schedule surgery to repair her rotator cuff. Petitioner phoned on August 1st and informed Dr. Lee that her shoulder had not improved. He recommended surgery and this was performed on August 12, 2011. (Px#7).

14IWCC0345

In the operative report, Dr. Lee stated that he performed a subacromial decompression, a distal clavicle excision, a mini-open repair of a large rotator cuff tear, and removal of a loose bony body. He noted that a portion of the rotator cuff fibers were attached to the loose bone fragment and it was difficult to tell whether this represented a chronic or acute phenomenon. (Px#7).

Prior to this surgery, Respondent had Petitioner evaluated by Dr. Peter Mirkin of Tesson Ferry Spine & Orthopedic Center on August 8, 2011. Dr. Mirkin reviewed the records which reflected that Petitioner underwent an open rotator cuff repair with an acromioplasty and excision of the distal clavicle on August 8, 2000, and the records of Dr. Heshmatpour which reflected that Petitioner complained of weakness in her right shoulder on December 11, 2000 and reports that she was doing well though with some discomfort at an unspecified date in "early 2001." Dr. Mirkin concluded that Petitioner had degenerative shoulder pain from a strain injury. He felt her examination was benign but reserved further comment until he could review the results of a recent MRI. (Rx#3).

Petitioner returned to work on November 22, 2011 just before Thanksgiving. Petitioner testified that she had difficulty performing her job, however, because lifting boxes of parts caused her right arm to hurt. She estimated that the boxes of parts she would inspect weighed between 10 to 15 pounds. She stopped working because of the difficulty she had, and she returned to work on November 29, 2011 working at a different job performing gauge inspection. She testified that some of the gauges were heavy and also she had to set up the work table and that doing this hurt, so she decided to retire, which she did on December 19, 2011.

Petitioner obtained an examination from Orthopedist Dr. Cory Solman on June 12, 2013. His examination of her right shoulder revealed reduced range of motion in abduction (90 degrees) and external rotation (45 degrees), and strength was measured at 4/5 for her external rotators and her supraspinatus. He felt this was good functional range of motion and good functional strength, and since she has retired she does not need to build up her strength to her pre-injury level. The exam of the left shoulder was normal. He concluded that will continue to have pain in her right shoulder which she should treat by icing it, taking anti-inflammatories, avoiding inciting activities, and engaging in strengthening exercises, though she may need an occasional cortisone injection (Px#9). He felt that with her chronic repetitive work she developed a re-tear of her rotator cuff, and also felt that she re-injured the shoulder when she pulled on the skid which could have produced an acute on chronic injury. (Px#9).

Petitioner testified that at the present time she gets throbbing pain at the top of her right shoulder if she is active with her right arm, such as when she uses a vacuum cleaner. Trying to comb her hair is difficult because she will drop the comb. She does not curl her hair herself because she will drop a curling iron; her granddaughter sometimes will curl it for her. She did not describe any other activities which produced pain, though she said she is no longer active since she retired. She takes Motrin every morning because of pain in her right shoulder and Aleve sometimes in the evening for her right shoulder. When the weather is rainy she will notice an achiness at the top of her right shoulder.

Respondent produced its Workers' Compensation Manager, Mr. Jeff Jake, to testify on its behalf. He testified that he recalled speaking with Petitioner at approximately 11:45 a.m., just prior to his lunch hour, on July 27, 2011. According to his testimony, he went to the receiving area to pick up flu shots which had arrived when Petitioner called him over. He stated that Petitioner told him that she wanted to let him know that she had a doctor's appointment scheduled for the next day for her shoulder and that it was Work Comp. According to him, he asked her what injury this was related to and she informed him that it was from when she had her surgery nine years ago. He replied that it would probably be too long ago for her to continue to treat for it and

14IWCC0345

he would check to see if she received a settlement for it. He claimed that he contacted her after lunch to notify her that her prior claim for her right shoulder was a closed claim and that she could not treat for it, but offered to provide her with family/medical leave paperwork. According to him, she came to his office later that day to obtain this paperwork. Per his testimony, she reported an injury to her foreman when she returned to work on August 2nd, alleging that she injured her shoulder while pulling a pallet jack. Mr. Jake acknowledged that he did not go to investigate the scene after Ms. Clements alleged that she injured her shoulder pulling a pallet jack and did not observe a pallet stuck on another pallet, nor did he ever discuss the alleged accident with Petitioner's foreman or her co-workers. He is not responsible for the investigation of work accidents, as that is handled by a different person, Rod Holman.

On Rebuttal, Petitioner denied that she spoke with Mr. Jake before she sustained an injury to her right shoulder while pulling a pallet jack on July 27, 2011. She testified that after this occurred he came into the receiving area and she showed him how she hurt her shoulder, and she left the skids where they were after she hurt her shoulder trying to separate them. According to her, he told her that she could not file another claim because she had previously settled a claim for her right shoulder and so she walked away from him. She further testified that later in the day she showed Airtex' investigator Ron Holman and her foreman Mike White how her accident occurred. She recalled that she called Dr. Lee's office later in the day after she got off of work.

CONCLUSIONS OF LAW

1. With regard to the issue of whether Petitioner sustained an accident which arose out of and in the course of her employment, the Arbitrator finds the Petitioner has met her burden of proof. The medical records from Dr. Lee's office corroborate Petitioner's testimony that she injured her right shoulder while working on July 27, 2011 which aggravated her condition. Petitioner testified that while she had ongoing pain in her right shoulder before this date, it became aggravated when she pulled on a skid which had caught on another skid. The records from Dr. Lee's office prior to that date show that Petitioner complained of pain in her right shoulder but that she did not want to have surgery. Dr. Lee consistently offered her the option of surgery to repair a rotator cuff tear if he could not control her pain with injections before this event; and Petitioner consistently demurred.

The testimony of Respondent's workers' compensation manager, Jeff Jake, is not persuasive because it does not fully explain the events of the day of the alleged accident. He claimed that Petitioner spoke with him on July 27, 2011 at 11:45 a.m. to inform him that she wanted to re-open an old claim for an injury to her right shoulder and did not mention an accident, and he did not receive notice of any claim of an accident until several days later. He further acknowledged that he is not responsible for the investigation of alleged work injuries, but rather this is the responsibility of Ron Holman. He did not offer any explanation as to why Ron Holman would have reviewed the scene with Petitioner later in the afternoon of July 27th, as Petitioner testified, if she did not report an accident until several days later. Respondent failed to produce either Ron Holman, Petitioner's foreman Mike White, or any other witnesses who could have addressed Petitioner's allegations that she sustained an accident on that date. Petitioner testified that after she sustained the accident she left the skid she had been pulling where it was and showed both Ron Holman and Mike White how her injury had occurred, yet Respondent did not present either of these gentlemen to testify on its behalf.

Petitioner testified that she did not call Dr. Lee's office for an appointment until after she got home from work that afternoon. The records from Dr. Lee's office show that she phoned for her appointment at approximately 10:26 that morning, however, and informed the nurse that she was having more problems with her shoulder that had begun that day. While Mr. Jake testified that Petitioner informed him at approximately 11:45 that morning that she already had an appointment with the doctor the next day, the records from the Bonutti Clinic show that

the appointment was not made until after 3:00 p.m. at the earliest. The records from the Bonutti Clinic are more consistent with the Petitioner's testimony than they are of Mr. Jake's. While the nurse's note regarding Petitioner's phone call at 10:26 that morning do not record that she had an injury that morning, there is no indication that the nurse was taking a full history from the patient and would have asked about or even recorded any mention of a new injury. Petitioner did provide a full history and did claim that she sustained an injury while pulling on a skid when she saw Dr. Lee the next day. The nurse's notes, however, do contradict Mr. Jake's claim that Petitioner told him that she had already made an appointment to see Dr. Lee.
For the reasons set forth above, the Arbitrator finds that Petitioner did sustain an accident which arose out of and in the course of her employment with Respondent on July 27, 2011.

2. The Arbitrator finds that Petitioner's current condition of ill-being is causally connected to her injury which occurred on July 27, 2011. Having found that Petitioner sustained an accident on July 27, 2011, the treatment following this accident, including her surgery two weeks later, is causally related to this accident. The medical records from Dr. Lee's office indicate that Petitioner's symptoms increased following her accident and she could no longer tolerate the pain. Whereas before she was trying to avoid surgery, after the accident she felt that she needed to undergo surgery. The Arbitrator is persuaded by the opinion of Dr. Solman that Petitioner's injury was an acute event, which aggravated her chronic condition, caused it to worsen, and required surgery.

3. With regard to the issue of Temporary Total Disability, the Arbitrator finds that Petitioner was temporarily totally disabled from August 8, 2011 through November 21, 2011 and again from November 29, 2011 through December 11, 2011, a period of 17 weeks. Dr. Lee restricted Petitioner from working on July 28, 2011 and did not release her to return to work until November 22, 2011. Petitioner testified that she attempted to perform her job but this caused increased pain and she was again off of work from November 29, 2011 through December 11, 2011, and returned to work on December 12, 2011 and retired a few days later. At Arbitration, Petitioner stipulated to a period of TTD which commenced on August 8, 2011. Respondent shall therefore pay to the Petitioner the sum of $438.21 per week for a period of 17 weeks, pursuant to Section 8(b) of the Act.

4. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment was reasonable and necessary to relieve the effects of her work injury. Petitioner submitted the bills for her medical treatment and these reveal that the following providers have unpaid balances for the treatment of her right knee in the following amounts:

1) Bonutti Orthopedic Clinic (DOS: 3/08/11-12/08/11):	$ 594.00
2) Marshall Clinic (DOS: 8/09/11):	$ 214.00
3) St. Anthony's Memorial Hosp. (DOS: 8/12/11):	$ 454.80

These bills total $1,262.80. The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $1,262.80 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

5. With regards to the nature and extent of the disability, the Arbitrator finds that Petitioner has sustained an injury which has resulted in a loss of 10% of a person as a whole, pursuant to Section 8(d)(2) of the Act.

14IWCC0345

Petitioner sustained an injury to her right shoulder, which resulted in a recurrent tear of her rotator cuff which was repaired by a mini-open surgery. She has loss of strength and range of motion and residual pain. Because of her ongoing symptomology, she felt she could not continue to work at her normal job and chose to retire. Respondent shall therefore pay to the Petitioner the sum of $394.39 per week for a period of 50 weeks, as provided in Section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ruthelma C. Attig,

Petitioner,

14IWCC0346

vs. NO: 11 WC 36447

Murphysboro Unit District 186,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ATTIG, RUTHELMA C
Employee/Petitioner

Case# **11WC036447**

14IWCC0346

MURPHYSBORO UNIT DISTRICT 186
Employer/Respondent

On 9/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0250 HOWERTON DORRIS & STONE
STEVE STONE
300 W MAIN ST
MARION, IL 62959

1337 KNELL & KELLY LLC
MATT BREWER
504 FAYETTE ST
PEORIA, IL 61603

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0346

RUTHELMA C. ATTIG
Employee/Petitioner

v.

MURPHYSBORO UNIT DISTRICT 186
Employer/Respondent

Case # **11** WC **36447**

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 **08/16/13**. By stipulation, the parties agree:

On the date of accident, **12/06/10**, 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 $**22,309.56**, and the average weekly wage was $**429.03**.

At the time of injury, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

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 **$257.41**/week for a further period of **37.5** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **7.5% loss of use of the person as a whole**.

Respondent shall pay reasonable and necessary medical services of $39,107.36, subject to the fee schedule and as provided in Sections 8(a) and 8.2 of the Act, with Respondent receiving credit for any bills which Respondent has already paid.

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

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

Signature of Arbitrator

9/9/13
Date

SEP 10 2013

14IWCC0346

FINDINGS OF FACT

Petitioner works for Respondent as a teacher's aide. She has worked for the Respondent for 26 years since 1987. There is no dispute that on December 6, 2010, the Petitioner was working for the Respondent when a student collided with her in the school hallway. This incident caused the Petitioner to experience pain in her neck and lower back. Petitioner had previously sustained a neck injury for which she was still receiving medical treatment. This claim is focused on Petitioner's injury to her lower back.

On the day of the accident, following the incident described above, the Petitioner sought treatment at the emergency room of Memorial Hospital. The records from that medical provider confirms Petitioner's complaints of pain to her neck and low back. They indicate Petitioner was directed to follow up with her neurosurgeon.

On January 27, 2011, Petitioner underwent an MRI at the recommendation of her treating physician, Dr. Taveau. The MRI revealed disc degeneration and facet arthropathy with possible impingement and radiculopathy at L5-S1, L4-5 and L3-4.

Petitioner ultimately came under the care of neurosurgeon, Dr. Gerson Criste. Dr. Criste diagnosed Petitioner with lumbosacral spondylosis without myelopathy. Dr. Criste treated Petitioner initially with a series of epidural steroid injections. Dr. Criste followed up the injections with radiofrequency denervation. Petitioner testified that this treatment gave her relief after having undergone the procedure twice.

Dr. Frank Petkovich testified on behalf of the Respondent via evidence deposition on Ju;y 1, 2013. He conducted a review of the Petitioner's medical records but did not actually examine the Petitioner in person. Dr. Petkovich opined that based on his review of the medical records, the Petitioner sustained a soft tissue injury with a temporary exacerbation of a degenerative lumbar disk disease.

Petitioner did not lose any time from work due to this incident. She testified that she has physical limitations with bending, bathing, using stairs, painting her nails or standing for long periods of time. Her testimony during cross examination and the medical records offered by Respondent confirm that the Petitioner had complaints of low back problems in the past.

CONCLUSIONS OF LAW

1. The Arbitrator finds that the Petitioner has met her burden of proof regarding whether her current condition of ill-being is causally connected to her undisputed work accident on December 6, 2010. This finding is supported by the Petitioner's uncontroverted testimony and the treating medical records. The Arbitrator finds persuasive the MRI and operative reports indicating Petitioner's diagnosis of lumbosacral spondylosis without myelopathy.

2. Petitioner's medical treatment for her lower back condition was reasonable and necessary to address her condition. The Arbitrator notes the Petitioner's credible testimony about her treatment, including her injections and her radiofrequency denervation procedures – all of which appears to have helped in minimizing her back complaints. Accordingly, Respondent shall pay any and all medical expenses incurred by Petitioner in relation to her back treatment as evidenced in the blue tabbed section of Petitioner's Exhibit number 1, subject to the fee

14IWCC0346

schedule and in accordance with Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any expenses it has already paid.

3. Petitioner has sustained a 7.5% loss of use of the person as a whole as the result of this accident. This finding is based on: the medical evidence indicating Petitioner's diagnosis of lumbosacral spondylosis without myelopathy; Petitioner's medical treatment, which included injections and two procedures of radiofrequency denervation; and Petitioner's continued physical complaints, which were both credible and unrebutted.

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

Karen Ramey,

Petitioner,

14IWCC0347

vs. NO: 11 WC 07818

State of Illinois, Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2013 is hereby affirmed and adopted.

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

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

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAMEY, KAREN
Employee/Petitioner

Case# **11WC007818**

14IWCC0347

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

On 9/6/2013, 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 0.05% 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:

1824 STRONG LAW OFFICES
HANIA SOHOUL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

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

4993 ASSISTANT ATTORNEY GENERAL
ANDREW SUTHARD
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 6 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0347

Karen Ramey
Employee/Petitioner

Case # **11** WC **007818**

v.

State of Illinois Department of Human Services
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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **July 10, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 19, 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 **$83,304.00**; the average weekly wage was **$1602.00**.

On the date of accident, Petitioner was **55** 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.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits at the maximum PPD rate of **$669.64/week** for **12.65** weeks, because the injuries sustained caused the **5%** loss of use of left arm, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical expenses of **$2,065.00** subject to the Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.

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

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

Nancy Lindsay — Signature of Arbitrator

9.3.13 — Date

SEP 6 - 2013

The disputed issues are accident, notice, causal connection, medical expenses and nature and extent. Petitioner was the only witness testifying at arbitration. She alleges an injury to her left elbow stemming from an accident on August 19, 2010.

The Arbitrator finds as follows:

Petitioner testified she is employed by Respondent as a supervisor in Social Security Disability Claims – Unit 7. Petitioner testified she has been employed with the State of Illinois since 1977. Her job duties, currently, and at the time of her accident, consist of supervising a unit of disability adjudicators.

Petitioner presented to the office of Dr. Widicus on October 18, 2010 complaining of left elbow pain after hitting it on a file cabinet at work two and a half months earlier. Petitioner told the doctor she thought it would get better but it was getting worse instead. Petitioner complained of radiating pain down her forearm and a feeling of increasing weakness. Dr. Widicus noted Petitioner was right hand dominant. Petitioner was referred to Dr. Watson. (RX 2)

Petitioner reported her injury to Respondent on October 19, 2010. According to the Employer's First Report of Injury Petitioner injured herself on August 19, 2010 when she was walking and turned a corner striking her left elbow on the corner of a cubicle. (RX 1) In her own Notice of Injury Petitioner stated she hit her left elbow on a cubicle corner while walking through the unit. She immediately experienced excruciating pain and her arm had remained painful and weak since then. (RX 1)

Petitioner presented to Dr. Watson at Watson Orthopaedics on October 20, 2010. As part of the visit Petitioner completed an Injury Report Form. In it Petitioner explained that she was walking within her unit and when she turned she hit her elbow on the corner of a cubicle resulting in excruciating pain. Petitioner further stated her elbow hurt for over two weeks and then began to get better. However, it continued to hurt when doing certain things and her arm felt like it was getting weaker. (PX 3)

According to the history noted in Dr. Watson's records, Petitioner injured her left elbow several weeks earlier at work when she struck the lateral aspect of her elbow against a cubicle wall. Petitioner described ongoing and persistent pain which was worse with lifting and power gripping. The pain also radiated into the dorsal aspect of her forearm and proximally into the arm. On physical examination Petitioner was tender about the lateral epicondyle. X-rays revealed no bony abnormalities. Petitioner was diagnosed with lateral epicondylitis and given an injection into her elbow. Petitioner was advised to return if necessary. (PX 3)

By letter dated December 10, 2010 Respondent notified Petitioner that her claim for workers' compensation benefits had been denied as 'there were no unsafe issues contributing to her elbow condition and the cause of her symptoms appeared to be idiopathic or unknown.' (PX 3)

Petitioner returned to see Dr. Watson on January 5, 2011 reporting some improvement in her left elbow but complaining of ongoing radiating pain into the lateral triceps area with ongoing tenderness about the

lateral epicondyle. She also experienced some de-pigmentation and fat atrophy from the cortisone injection. Dr. Watson recommended physical therapy and a return visit in three weeks. (PX 3)

Dr. Watson re-examined Petitioner on February 7, 2011 noting persistent left arm pain primarily along the distal lateral triceps and brachial radialis. Petitioner reported ongoing pain since her accident. While her lateral epicondylar pain had primarily resolved after two injections Petitioner noted ongoing pain with elevation of her shoulder and elbow in a flexed and pronated position. Dr. Watson was able to reproduce the symptoms in the office. Dr. Watson suspected some scar tissue or a contusion. He gave her another injection and recommended another visit in three weeks. (PX 3)

When Petitioner returned to see Dr. Watson on March 1, 2011 she reported no change in her symptoms and her physical examination was unchanged. Dr. Watson ordered an MRI scan. (PX 3)

Petitioner met with Dr. Watson on May 2, 2011 at which time her complaints and examination remained unchanged since her previous visit. Dr. Watson noted the MRI had not been authorized by workers' compensation so Petitioner was going to try and get it scheduled through her personal insurance. In the meantime, Petitioner was advised she could continue working. (PX 2)

Petitioner underwent the MRI on May 10, 2011. According to the report, soft tissue T2 signal abnormality involving the origin of the common extensor tendon and adjacent soft tissues was noted. The findings were consistent with tendinitis/partial tear of the origin of the common extensor tendon. The radial collateral ligament was not optimally visualized on the MRI and if there was any concern about an injury to that ligament an MRI arthrogram was recommended. (PX 2)

After the arthrogram Petitioner followed up with Dr. Watson on May 17, 2011 who noted the scan was indicative of a partial thickness tear with tendinitis of the common extensor tendon. Reluctant to recommend surgery, Dr. Watson recommended a second opinion with Dr. Christopher Maender. (PX 2)

Dr. Maender examined Petitioner on June 22, 2011. At that time he believed Petitioner's problem was two-fold: lateral epicondylitis and a radial nerve contusion. Dr. Maender recommended a trial of Mobic, a counterforce brace, and exercises. He wished to see her again in six weeks. (PX 2)

Petitioner returned to see Dr. Maender on August 3, 2011. Petitioner reported improvement after the last visit for approximately three weeks and then she returned to baseline. Petitioner described a lot of pain over the area about one handbreadth above her lateral epicondyle and pain with getting her hand behind her head and engaging in overhead activities. On physical examination Petitioner experienced pain with forward flexion up above ninety degrees. She had positive Neer and Hawkins impingement signs with good strength to her rotator cuff in all positions but pain when stressing them. She was most exquisitely tender right above the lateral epicondyle in the area previously described. Dr. Maender's diagnoses were impingement syndrome and parascapular shoulder pain and left radial nerve pain from direct compression that has not improved. Dr. Maender had no recommendations for the radial nerve, including surgical solutions. He recommended she continue using the anti-inflammatory and protect it; however, Petitioner expressed no interest in trying the brace. Dr. Maender believed Petitioner's shoulder complaints were due to compensation and he recommended some therapy. (PX 2)

Petitioner was again examined by Dr. Maender on September 13, 2011. Petitioner reported that some of the physical therapy exercises exacerbated her pain and were, therefore, stopped. Petitioner was still

experiencing pain in the radial nerve area along with a new complaint of burning. Dr. Maender gave Petitioner a second injection as he believed most of her pain was coming from extensor musculature. (PX 2)

Petitioner completed her physical therapy on September 22, 2011 (PX 2) and returned to see Dr. Maender on October 12, 2011. He noted improvement in her condition and recommended that she continue with conservative measures and avoid aggravating activities. If she had an acute exacerbation, he recommended she use the wrist brace. (PX 2)

Dr. Maender last examined Petitioner on December 7, 2011 at which time Petitioner reported ongoing pain along her left lateral epicondylar region. The doctor noted Petitioner had done a lot of work on Thanksgiving and the area was really painful and swollen thereafter. She reported diminished strength and pain when driving, along with occasional burning. On physical exam, Petitioner was tender directly over the lateral epicondyle and proximal to it. He did not really notice tenderness over the radial nerve. His diagnosis remained left lateral epicondylitis which he described as "persistent." He also noted some radial nerve irritation but it did not seem to be contributing to her pain that day. He again recommended exercises and avoidance of aggravating activities. She was told this could recur off and on for many years and that she needed to work on her strengthening exercises. If it ever gets bad enough, they can discuss available options at that time. (PX 2)

Petitioner has had no further medical care since December 7, 2011.

At arbitration Petitioner testified that she is 58 years old with three adult children. Petitioner graduated from college and has been employed by Respondent as a public service administrator supervisor. In that position Petitioner supervises adjudicators who decide social security disability claims. According to Petitioner, it is a very stressful job.

Petitioner testified that she was working late on the evening of August 19, 2010. While she normally worked until 4:30 there were three times each month when she was required to work until 6:00 p.m. Petitioner would receive "comp time" for working the additional hours. Petitioner testified she was walking into a co-worker's cubicle to put some papers in an adjudicator's tray when she turned and hit her left elbow. She stated around 5:30 p.m. she walked into a cubicle within Unit 7 to put "a piece of paper" in the employee's in-box. After she put the paper into the in-box she turned to the left and struck her left elbow on either the cubicle trim or a standing file cabinet. She stated she immediately felt excruciating pain, to the point it made her cry. She stated she continued to work, but did not immediately report her injury. Petitioner testified she gave oral notice to her supervisor, Jim Neposrehlan, on August 27, 2010, after her symptoms had not subsided.

On cross-examination Petitioner admitted she filled out certain forms when filing her workers' compensation claim. She was shown three forms – Illinois Form 45, Employee's Notice of Injury, and the Supervisor's Report of Injury. (RX 1) She acknowledged she had to call into Caresys to provide claim information, which is contained in the Illinois Form 45. She also acknowledged she filled out and signed the Employee's Notice Injury. Further, she agreed she provided the Supervisor's Report of Injury to her supervisor for him to fill out. She agreed all forms showed the time of injury to be 3:30 p.m., not after hours as she had testified. The Supervisor's report also indicates oral notice was not given until October 19, 2010. It is signed by Jim Neposrehlan and Petitioner confirmed his signature on the document when testifying at arbitration.

Petitioner testified she was not certain if she struck her arm on a file cabinet or cubicle trim because the two were close together. She stated hitting her elbow made a sound, but could not remember what kind of sound (such as if it was metallic or not). She agreed, however, both the cubicle and the file cabinet are stationary objects. She also stated neither was defective in anyway. Petitioner described the cubicle layout in detail, but did not note any deficiencies with the set up. She also did not describe any deviation from the standard, because, as she stated, she didn't know what standard cubicles were. She stated nothing in particular caused her strike her elbow; nothing was sticking out, and nothing fell on her. She testified she was walking within the unit, not running, and the accident did not happen under extenuating circumstances. She testified she was simply standing in the middle of the cubicle, turned around and struck her elbow on something.

Petitioner admitted she waited two months before seeking treatment. She stated her symptoms never improved so she decided to see Dr. Diana Widicus, her primary care physician on October 18, 2010. (RX 2)

Petitioner testified she underwent three injections but nothing more could be done. Surgery, according to her, is not an option due to the location of the nerve. Petitioner testified to occasional "excrutiating shooting pain" from the middle of her elbow up her arm about half-way. She also claims diminished grip strength. When sitting, gardening, or playing with her grandchildren she may experience a "jolt" which lasts a few seconds. It happens maybe 6-7 times per week but may occur more often which is why she occasionally stretches her arm a certain way. Petitioner further testified that she tries not to grab things as she is concerned she might drop them if she experiences a jolting episode. Petitioner testified to trouble putting her left arm out the car window when going through drive-up windows at banks and fast food restaurants so she does not frequent them as often as she used to.

Petitioner is right hand dominant.

Petitioner's medical bills are contained in PX 4 and consist of charges to the Orthopaedic Center of Illinois, Dr. Watson, and prescriptions. The Orthopaedic Center bill totals $1307.00. Dr. Watson's bill totals $748.00. Petitioner paid $10.00 for prescriptions. Petitioner testified her co-pays were paid by herself while her personal insurance covered the balances on the bills.

<u>The Arbitrator concludes:</u>

1. **Petitioner's Credibility**

   Petitioner was a credible witness concerning the details of her accident as she testified in detail and with clarity concerning the layout of Unit 7, her job duties, and the mechanism of injury. However, Petitioner was not as credible concerning the nature and extent of her injury as her testimony seemed somewhat exaggerated and dramatic as when she described "a lot of excruciating pain in her funny bone" with "shooting pain" that brought "tears to her eyes." The Arbitrator finds Petitioner believable regarding ongoing issues with her left arm but just not to the degree she claims.

2. **Accident**

Petitioner sustained an accident on August 19, 2010 that arose out of and in the course of her employment with Respondent. Petitioner testified that the cubicles are congested and there isn't a lot of space. Petitioner's job requires her to walk to various cubicles throughout the unit to deliver papers. No evidence was presented suggesting that the unit and the area(s) around the cubicles is open to the public. As such, and due to the demands and requirements of Petitioner's job, Petitioner is exposed to a risk of injury to a greater degree than that of the general public. While the first specific mention of placing a piece of paper in an "In Box" was made at arbitration Petitioner's history as found in Dr. Watson's Injury Report Form, history to Dr. Watson, and Employer's First Report of Injury are consistent with Petitioner's testimony. Any discrepancies in the time of the accident are minor and insignificant.

3. **Notice**

Prior to the arbitration hearing Petitioner completed a Request for Hearing form (AX 1) in which she indicated that notice was given to her section chief, Jim Neposrehlan, on/about August 27, 2010. Thus, Respondent was aware of the identity of the individual Petitioner would be claiming she provided notice to. Petitioner testified that she orally notified Mr. Neposrehlan approximately one week later. Petitioner's testimony to that effect was unrebutted as Mr. Neposrehlan did not testify.

Respondent challenges notice on the basis of the October 19, 2010 CMS documents (RX 1). Petitioner completed a Notice of Injury form on that date and identified Mr. Neposrehlan as the person to whom she reported her injury. She did not indicate the date or time. While Mr. Neposrehlan completed a supervisor's report and indicated he received oral notice on October 19, 2010, he also stated in the report that the accident occurred on "August 17, 2010." Petitioner's accident date is August 19, 2010. The Arbitrator reasonably infers that Petitioner either had another accident on August 17, 2010 or Mr. Neposrehlan incorrectly noted the date of accident. If the latter, the Arbitrator reasonably infers that if he made a mistake as to the date of accident he may have also made a mistake as to when notice was provided. Had he appeared at trial and testified, the matter might have been clarified. As such, Petitioner's testimony regarding oral notice being provided in late August of 2010 remains unrebutted.

4. **Causal Connection.**

Petitioner testified that after the accident, she went to see Dr. Widicus, who referred her to Dr. Watson. Dr. Watson took a history from Petitioner and in his records of October 22, 2010 stated that "she struck the lateral aspect of the elbow against a cubicle wall. She developed pain which has persisted to this day." (P X 3) Petitioner credibly testified that prior to the injury of August 19th, 2010 she had not sustained any injuries to her left elbow, and had never experience pain in her left elbow prior to the injury of August 19th, 2010. As such causation is established through Petitioner's credible testimony, the treating medical records, and a chain of events. Respondent

presented no evidence refuting causal connection; rather, its defense was based upon whether Petitioner's accident arose out of her employment.

5. **Medical Expenses.**

Having found in Petitioner's favor on the issues of accident and causal connection, Petitioner is awarded medical bills in the amount of $2,065.00 as set forth in PX 4 and subject to the Medical Fee Schedule. These bills include prescription charges of $10.00, services by Dr. Watson in the amount of $748.00, and outstanding charges to the Orthopaedic Center of Illinois ($1,307.00). All of these bills relate to treatment incurred by Petitioner as a result of her work injury. Respondent claimed no 8(j) credit.

6. **Nature and Extent**

Petitioner's elbow has been treated conservatively. No surgery has been recommended at this time. Petitioner was diagnosed with both lateral epicondylitis and a radial nerve contusion. While Dr. Maender believed Petitioner also had some shoulder impingement due to overcompensation, she seems to have recovered from it and has had no further treatment beyond some therapy nor did she testify to any ongoing shoulder problems.

Petitioner testified she was released from Dr. Maender's care on December 7, 2011. At that time Dr. Maender noted Petitioner complained of pain over her left lateral epicondyle, but also noted she had aggravated it "doing work over Thanksgiving." He diagnosed Petitioner with persistent left lateral epicondylitis with some non-contributing radial nerve irritation. At that time he recommended home exercises and avoidance of aggravating activities.

Petitioner testified she continues to experience shooting pains approximately 6-7 times per week with activities. She stated the pain can be "excruciating." She also complains of decreased grip strength and a tendency to drop things. Petitioner testified she has not returned to see Dr. Maender since she was released from his care. She further testified, despite her recurring pain, she has not sought medical treatment with any of her other doctors since being released in December of 2011.

Petitioner continues to work for Respondent on a full duty basis. She had no lost time from work nor has she been given any formal restrictions. She appears to be working without any problems except for some occasional pain and occasional dropping of papers.

Having found in Petitioner's favor on the issues of accident and causal connection, and based upon Petitioner's treatment records, the Arbitrator awards Petitioner permanent partial disability in the amount of 5% loss of use of the left arm pursuant to Section 8(e) of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Danny Burgess,

Petitioner,

14IWCC0348

vs. NO: 11 WC 47207

Tri County Coal, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 7, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURGESS, DANNY
Employee/Petitioner

Case# **11WC047207**

14IWCC0348

TRI COUNTY COAL LLC
Employer/Respondent

On 8/7/2013, 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 0.07% 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:

1539 DRUMMOND LAW LLC
PETE DRUMMOND
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LITCHFIELD, IL 62056

0332 LIVINGSTONE MUELLER ET AL
DENNIS O'BRIEN
P O BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY BURGESS
Employee/Petitioner
v.
TRI COUNTY COAL, LLC
Employer/Respondent

Case # 11 WC 47207

14IWCC0348

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

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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 **November 26, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,474.03**; the average weekly wage was **$1,066.81**.

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

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$7,339.89** for other benefits, for a total credit of **$7,339.89**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $711.21/week for 26 2/7 weeks, commencing November 29, 2011 through May 30, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $640.09/week for 100 weeks, because the injuries sustained caused the 20% loss of use to the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

07/31/2013
Date

AUG 7 - 2013

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY BURGESS
Employee/Petitioner

14IWCC0248

v.

Case# 11 WC 47207

TRI COUNTY COAL, LLC
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Danny Burgess, was employed in the coal mining industry from 1974 until his retirement in 2012. (See Petitioner's Exhibit (PX) 5, Petitioner's Deposition Exhibit 3). He performed a variety of laboring duties during his mining tenure. Petitioner testified he worked for Respondent or a group of mines affiliated with Respondent for twelve years, or from approximately 1999-2012. (See also PX 5, Petitioner's Dep. Exh. 3). In 2011, Petitioner was classified as "INBY," which meant he could have been classified into any of the following jobs: roof bolter operator, mine operator, ram car operator, and "utilityman." (PX 1). Petitioner testified that he worked all of the foregoing jobs during his time classified as INBY with the exception of a mine operator. Petitioner testified at length concerning the duties of the three positions he worked when an INBY with Respondent, *i.e.*, a roof bolter, a ram car operator and a utilityman.

As a roof bolter, Petitioner testified that the primary goal of these duties was to install pins in the mine's roof so as to hold up and secure the roof. Petitioner testified that while a machine was used to perform most of the roof bolting work, there was also significant physical and overhead work involved. He testified that the machine could not manually put pins up into the roof, and that the worker performs this aspect of the job. He testified that not all pins placed in the roof fit like they should. He noted that if there was an eight foot pin, such a pin has a bent nature to it, and when pushed into the roof hole, the roof bolter employee would have to push it with his hand to straighten it out, using considerable force with his shoulders. Petitioner testified that the difficulty in pushing up the pins was also commensurate with how high the roof was, in that the lower the ceiling, the easier it was to insert the pin. He noted that there was significantly more manual labor involved with a high and ragged (or unsmooth) ceiling. Petitioner testified that the use of a pry bar was needed as a roof bolter to knock down loose rock overhead, and that said action required a lot of overhead shoulder use.

Petitioner testified that a "ram car" was essentially an underground dump truck used in Respondent's coal mine to transport mined coal to a conveyor belt. The ram car operator would drive this vehicle underground in the mine performing these transportation duties. Petitioner also testified that other

duties were associated with being a ram car operator. When one entry was mined out, the mining machine would then move into a new entry and set up to begin to load coal. Petitioner testified that the ram car operator would assist with the physical lifting aspects involved in these moves. Petitioner testified that said move would occur between twelve-to-fifteen times per eight-to-nine hour shift. Petitioner stated that ram car operators would also hang "curtains" (which he testified was overhead work), build "stoppings" (metal or concrete – which included overhead work), and hang miner cable (or at times just throwing the cable out of the way – again which Petitioner testified was overhead work). Petitioner also testified that if the "belt tail" needed shoveled, a ram car operator would perform this shoveling work at times. All of the aforementioned ancillary duties of a ram car operator involved considerable physical labor, according to Petitioner (about four-to-five hours per shift), and he further testified that all of these duties were hard on his shoulders.

Petitioner testified that the duties of a utilityman involved transporting bolting material for unloading, so that the roof bolters would have supplies for which to perform their roof bolting duties. The utilityman would also utilize a machine that used a bucket to scoop loose coal and "glob" away so that the area was cleaner for the incoming roof bolters. The utilityman would also spray a wet substance onto surfaces to keep the area non-combustible. The utilityman would make the spray material in question, by which he would dump 50 pound bags of rock dust into a metal pot and then mix water with it.

Petitioner testified that he performed all three of the aforementioned jobs with Respondent at varying times, performing the duties of a utilityman the least amount of time. Records offered from Respondent indicated that Petitioner performed the duties of ram car operator a majority of the time from January 2009 through November 2011, but that he also performed the duties of roof bolting and utilityman during that timeframe. (RX 10). Petitioner testified that just because a worker was classified at the beginning of the shift on one of the particular three jobs did not mean that at anytime throughout a shift said worker would be taken off the initial, labeled assignment and placed on one of the remaining two other job assignments. For example, Petitioner testified that if a worker was set to be a ram car operator and a roof bolter left work due to illness, the ram car operator could be placed as a roof bolter for the rest of the shift. When this occurred, the worker would still be classified in Respondent's records by the position he started in that shift (*e.g.*, a ram car operator transferred to a roof bolter position would still be classified as a ram car operator for that shift in Respondent's records). Petitioner testified that this change happened fairly regularly, and when it occurred it was usually just for a part of the shift.

John LeGrand testified on behalf of Respondent. Mr. LeGrand is a mine superintendant with Respondent and was a mine supervisor before that for 33 years. Mr. LeGrand listened to Petitioner's testimony at trial and believed it was "overstated." Mr. LeGrand testified that a ram car operator would only perform the physical labor aspect of the job for two hours or less per shift, as opposed to Petitioner's testimony that the physical work would consist of four-to-five hours per shift. Mr. LeGrand confirmed Petitioner's testimony that an INBY worker could change positions during a shift due to a worker leaving for health reasons, but that said change would not occur very often.

Petitioner is claiming a repetitive trauma injury to both shoulders with a manifestation date of November 26, 2011. Petitioner testified to pre-existing issues concerning his shoulders. Respondent also offered into evidence various accident reports and medical records relating to injuries Petitioner incurred to his shoulders (primarily his right shoulder), as well as various other body parts. (RX 3-8). Petitioner testified that all of the foregoing shoulder complaints indicated in Respondent's records resolved prior to his claimed manifestation date of November 26, 2011. He further testified that he had no "real" medical treatment to his shoulder before October 2011, with the exception of therapy or medication.

Petitioner testified that sometime in July 2011, he noticed severe bilateral shoulder pain when performing overhead work duties. In approximately August or September 2011, he presented to Dr. Brian Quarton concerning his shoulder complaints, and testified that he was in turn referred to orthopedic surgeon Dr. Rodney Herrin for these symptoms. (See also PX 5, p. 7; PX 3). Petitioner first presented to Dr. Herrin on October 6, 2011. (PX 3; PX 5, p. 7). Petitioner reported to Dr. Herrin that his shoulder complaints began approximately three months prior, and that he worked as a coal miner performing "quite a bit" of overhead work. (PX 5, pp. 8, 47). Dr. Herrin ordered physical therapy and a corticosteroid injection into each shoulder. (PX 5, pp. 10-11; PX 3). MRI testing was also performed. (PX 3; PX 4).

Petitioner underwent left shoulder surgery by Dr. Herrin on November 29, 2011. (PX 3). The surgery consisted of a left shoulder arthroscopy with repair of the supraspinatus tendon, a subacromial decompression, a distal clavicle excision, and debridement of tearing of the superior labrum. (PX 3; PX 5, p. 10). The post-operative diagnosis noted was left shoulder pain secondary to full-thickness attenuated tear of the supraspinatus and tearing of the superior labrum, as well as a symptomatic acromioclavicular (AC) joint.

Petitioner was taken off work by Dr. Herrin on the date of surgery for a then-undetermined period of time. (PX 3). Petitioner testified that he worked directly up until the date of surgery, but took a "personal day" the day before surgery. A note from Dr. Herrin dated January 26, 2012 indicated Petitioner was still held off of working per the doctor's order. Petitioner also underwent physical therapy following the left shoulder surgery. (PX 3).

Dr. Herrin authored a letter to Petitioner's counsel dated January 23, 2012. Dr. Herrin reported the following in that note: "The assumption is that [Petitioner's] employment is as a coal miner would involve overhead drilling of holes and installing roof bolts, hanging cables overhead (which weigh approximately 70 pounds per cable), building brattice walls and ceilings out of concrete block, which weigh approximately 40 pounds or more per block (for ventilation and running a ram car)." Dr. Herrin further reported as follows: "It is my opinion that the problems with both of [Petitioner's] shoulders are related to his work activities as a coal miner. It is my opinion that those activities would have caused or at least significantly contributed to the problem with each shoulder. The type of work that he does as a roof bolter would put significant stress on the shoulders, and this would place him at significant risk for injury to the rotator cuff." (PX 5, Petitioner's Dep. Exh. 2).

Petitioner underwent right shoulder surgery by Dr. Herrin on February 10, 2012. (PX 3). The surgery consisted of a right shoulder arthroscopy with repair of the supraspinatus tendon with suture anchors, a subacromial decompression and a distal clavicle excision. (PX 3; PX 5, p. 12). The post-operative diagnosis noted to Petitioner's right shoulder was pain secondary to significant articular-sided tear of the supraspinatus, subacromial impingement and a symptomatic AC joint. (PX 3).

Petitioner underwent a post-operative course of physical therapy, and was given work restrictions on March 9, 2012 of no use of the right arm and minimal use of the left arm, with no pushing, pulling, lifting or overhead work. The work restriction note also stated that if those restrictions could not be accommodated, then Petitioner was to remain off work at that time. Notes from Dr. Herrin dated April 19, 2012 and May 21, 2012 continued the work restrictions. (PX 3). Petitioner did not return to work during this time (RX 9), but testified he received "sickness/accident" pay until approximately May 24, 2012. (See also Arbitrator's Exhibit (AX) 1). Petitioner testified that he retired from Respondent's employment at the end of May 2012, as Respondent would not allow Petitioner to work with the restrictions in place by Dr. Herrin. A note signed by Petitioner indicates that he terminated his employment with Respondent

effective June 11, 2012. (RX 11). Mr. LeGrand testified that it was Respondent's policy to bring back and accommodate "almost all" injured workers with effective restrictions. He testified that workers returning with light duty restrictions can run ram cars, but he could not say for certain whether there were any light duty workers on ram cars currently that had restrictions of no overhead lifting.

Petitioner presented to Dr. Herrin on July 30, 2012. Petitioner noted on that visit that he still experienced some bilateral shoulder pain. Dr. Herrin noted that Petitioner was retired, so he did not offer any specific work restrictions, other than using the shoulders as tolerated. Dr. Herrin set a follow-up appointment to occur in the following eight weeks, and noted that if Petitioner was progressing satisfactorily at that time, then he would be released from care concerning his shoulder problems. (PX 3). Petitioner last presented to Dr. Herrin on September 10, 2012. Dr. Herrin released Petitioner on this date, noting he was "functioning fairly well" and for him to return on an "as-needed" basis. Petitioner was released at maximum medical improvement (MMI). (PX 3; PX 5, p. 37).

Dr. Herrin's deposition testimony was taken on September 20, 2012. (PX 5). Dr. Herrin confirmed his opinion noted in his January 2012 letter that Petitioner's bilateral shoulder conditions that required surgery were caused or contributed by Petitioner's work activities in Respondent's coal mine. (PX 5, pp. 9-10). Dr. Herrin testified that Petitioner only reported his roof bolting activities to the doctor, but that he learned of the specific work duties at issue, including Petitioner's overhead cable hanging duties, brattice wall and ceiling building and running a ram car, from a letter drafted by Petitioner's counsel. (PX 5, pp. 37-38). Dr. Herrin also testified as to some familiarity with Petitioner's work duties, as the doctor had previously worked in a coal mine before becoming a physician. (PX 5, p. 38).

On November 5, 2012, Petitioner presented to Dr. Mitchell Rotman for an evaluation at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). (RX 1, Dep. Exh. 2). Dr. Rotman's deposition testimony was taken on February 5, 2012. (RX 1). The doctor's diagnosis concerning Petitioner's shoulders was similar to that as referenced by Dr. Herrin, although Dr. Rotman added that he felt the existence of a bone spur could have caused rubbing and thinning of the rotator cuff. (RX 1, p. 14; RX 1, Dep. Exh. 2). Dr. Rotman reported that it was impossible to state with any reasonable degree of certainty that Petitioner's bilateral shoulder complaints were a direct result of his alleged work-related injuries without knowing what outside activities Petitioner may have been performing and without knowing the exact percentage of overhead work Petitioner was performing in the coal mine. Dr. Rotman also noted the following: "If Mr. Burgess was doing a lot of overhead work in July 2011, then that type of work could be an aggravating factor for an underlying chronic bilateral impingement condition. If, however, Mr. Burgess was not doing a lot of overhead work in July 2011, then that type of work would be considered an aggravating factor." (RX 1, Dep. Exh. 2). Dr. Rotman reiterated this point during his deposition, stating, "[a]nd if you're doing continuous overhead work for several hours a day, then that's the kind of job that would be an aggravating factor for a chronic condition like this." (RX 1, p. 20). The following exchange occurred between Petitioner's counsel and Dr. Rotman:

> [Q]: Would it be fair to say that if it were established that the claimant did a lot of heavy lifting, and particularly overhead work or just lifting generally with his shoulders, that it would tend to be an aggravating factor in his shoulders?
>
> [A]: If the lifting were shoulder level or above, it certainly would be an aggravating factor.
>
> (RX 1, pp. 24-24).

Dr. Rotman said he was unfamiliar with what would be involved in hanging cables or constructing brattice walls in coal mines (RX 1, p. 24). Dr. Rotman was also unaware of how much time Petitioner would spend performing the jobs in the mine as described by Petitioner's counsel, such as hanging cables. (RX 1 p. 28).

Petitioner testified concerning current symptoms he experiences with his shoulders, including continuing pain that is about the same level of intensity in each shoulder. Any reaching or lifting of the arms bothers Petitioner. He testified that his shoulder difficulties do not affect his hobbies. His shoulders ache at times during the night, and when this occurs, he takes extra strength Tylenol. He does not take any prescription medication. The most he allows himself to lift with his arms is fifteen pounds. He noted that this was not a restriction per his physician, but rather the threshold weight limit he notices regarding the level of pain intensity when lifting.

The parties noted at trial that all medical expenses regarding the treatment Petitioner received in this matter was paid through Respondent's group insurance pursuant to Section 8(j) of the Act.

CONCLUSIONS OF LAW

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

Issue (D): What was the date of the accident?; and

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

The Arbitrator finds that Petitioner sustained a repetitive trauma injury to his bilateral shoulders that arose out of and in the course of his employment with Respondent, and that his current condition of ill-being is causally related to the work injury. While Petitioner had pre-existing shoulder complaints before November 2011, the Arbitrator notes that these issues occurred in 1993, 1994, 1995 and 2007. Medical records from 1993 indicate that Petitioner injured his right elbow at work, and in the process suffered a right shoulder strain. He underwent some therapy and was given a prescription of ibuprofen for this injury. (RX 7). In 1994, Petitioner completed an accident report, noting he felt a right shoulder "pop" at work. No medical records are associated with this injury. (RX 5). Petitioner also experienced a right shoulder injury in mid-1995, where he was again diagnosed with a strain and prescribed medication. He was taken off work for one day for this incident. (RX 4; RX 8). In 2007, Petitioner noted a left shoulder contusion as a result of another ram car striking his ram car. No medical records are associated with this injury. (RX 6). Petitioner testified that he had no "real" medical treatment to his shoulder before October 2011, with the exception of therapy and medication prescription. The Arbitrator finds that Petitioner is correct in this regard. Petitioner testified to feeling bilateral shoulder pain with lifting in July 2011. Dr. Herrin's records support this contention. Petitioner continued performing his duties to the point where medical intervention was required. The Arbitrator finds that any pre-existing shoulder conditions up to this time were asymptomatic in light of the foregoing discussion concerning Petitioner's prior problems and minimal treatment.

While there is some dispute as to how much physical and overhead work Petitioner actually performed between 2009 and 2011, the evidence supports Petitioner's assertions that he was engaged in laborious duties while working for Respondent, and that said duties included regular and repetitive

overhead work. The records show that Petitioner worked as a ram car operator for the majority of time during this period. He testified to myriad other physical activities that were a part of this position, and that those physical duties were performed four-to-five hours per shift. Mr. LeGrand testified that these physical duty aspects of being a ram car operator as described by Petitioner would only be performed two hours or less per shift. Regardless of who is more accurate, the fact remains that Petitioner was performing regular physical activity with his arms as a ram car operator. Petitioner also worked as a utilityman and a roof bolter during this timeframe, albeit less than working as a ram car operator. The duties involved with these positions also involved repetitive and physical use of the arms, including overhead lifting. Furthermore, while Mr. LeGrand testified that it was not very often that a ram car operator would be transferred to the position of utilityman or roof bolter during a shift, he confirmed that said changing of positions did occasionally occur.

Both treating physician Dr. Herrin and examining physician Dr. Rotman believe that overhead work in coal mining could cause or contribute to the type of shoulder injuries suffered by Petitioner. Dr. Herrin, who testified to having some familiarity with coal mine work given he was a coal miner before his medical career began, noted that in addition to performing roof bolting, Petitioner had duties involving "hanging cables overhead (which weigh approximately 70 pounds per cable), building brattice walls and ceilings out of concrete block, which weigh approximately 40 pounds or more per block (for ventilation and running a ram car)." Dr. Herrin reported the following in light of his understanding of Petitioner's job duties: "It is my opinion that the problems with both of his shoulders are related to his work activities as a coal miner. It is my opinion that those activities would have caused or at least significantly contributed to the problem with each shoulder. The type of work that he does as a roof bolter would put significant stress on the shoulders, and this would place him at significant risk for injury to the rotator cuff." (PX 5, Petitioner's Dep. Exh. 2). Dr. Rotman said he was unfamiliar with what would be involved in hanging cables or constructing brattice walls in coal mines, and was further unaware of how much time Petitioner would spend performing the other jobs in the mine, such as hanging cables. (RX 1 p. 28).

The Arbitrator places great weight on the opinions of Dr. Herrin in this matter concerning causal connection and a manifestation of a work accident. Based on the foregoing facts, the Arbitrator finds that Petitioner has met his burden of proving repetitive trauma injuries to both shoulders that were caused or contributed by his coal mining duties, and that his current condition of ill-being is causally related to those work duties and resulting injuries.

The Arbitrator also finds that November 26, 2011 is an appropriate manifestation date for the claimed injuries. November 26, 2011 is the date that Petitioner stopped working in preparation for his surgery to his left shoulder. The definitive diagnoses regarding his bilateral shoulders had recently been issued by Dr. Herrin at that time. This was a date that a reasonable person in Petitioner's position would have realized his condition could have been related to his work duties with Respondent.

<u>Issue (K)</u>: What temporary benefits are in dispute? (TTD)

Petitioner was taken off work per Dr. Herrin on the day of his left shoulder surgery, November 29, 2011. Petitioner testified that he worked up through the date of his surgery, taking one "personal day" the day before surgery. Dr. Herrin kept Petitioner off work through the date of his right shoulder surgery, February 10, 2012, and continuing through March 9, 2012, when restrictions were noted of no use of the right arm and minimal use of the left arm, with no pushing, pulling, lifting or overhead work. Notes from Dr. Herrin dated April 19, 2012 and May 21, 2012 continued the work restrictions. Petitioner did not return to work during this time (RX 9), but testified he received "sickness/accident" pay until

approximately May 24, 2012. Petitioner testified that he retired from Respondent's employment at the end of May 2012, as Respondent would not allow Petitioner to work with the restrictions in place by Dr. Herrin. A note signed by Petitioner indicates that he terminated his employment with Respondent effective June 11, 2012. (RX 11). Mr. LeGrand testified that it was Respondent's policy to bring back and accommodate "almost all" injured workers with effective restrictions. He testified that workers returning with light duty restrictions can run ram cars, but that he could not say for certain whether there were any light duty workers on ram cars currently that had restrictions of no overhead lifting. Petitioner is claiming temporary total disability (TTD) benefits from November 28, 2011 through May 30, 2012. (See AX 1). The Arbitrator finds that May 30, 2012 is a reasonable date in which to terminate Respondent's liability for TTD benefits. Petitioner is not claiming any TTD due past this date, and in fact acknowledged retiring from Respondent at the end of May 2012. (See also RX 11, noting June 11, 2012 as the effective termination date).

Based on the foregoing, the Arbitrator awards Petitioner TTD benefits from November 29, 2011 (the date of his first surgery) through May 30, 2012, a period of 26 2/7 weeks. Respondent shall have a credit in the amount of $7,339.89 for non-occupational indemnity disability benefits that it paid. (See AX 1).

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

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning permanency. It is noted when discussing the permanency award being issued that no permanent partial disability impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), the Arbitrator notes that Petitioner's occupation as a coal miner was a "heavy" demand level position and quite labor-intensive. However, there exists a dispute as to whether Petitioner retired due to Respondent's unwillingness to accommodate his restrictions. Dr. Herrin did not address work restrictions during Petitioner's final evaluation with the doctor in September 2012, as it was noted Petitioner was retired. Mr. LeGrand testified that it was Respondent's policy to accommodate almost all workers with restrictions, and in fact several employees with Respondent are working with restrictions. However, he was not aware of any current ram car operators on restrictions who would be working with a restriction of no overhead lifting. The fact remains that Petitioner is retired, and nothing in the record indicates that he plans on looking for future employment. Based on the foregoing, only some weight is afforded this factor when determining the permanency award.

Concerning Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of injury), the record indicates that Petitioner was 56 years old on November 26, 2011. (See AX 1; AX 2, noting a birth date of July 2, 1955). At the time of trial, Petitioner was retired, and voiced no indication of returning to work in any capacity. The Arbitrator notes that in terms of future working years, especially given Petitioner's retirement, Petitioner is a somewhat older individual with fewer working years ahead of him than that of a younger worker, and thus will not have to work and live with the permanency of his condition as long. The Arbitrator gives weight to this factor when determining the permanency award.

Concerning Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), the Arbitrator again notes the dispute concerning the true cause of Petitioner's retirement. Petitioner testified that he retired after Respondent would not accommodate his restrictions. Nothing in the record indicates that he

looked for other employment opportunities within his restrictions. In fact, Petitioner did not even claim entitlement to TTD benefits past May 30, 2012, presumably because he was content with retirement. In light of the foregoing, the Arbitrator finds that there is not enough solid evidence to prove Petitioner's future earning capacity was diminished solely as a result of the work injuries. Only some weight is placed on this factor when determining the permanency award.

Concerning Section 8.1b(b)(v) of the Act (evidence of Petitioner's disability corroborated by the treating medical records), the Arbitrator notes Petitioner suffered repetitive trauma injuries to both arms that necessitated surgeries to each shoulder. The left shoulder surgery consisted of an arthroscopy with repair of the supraspinatus tendon, a subacromial decompression, a distal clavicle excision, and debridement of tearing of the superior labrum. The right shoulder surgery consisted of an arthroscopy with repair of the supraspinatus tendon with suture anchors, a subacromial decompression and a distal clavicle excision. The post-operative diagnosis to Petitioner's left shoulder was pain secondary to full-thickness attenuated tear of the supraspinatus and tearing of the superior labrum, as well as a symptomatic AC joint. The post-operative diagnosis to Petitioner's right shoulder was pain secondary to significant articular-sided tear of the supraspinatus, subacromial impingement and a symptomatic AC joint. (PX 3). Petitioner underwent post-operative physical therapy. As noted *supra*, the issue of permanent work restrictions is ambiguous because Petitioner retired while on work restrictions per Dr. Herrin, and Dr. Herrin never formally noted current work restrictions due to Petitioner's retirement. At Petitioner's final evaluation with Dr. Herrin, the doctor noted Petitioner was "functioning fairly well" and for him to return on an "as-needed" basis. Petitioner was released at MMI on this date, and the record indicates that Petitioner has not returned to Dr. Herrin since that time. Petitioner testified to current complaints with his shoulders, including pain and difficulty with reaching and lifting his arms. He testified that the level of pain is the same in each shoulder. He does not take prescription medication, but does take over-the-counter pain medication at times for his shoulder discomfort. His current shoulder limitations do not affect any of his hobbies. The Arbitrator finds Petitioner's complaints concerning his current disability credible and corroborated by the treating medical records. Accordingly, great weight is placed on this factor when determining the permanency award.

Based on the foregoing, the Arbitrator finds that Petitioner has sustained the 20% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act as a result of the bilateral shoulder injuries, and is awarded permanent partial disability benefits accordingly. *See Will County Forest Preserve Dist. v. Workers' Comp. Comm'n*, 2012 IL App (3d) 110077WC.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gerardo Mendoza,

Petitioner,

14IWCC0339

vs. NO: 11 WC 19340

Andy Frain Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, vocational rehabilitation assessment, maintenance, 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 October 18, 2013 is hereby affirmed and adopted.

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

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

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

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

DATED: MAY 0 5 2014

David L. Gore

DLG/gal
O: 5/1/14
45

Stephen Mathis

Mario Basurto

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

MENDOZA, GERARDO
Employee/Petitioner

Case# **11WC019340**

14IWCC0339

ANDY FRAIN SERVICES
Employer/Respondent

On 10/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0140 CORTI ALEKSY & CASTANEDA
RICHARD ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

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

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

14IWCC0339

GERARDO MENDOZA
Employee/Petitioner

v.

ANDY FRAIN SERVICES
Employer/Respondent

Case # **11** WC **19340**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **8/19/2013**. 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

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

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

N. [ ] Is Respondent due any credit?

O. [X] Other **Vocational Rehabilitation Assessment**

FINDINGS

On the date of accident, **5/10/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

See attached conclusions of law for the Arbitrator's causation-related findings.

In the year preceding the injury, Petitioner earned $**20,368.40**; the average weekly wage was $**391.70**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of $**8,882.19** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**8,882.19**.

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

ORDER

The parties agree Petitioner was temporarily totally disabled from May 10, 2011 through May 18, 2011 and from June 8, 2011 through November 28, 2011. These two periods total 26 1/7 weeks. They further agree that Respondent paid $8,882.19 in temporary total disability benefits prior to trial. Arb Exh 1.

The Arbitrator finds that Petitioner failed to establish a causal connection between the undisputed work accident of May 10, 2011 and the restrictions that Dr. Lorenz re-instituted on November 28, 2011. Based on that finding, the Arbitrator denies Petitioner's claim for maintenance from November 29, 2011 through the hearing of August 19, 2013.

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that Respondent was obligated to prepare a written assessment pursuant to Rule 7110.10 of the Rules Governing Practice Before the Workers' Compensation Commission. Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191 (1st Dist. 2009).

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

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

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

Molly C. Mason
Signature of Arbitrator

10/18/13
Date

OCT 18 2013

Arbitrator's Findings of Fact

The parties agree that Petitioner, an unarmed security officer, sustained an accident while working at a FedEx facility for Respondent on May 10, 2011. Petitioner testified his duties included checking employee I.D. cards, searching employees for weapons and recording information concerning the trailers that went in and out of Respondent's facility. T. 13-14, 17. Petitioner testified he was not required to get into a tractor to talk with a driver but sometimes had to open the rear door of an exiting trailer to make sure it was empty. The rear doors were of the roll-up type. Petitioner would open the door to the point where he could see the interior of the trailer. T. 15. Petitioner testified he was not required to perform any lifting. T. 15-16.

Petitioner testified he started working for Respondent in March or April of 2010, at which point he underwent training at a FedEx facility in Summit for about a month. At the time of the accident, he worked at a FedEx facility in McCook. T. 18-19.

Petitioner testified he worked the night shift, from 10 PM to 6 AM. To his recollection, he was working Monday through Friday as of the accident. T. 20-21.

Petitioner testified that, on May 10, 2011, he was on his motorcycle, exiting the FedEx facility, when another worker struck him head on, causing him to fly off of his bike and land on the concrete. His supervisor, Veronica Zenner, came to his aid and took him to the Emergency Room at LaGrange Memorial Hospital. T. 23-24.

The Emergency Room records reflect that Petitioner complained of back and bilateral leg pain after being struck by a car while he was operating his motorcycle. The attending physician, Dr. Phillips, noted a past history of a spinal fusion. He also noted leg abrasions and a laceration below Petitioner's right knee. He described Petitioner as cooperative and exhibiting an "appropriate mood and affect."

Dr. Phillips ordered X-rays of the lumbar spine, right knee and left tibia/fibula. The lumbar spine X-rays showed post-surgical changes from the previous fusion of L4-L5 and L5-S1. [Dr. Lorenz of Hinsdale Orthopaedics performed this fusion on May 2, 2008. The need for the fusion stemmed from a work accident of January 30, 2008 involving a different employer. RX 4.] The right knee X-ray showed a small effusion but no fracture. The left tibia/fibula X-ray showed no acute fracture or dislocation. Petitioner was given Motrin and Vicodin for pain. Dr. Phillips released Petitioner to light duty, with no lifting over 5 pounds. He instructed Petitioner to follow up with Dr. Khan the next day. PX 1. T. 24-25.

The Emergency Room records (PX 1) describe Petitioner as "alert and oriented." They contain no reference to drug testing.

Petitioner testified he went to the LaGrange Medical Center the following day, May 11, 2011, but saw Dr. Dugar instead of Dr. Khan. T. 25. Dr. Dugar noted that, the previous morning, Petitioner was on his motorcycle, stopped at a stop sign, when a FedEx employee driving a station wagon struck him, causing him to be thrown off of the motorcycle. Dr. Dugar noted that Petitioner landed on his right side.

Petitioner complained to Dr. Dugar of pain in his lower back, right shoulder and left shin, as well as a "pulling sensation" in his right knee after walking that day. Petitioner indicated he had undergone a lumbar fusion in 2008.

On examination, Dr. Dugar noted tenderness but a full range of motion in the right shoulder, mild muscle spasm in the lumbar area, a scrape and minimal swelling of the right knee and bruising/minimal swelling of the left shin.

Dr. Dugar diagnosed muscle strains and contusions. He recommended that Petitioner begin physical therapy "after Ibuprofen and rest." He directed Petitioner to refrain from working and return in two days. PX 2.

Petitioner returned to LaGrange Medical Center on May 13, 2011 and saw Dr. Khan. The doctor's note sets forth a consistent history of the accident of May 10, 2011. Dr. Khan noted that Petitioner injured his lower back, right shoulder, right knee and left shin. He also noted that Petitioner complained of 3/10 lower back pain despite taking Hydrocodone. On examination, Dr. Khan noted spasm in the right trapezius area, mild tenderness to palpation of the lumbar spine and a mild right knee abrasion. He diagnosed a trapezius muscle spasm and a cervical strain with right-sided radicular symptoms. He instructed Petitioner to continue the Vicodin (but only when at home), start Naproxen after finishing the Ibuprofen, begin therapy and return on May 17th. He directed Petitioner to stay off work.

On May 16, 2011, Petitioner underwent a physical therapy evaluation at LaGrange Medical Center. T. 26. The evaluating therapist noted complaints of pain in the neck, back, right shoulder and right knee. PX 2.

Petitioner returned to Dr. Khan on May 17, 2011, as directed. Petitioner reported some right trapezius and lower back improvement secondary to therapy but described his neck pain as unchanged. On cervical spine examination, Dr. Khan noted a reduced range of motion to the right, paracervical tenderness on the right and mild trapezius tenderness. He refilled the Naproxen and instructed Petitioner to continue therapy and return in ten days. He released Petitioner to non-specific "light duty" as of May 19, 2011. PX 2. T. 26-27.

Petitioner testified he did not return to work on May 19, 2011 because Respondent did not offer light duty. T. 27. He delivered Dr. Khan's light duty note to his supervisor, Veronica Zenner. On receipt of the note, Zenner told him, "I'll get back to you." Zenner did not schedule him for work thereafter. T. 36-37.

RX 1 reflects that Respondent terminated Petitioner on May 23, 2011 because Petitioner "failed drug test." RX 1 also reflects that Petitioner was "warned before discharge." No drug test records are in evidence. Petitioner testified that, at some point after he delivered the light duty note to Zenner, Brian Rayzicks, Respondent's branch manager, called him and informed him he was being terminated. T. 33-34, 37. He never heard from Respondent again. T. 47.

Petitioner attended therapy at LaGrange Medical Center on May 24, 25 and 26, 2011. On May 26, 2011, the therapist noted that Petitioner complained of neck pain, especially when looking up and to the right. She recommended that Petitioner continue therapy. PX 2.

On June 8, 2011, Petitioner saw Dr. Lorenz of Hinsdale Orthopaedics. Petitioner testified he selected Dr. Lorenz because the doctor had previously operated on his lower back. T. 28.

Dr. Lorenz's note of June 8, 2011 reflects that Petitioner previously underwent a lumbar fusion, returned to work following the fusion and was "doing fine" until the accident of May 10, 2011. The note also reflects that Petitioner had "multiple areas of complaints" following this accident and was "taken to occupational therapy," where, according to Petitioner, a drug test was "slightly positive for marijuana."

Dr. Lorenz noted that Petitioner complained of neck pain radiating toward the right scapular area and right shoulder.

On cervical spine examination, Dr. Lorenz noted a positive Spurling maneuver to the right and a decreased range of motion. On lumbar spine examination, Dr. Lorenz noted some mild tenderness in the paraspinous musculature, a "sensation of tightness" and passive forward flexion of 50 to 60 degrees.

Dr. Lorenz obtained cervical and lumbar spine X-rays. The cervical spine X-rays showed no fractures. The lumbar spine X-rays showed "a well-healed fusion with no abnormality."

With respect to the cervical spine, Dr. Lorenz diagnosed C4-C5 radicular irritation and a possible disc herniation. With respect to the lumbar spine, he diagnosed a strain.

Dr. Lorenz started Petitioner on a Medrol Dosepak. He prescribed Norco for severe pain and a cervical spine MRI. He took Petitioner off work and instructed him to continue therapy. PX 3.

The cervical spine MRI, performed on June 9, 2011, showed mild spondylotic changes with reversal of normal lordosis, a mild disc bulge without significant stenosis at C4-C5 and a disc bulge and mild stenosis at C5-C6, greater on the right. PX 3.

Petitioner returned to Dr. Lorenz on June 22, 2011. Petitioner again complained of neck pain, especially when extending his neck or turning his head to the right.

On examination, Dr. Lorenz noted 5/5 strength, decreased rotation to the right, full rotation to the left, some pain on flexion and extension, tenderness over the right trapezius, some focal trigger point and tenderness in the right occiput.

Dr. Lorenz interpreted the MRI as showing diffuse bulging at C4-C5 and C5-C6, with no signs of herniation, and a high intensity signal in the posterior annulus at C5-C6, "consistent with what looks like a partial tear." He started Petitioner on Naprelan, an anti-inflammatory, and instructed him to stay off work. He referred Petitioner to Dr. Gruft for therapy and to Dr. Lipov for possible occipital trigger point and/or facet injections. PX 3.

Petitioner underwent therapy at Dr. Gruft's facility, From Pain to Wellness, from July 14, 2011 through August 26, 2011. PX 3. T. 29-31. Petitioner testified he never saw Dr. Lipov. T. 30.

Petitioner returned to Dr. Lorenz on November 28, 2011. In his note of that date, Dr. Lorenz indicated Petitioner reported improvement secondary to the therapy and complained only of "a little trigger point on the right" and some low back achiness with excessive activity. Dr. Lorenz obtained lumbar spine X-rays, which showed an "L4 to S1 fusion with the hardware removed." Dr. Lorenz assessed the following: 1) resolved cervical strain; 2) cervical spondylosis; and 3) L4 to S1 fusion." He released Petitioner to "permanent light duty" in accordance with a functional capacity evaluation performed in 2009, i.e., no lifting over 17 pounds frequently, no lifting over 50 pounds occasionally, sitting limited to 60-minute intervals, standing limited to 30-minute intervals and occasional bending. He found Petitioner to have reached maximum medical improvement. PX 3.

At the hearing, the parties stipulated that Petitioner was temporarily totally disabled from May 10, 2011 through May 18, 2011 and from June 8, 2011 through November 28, 2011. These two intervals total 26 1/7 weeks. They also stipulated that Respondent paid temporary total disability benefits totaling $8,882.19. Arb Exh 1.

The dispute in this case centers on Petitioner's claim for maintenance benefits from November 29, 2011 through August 19, 2013, the date of hearing. Arb Exh 1.

Petitioner testified he did not resume working for Respondent at any time after his last visit to Dr. Lorenz on November 28, 2011. T. 37. Petitioner also testified he stopped receiving benefits as of that date. T. 38, 47. After Dr. Lorenz released him to restricted duty, he began looking for work. On about May 15, 2012, he began working as a pizza delivery driver. He was still working in this capacity as of the hearing. He testified he does not receive paychecks or benefits. His pay consists of $2.50 per delivery plus tips. He receives his pay at the end of each workday. T. 39-40. He uses his own vehicle to make the deliveries. He is responsible for paying for gas, insurance and any necessary repairs. As of the hearing, he was working from 5:00 PM

to midnight, typically five nights per week. T. 41, 44. The pizza parlor stops delivering at midnight. If an order comes in at 11:59 PM, he has to pay the business for the pizza upfront with the understanding he will collect from the customer on delivery. T. 42. He averages about $300 per week, before deducting gas and other expenses. T. 44. He pays about $400 in child support per month. T. 46. He is continuing to look for work. He receives job leads from friends but the leads are typically for jobs that involve heavy lifting. T. 47-48. In the last six months, a business called Polar Ice offered him a job but the job exceeded his work restrictions. T. 46.

Petitioner denied re-injuring his neck or back after May 10, 2011. T. 48. The lumbar spine surgery that Dr. Lorenz performed before that date stemmed from a work accident. It was after he recovered from this surgery that he began working for Respondent. T. 48-49.

Under cross-examination, Petitioner testified he began working for Respondent in approximately May 2010. He worked from 10:00 to 6:00. He did not work overtime. T. 51. The accident of May 10, 2011 occurred at about 6:05 AM, right after he left work. T. 52. He was in FedEx's parking lot when a FedEx employee struck him. T. 52. Before he returned to Dr. Lorenz in June of 2011, he had last seen the doctor in early 2010, at which point the doctor had him on permanent restrictions. T. 55. The job he accepted at Respondent was within those restrictions. T. 60. Otherwise, he would not have been able to accept the job. T. 60. He told Respondent about the restrictions when he was hired. T. 61. The job allowed him to sit and stand. He was not required to exceed Dr. Lorenz's restrictions. T. 61. After the May 10, 2011 accident, he underwent drug testing. T. 63. His understanding is that the testing was positive for marijuana. T. 64. When Respondent's regional manager called him, he asked the manager why he was being terminated and was told that it was because the drug test "came out positive." T. 64. Respondent had never reprimanded him for not performing his job correctly. T. 65. He cannot remember whether the restrictions Dr. Lorenz imposed in November of 2011 were different from the previous restrictions. T. 65. The job he performed for Respondent was within Dr. Lorenz's lifting and sit/stand restrictions. The job did not require him to bend frequently. T. 71. When he looked for work, he went through agencies. He does not have proof of the job applications he has submitted. T. 73-74. He writes down information concerning his pizza delivery earnings. He did not bring any of this information to the hearing. T. 73. When he worked for Respondent, he was not reimbursed for gas or vehicle repairs. T. 73. He applied online for the job with Respondent. T. 74.

On redirect, Petitioner testified he wanted to return to work for Respondent when he presented Dr. Khan's light duty note to Veronica Zenner. Zenner did not tell him he would be put back to work. He next had contact with Respondent when the regional manager called him and told him he had been terminated. T. 81-82. No one provided him with any drug test results. His belief that the test was positive was based on what Respondent told him. T. 83.

Respondent did not call any witnesses. In addition to the exhibits previously discussed, Respondent offered into evidence an undated "return to work job description" completed by Dr. Phillips concerning Petitioner's security officer job. This description describes the job as sedentary and involving no lifting over 5 pounds. RX 2. Respondent also offered into evidence

a print-out of the temporary total disability and medical payments it made in this case. RX 3. Respondent also offered into evidence records concerning the treatment Petitioner underwent with Dr. Lorenz prior to May 10, 2011. RX 3.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed work accident of May 10, 2011 and his current condition of ill-being?

The Arbitrator finds that Petitioner's undisputed work accident resulted in a new cervical spine condition of ill-being, as diagnosed by Dr. Lorenz, and an aggravation of his pre-existing lumbar spine condition of ill-being. In so finding, the Arbitrator relies on the "chain of events" and the treatment records. The records from LaGrange Memorial Hospital and LaGrange Medical Center reflect that Petitioner was on a motorcycle, stopped at a stop sign, when another worker driving a station wagon struck him, causing him to be thrown off the motorcycle. The records also reflect that Petitioner experienced an abrupt onset of right-sided spine and bilateral leg pain after this collision. Within a couple of days of the collision, Petitioner was also complaining of right-sided trapezius and neck pain. Dr. Khan diagnosed cervical, right trapezius and lumbar strains on May 13, 2011. When Dr. Lorenz saw Petitioner on June 8, 2011, having last seen him about fifteen months earlier, he noted that Petitioner had returned to work following the 2008 lumbar fusion and had been doing relatively well until the May 10, 2011 accident. Based on Petitioner's presentation on June 8, 2011, Dr. Lorenz diagnosed a lumbar strain and a possible cervical disc herniation. He ordered a cervical spine MRI, which he later interpreted as showing bulges and what appeared to be a partial tear at C5-C6. He recommended a course of conservative care with two different physicians, only one of whom Petitioner saw. When Dr. Lorenz last saw Petitioner, on November 28, 2011, he noted that Petitioner was still experiencing some right-sided "trigger point" pain in his upper back and some lower back achiness. PX 3.

The Arbitrator further finds that Petitioner failed to establish a connection between the undisputed work accident of May 10, 2011 and the permanent restrictions that Dr. Lorenz re-instituted on November 28, 2011. Those restrictions were based on a functional capacity evaluation performed on December 10, 2009 in connection with the January 30, 2008 work accident. RX 4.

Is Petitioner entitled to maintenance?

The parties agree that Petitioner was temporarily totally disabled during two intervals, with the last interval ending on November 28, 2011, the date of Petitioner's last visit to Dr. Lorenz. Arb Exh 1. The dispute centers on whether Petitioner is entitled to maintenance from November 29, 2011 through the August 19, 2013 hearing.

Section 8(a) of the Act provides that an "employer shall * * * pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the

employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a). The courts have construed the term "rehabilitation" broadly to include an injured worker's self-directed job search. See, e.g., Greaney v. Industrial Commission, 358 Ill.App.3d 1002, 1019 (2005). A claimant is generally entitled to vocational rehabilitation when he sustains an injury which causes a reduction in earning power. National Tea Co. v. Industrial Commission, 97 Ill.2d 424, 432 (1983).

Petitioner argues that the injuries he sustained on May 10, 2011 caused a reduction in earning power. In advancing this argument, Petitioner relies in part on RX 2, a return to work job description completed by Dr. Phillips. Petitioner asserts that RX 2 memorializes work restrictions [including a 5-pound lifting restriction] imposed on Petitioner by Dr. Phillips after the May 10, 2011 accident. The Arbitrator does not view RX 2 as such. RX 2 bears no date and no reference to the accident.

Petitioner also relies on McHatton v. Manchester Tank, 08 WC 43131, a decision in which the Commission affirmed an award of maintenance to a claimant who conducted a self-directed job search after being terminated while subject to permanent restrictions. The Arbitrator views McHatton as factually distinguishable from the instant case. The claimant in McHatton acquired permanent restrictions as a result of the work accident at issue in his claim whereas Petitioner was subject to permanent restrictions before Respondent hired him. Petitioner testified he made Respondent aware of the restrictions at hiring. Petitioner also testified that the security job he performed for Respondent was within those restrictions. When Dr. Lorenz released Petitioner from care on November 28, 2011, he relied on a functional capacity evaluation performed in 2009 and imposed the same restrictions that Petitioner brought to Respondent's door. There is no indication that Dr. Lorenz linked any of the November 28, 2011 restrictions to the injuries Petitioner sustained on May 10, 2011.

Having found that Petitioner failed to establish causation as to the restrictions Dr. Lorenz re-instituted on November 28, 2011, the Arbitrator declines to award maintenance benefits in this case.

Was Respondent obligated to prepare an assessment pursuant to Rule 7110.10?

Rule 7110.10 of the Rules Governing Practice Before the Workers' Compensation Commission requires an employer, in consultation with an injured employee and his representative, to prepare a "written assessment of the course of medical care and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injuries be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity of work exceeds 120 continuous days, **whichever first occurs.**" [emphasis added] In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 207-8 (1st Dist. 2009), the Appellate Court held that "Rule 7110.10 requires the preparation of a written assessment even in circumstances where no plan or program of vocational rehabilitation is necessary or appropriate."

In the instant case, Respondent stipulated to two intervals of temporary total disability, with the second interval consisting of 174 consecutive days. Arb Exh 1. At no point did Respondent prepare an assessment. Based on the wording of Rule 7110.10 and Ameritech Services, the Arbitrator finds that Respondent was obligated to prepare an assessment at the 120-day point, regardless of any other factors.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lee Walker,

Petitioner,

14IWCC0340

vs. NO: 08 WC 03203

United Airlines,

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 temporary total disability, causal connection, medical expenses, prospective medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby adopts the Arbitrator's findings of fact and conclusions of law. 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 October 11, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $49,000.00. 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: MAY 0 5 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 5/1/14
45

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

WALKER, LEE
Employee/Petitioner

Case# **08WC003203**

14IWCC0340

UNITED AIRLINES
Employer/Respondent

On 10/11/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2356 DONALD W FOHRMAN & ASSOC
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0560 WIEDNER & McAULIFFE LTD
MARK P MATRANGA
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CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b) & 8(a)

14IWCC0340

Lee Walker
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **08** WC **3203**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **July 23 & 25, 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. [ ] 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, **November 2, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$29,334.24**; the average weekly wage was **$564.12**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$63,192.51** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$63,192.51**.

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 $376.08/week for 298 & 4/7th weeks, commencing November 3, 2007 through July 23, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 2, 2007 through July 23, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $63,192.51 for temporary total disability benefits that have been paid.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator awards the prospective medical care requested pursuant to Section 8(a) of the Act in the form of the recommended left knee surgery prescribed by Dr. Nenno as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

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

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

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

Signature of Arbitrator

October 10, 2013
Date

ICArbDec19(b)

OCT 11 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Lee Walker
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **08** WC **3203**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute are causal connection, a period of temporary total disability benefits, and Petitioner's entitlement to prospective medical care. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he was employed by Respondent on November 2, 2007 as a flight attendant and had been so employed since October of 1997. Petitioner described that he was on his feet up to 15 hours at a time and that his job required constant walking, lifting, bending, squatting, and ability to lift doors weighing over 50 lbs. in case of an emergency. Petitioner was living in Ohio at the time of the injury and subsequently moved to New York.

On November 2, 2007, Petitioner was flying from Richmond, Virginia to Washington Dulles airport. He testified that about 10-15 minutes before landing, the crew was making final preparations and he was picking up trash and walking toward the rear of the aircraft when he tripped over a piece of carpeting that was not secured in front of the rear lavatory. Petitioner testified that he fell and hit the wall opposite the washroom door and fell into the washroom door and then landed hard on his knees. He testified that he injured his left knee and experiencing "striking pain" immediately following the occurrence. He notified two other flight attendants and later completed accident reports.

Prior to this incident, Petitioner testified that he had a left knee injury approximately six years earlier during an annual training exercise for re-certification. He testified that his treatment included an arthroscopic surgery and debridement. He missed approximately 6-8 weeks of work and then returned to work. Petitioner testified that he has had no left knee problems until November 2, 2007.

Medical Treatment

Petitioner testified that he went to Mercy Medical in Canton, Ohio. He was examined and placed off work. He testified that he followed up over the next few weeks while he was kept off work and moved to Buffalo, New York before Thanksgiving of 2007. The medical records reflect that a Dr. Hensley ordered a left knee MRI which was performed on November 20, 2007 and revealed no evidence of a meniscal tear, a minimal medial collateral ligament injury most likely remote in nature, and chondromalacia patella. PX2 at 142-43.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

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Petitioner testified that he then went to Knee Center of Western New York and saw Dr. Stube as referred by Gallaher Bassett. The medical records reflect that Keith Stube, M.D. ("Dr. Stube") at The Knee Center of Western New York on December 24, 2007. PX1 at 1-2. He provided a history of injury while working, primarily anterior medial knee pain, and that he had been using ice and heat without relief. *Id.* He also reported a twisting injury six years prior which required an arthroscopy. *Id.* After an examination noting medial joint line tenderness with a positive McMurray's test, Dr. Stube diagnosed Petitioner with left medial knee pain and possible medial meniscal tear. *Id.* He ordered a left knee MRI. *Id.*

On January 21, 2008, Petitioner returned to the Knee Center and saw a certified physician's assistant, Jeffrey Rassman, PA-C ("Mr. Rassman") reporting continued symptomatology. PX1 at 3. Mr. Rassman noted that Petitioner appeared to have exacerbated mild patellar chondromalacia and administered a cortisone injection. *Id.* He provided a patellar stabilizing knee brace, recommended riding a stationary bike at home, and released him to sedentary work until his next follow up visit. *Id.* On March 17, 2008, Petitioner reported continued pain along the medial aspect of the knee. PX1 at 4-5. Mr. Rassman reviewed Petitioner's recent MRI noting that it showed a fissure along the medial aspect of the patella. *Id.* He noted that Petitioner had not improved after physical therapy, his injection did not benefit Petitioner, and he requested authorization for Visco supplementation for the fissure in the patella. *Id.*

First Section 12 Examination – Dr. Zoellick

On April 8, 2008, Petitioner underwent an independent medical examination with David Zoellick, M.D. ("Dr. Zoellick") at Respondent's request. PX8 at 1-5. Petitioner reported continued pain on the inside of his left knee with no change, swelling and increase in pain with any activity. *Id.* Dr. Zoellick examined Petitioner, took a history from him, reviewed various medical records, and issued a report of the same date. *Id.* He diagnosed Petitioner with a left knee strain/contusion with aggravation of underlying chondromalacia of the left knee following the accident at work. *Id.* He recommended either repeat steroid injections with therapy, hyaluronic acid supplementations such as Supartz or Synvisc, or repeat arthroscopy. *Id.*

Continued Medical Treatment

Petitioner received three Euflexxa injections on May 15, 22, and 29, 2008. PX1 at 5-11. He then came under the care of Donald Nenno, II, M.D. ("Dr. Nenno") on July 20, 2008, when he presented with complaints of swelling, locking and giving way of the left knee. PX2 at 100-101. On examination, Dr. Nenno noted tenderness over the left knee generally, but especially along the medial joint line and medial patellar area. *Id.* He diagnosed Petitioner with chronic left knee pain of an unclear etiology, but most likely on the basis of chondromalacia. *Id.* He ordered Neurontin and scheduled a follow up in one month. *Id.*

On August 17, 2008, Petitioner reported that the Neurontin did not help him significantly and that he continued to have some swelling, giving way sensations, and pseudo-locking with the knee in extension. PX2 at 98. Dr. Nenno diagnosed Petitioner with classic patellofemoral signs, ordered physical therapy for patellar mobilization and strengthening, and a follow up visit. *Id.*

On September 14, 2008, Petitioner returned to Dr. Nenno reporting no improvement with physical therapy, decreased range of motion, feeling that his knee was "full" and gave way at times, and that squatting bothers

him significant. PX2 at 96. Dr. Nenno noted Petitioner's lack of improvement despite ten months of conservative treatment and recommended an arthroscopy to diagnose and debride the knee. *Id.*

Petitioner underwent the recommended surgery on October 6, 2008. PX2 at 93-94. Pre-operatively, Dr. Nenno diagnosed Petitioner with chondromalacia of the left knee. *Id.* He performed an arthroscopy, debridement and excision of plica left knee. *Id.* Intra-operatively, Dr. Nenno noted significant chondromalacia of the medial facet of the patella and significant cartilaginous loose fragments within the knee, a significant plica formation along the medial femoral condyle, and fairly well-maintained medial and lateral compartments and anterior and posterior cruciate ligaments. *Id.* He also debrided synovitis anteriorly and medially and removed plica from the superior lateral aspect of the suprapatellar pouch, across the suprapatellar pouch, and down the medial gutter. *Id.* Post-operatively, Dr. Nenno diagnosed Petitioner with chondromalacia of the left knee plus plica. *Id.*

Petitioner followed up with Dr. Nenno post-operatively from October 20, 2008 through December 2, 2008 at which time he ordered additional physical therapy. PX2 at 87, 89, 91. At his initial physical therapy session on December 12, 2008, the physical therapist noted a positive Clarke's sign for chondromalacia patella on the left. PX4 at 8-10.

As of January 6, 2009, Dr. Nenno noted that Petitioner was making slow but continued progress. PX2 at 85. Petitioner was standing and walking fairly well, but was cautious with weight bearing. *Id.* The knee was stable and had full range of motion, although there was some tenderness but no effusion. *Id.* Dr. Nenno ordered continued physical therapy and scheduled a follow up in six weeks. *Id.* On February 13, 2009, Petitioner reported stiffness aggravated by stair climbing or squatting, inability to kneel, and significant swelling in the knee. PX2 at 83. Dr. Nenno requested authorization for Synvisc injections to improve function. *Id.*

Second Section 12 Examination – Dr. Zoellick

Petitioner saw Dr. Zoellick a second time on February 24, 2009. PX8 at 6-9. At that time, Petitioner reported continued pain under the kneecap and pain with bending, kneeling, squatting, and ascending/descending stairs. *Id.* He also reported only a 20% improvement since his surgery in October. *Id.* On examination, Dr. Zoellick noted no crepitus or instability, minimal swelling, and full range of motion. *Id.* Lachman and anterior Drawer tests were negative, but there was pain with patellofemoral compression, and Petitioner had tenderness medially and laterally as well as on extremes of motion. *Id.*

Dr. Zoellick diagnosed Petitioner with left knee chondromalacia that was aggravated or caused by his injury at work. *Id.* He noted that Petitioner's examination findings were objectively consistent with his reported symptoms of pain with patellofemoral compression (i.e., pain going up and down stairs). *Id.* He agreed with the recommendation for Synvisc injections and a trial return to work thereafter. *Id.* He opined that Petitioner was not yet at maximum medical improvement. *Id.*

Continued Medical Treatment

Petitioner continued to follow up with Dr. Nenno from March 13, 2009 through May of 2009. PX2 at 72-81. Petitioner received the recommended series of three Synvisc injections through May 12, 2009. PX2 at 75, 77. Petitioner testified that these injections did not change his pain level.

At his next follow up visit on July 9, 2009, Petitioner reported really having no change in his knee condition, difficulty with walking/stairs/kneeling and pain at rest. PX2 at 72. Dr. Nenno's examination revealed no

swelling or deformity, normal gait, full range of motion, and tenderness about the patellofemoral joint. *Id.* Dr. Nenno prescribed Celebrex to see if that helped improve Petitioner's function. PX2 at 72.

On July 21, 2009, Petitioner underwent a functional capacity evaluation at Niagara Physical Therapy. PX2 at 110-119. The evaluation report indicated that Petitioner could perform very light duty with no lifting over 10 lbs. and no standing for more than 6 hours. PX2 at 113. Petitioner testified that Respondent remained unable to accommodate his work restrictions at this time.

Petitioner returned to Dr. Nenno on August 14, 2009, but noted that the functional capacity evaluation results did not indicate what Petitioner's restrictions would be. PX2 at 68. He scheduled a follow up visit in six weeks. *Id.* On September 25, 2009, Petitioner reported that he was not doing very well regarding his knee. PX2 at 65. He reported pain, limping, swelling, inability to walk over one block or kneel, and that stairs were almost impossible to do. *Id.* Dr. Nenno diagnosed Petitioner with chronic left knee pain status post arthroscopy one year earlier and now showing significant patellofemoral chondromalacia. *Id.* He recommended an arthroscopy or perhaps some form of a partial knee replacement depending on the intraoperative findings at that time. *Id.*

Third Section 12 Examination – Dr. Zoellick

Petitioner saw Dr. Zoellick a third time on February 9, 2010. PX8 at 10-13. At that time, he reported constant pain, pain with walking/bending/twisting/going down stairs, and no instability or weakness, but incapacitation due to the pain. *Id.* On examination, Dr. Zoellick noted a slight antalgic gait, mild swelling of the left knee with tenderness along the medial joint line, and mild pain on patellofemoral compression. *Id.* X-rays revealed slight medial joint space narrowing. *Id.*

Dr. Zoellick reviewed additional treating medical records and Petitioner's functional capacity evaluation test results. *Id.* He opined that Petitioner's left knee complaints were due to chondromalacia patella and that a third arthroscopy would not do much to change Petitioner's condition. *Id.* Instead, Dr. Zoellick recommended one month of work conditioning and then to increase Petitioner's activity level. *Id.* He noted that if Petitioner was unable to undergo the work conditioning, then surgery would be the only remaining option. *Id.* In those circumstances, Dr. Zoellick recommended a patellofemoral resurfacing procedure instead of any type of knee replacement given that Dr. Nenno's last operative note reflects that the articular cartilage in Petitioner's medial and lateral joints looked good. *Id.* He also opined that Petitioner could return to work based on the functional capacity evaluation results. *Id.*

Continued Medical Treatment

Petitioner returned to Dr. Nenno on May 4, 2010 at which time he commented on Dr. Zoellick's report. PX2 at 56-57. Petitioner reported that he had constant pain in his whole knee, ability to walk about a block, and difficulty with stairs. *Id.* On examination, Petitioner had both medial and patellofemoral tenderness. *Id.* Dr. Nenno indicated that Petitioner had left knee arthritis as a result of a work related injury, which was significantly limiting his functions and causing him to be unable to work. *Id.* Dr. Nenno considered the patellofemoral resurfacing Dr. Zoellick recommended to be "a fairly aggressive approach," and doubted that it would solve Petitioner's problems. *Id.* He indicated that this type of surgery was performed in the late 1970's and fell out of favor, and have now resurfaced as a partial knee replacement solution similar to a unicompartmental knee for medial or lateral joint arthritis. *Id.* Dr. Nenno further indicated that the arthroscopic surgery that he recommended was also to evaluate whether there is significant arthritis in the rest of the knee,

which would render the patellofemoral resurfacing [recommended by Dr. Zoellick] unsuccessful. *Id.* He reiterated his request for authorization. *Id.*

Petitioner saw Dr. Nenno again on June 18, 2010 at which time he changed his opinion regarding the propriety of patellofemoral arthroplasty somewhat. PX2 at 53. He continued to request an arthroscopy to assess the other compartments of Petitioner's knee, but indicated that if this was not authorized he would propose to undertake the patellofemoral arthroplasty and stated that a complete knee replacement might be required if the other compartments in the knee showed significant changes. *Id.*

Petitioner testified that he moved back to Ohio before October of 2010 and saw a new physician, Dr. London, who did not recommend surgery.

Petitioner resumed his medical care with Dr. Nenno on February 25, 2011 with continued complaints. PX2 at 44. Dr. Nenno noted a loss of extension, a very slightly altered gait, and tenderness over the medial joint line and the patellofemoral area. *Id.* He noted his concern that Petitioner was now developing changes in the medial aspect of the knee. *Id.* He noted also Petitioner's report that he had been terminated from his employment based on having an extended period of disability. *Id.* Dr. Nenno reiterated the recommendation for surgery: a patellofemoral [resurfacing] or total knee replacement. *Id.*

Petitioner testified that his benefits were discontinued in March of 2011 and that no vocational rehabilitation or retraining was offered to him. He also testified on cross examination that he did not look for work since his functional capacity evaluation test results within his limitations. Petitioner testified that he applied for, and was placed on, social security disability and began receiving benefits in 2010 based on a cluster headaches condition. He testified that his ssdi payments were offset by the temporary total disability benefits that he received during the period of time that these two sources of income overlapped.

Fourth Section 12 Examination – Dr. D'Silva

On June 29, 2011, Petitioner underwent a fourth independent medical examination with a new evaluator, Joseph D'Silva, M.D. ("Dr. D'Silva"), at Respondent's request. RX1. Dr. D'Silva examined Petitioner, took a history from him, reviewed various medical records, and issued a report of the same date. *Id.*

Petitioner reported experiencing daily pain while awake and at night. *Id.* He also reported worsening pain with attempting to bend/stoop/kneel or walk over one block. *Id.* Petitioner further reported that the pain was underneath the patella and peripatellar in nature. *Id.* On examination, Dr. D'Silva noted a non-antalgic gait with no effusion in either knee, a positive Hoover sign when asked to extend the lower extremity reporting too much pain to do that and no pressure on the contralateral leg (which he noted was in contraindication when asked to lift the right leg and forcibly pushing down with the left lower extremity), pain on compression to either side of the patella and pain to light touch over the skin of the patella, and diffuse pain medially, greater than laterally, and along the femoral condyles. *Id.* Petitioner also reported pain with varus/valgus stress testing and an attempted anterior Drawer maneuver. *Id.* Dr. D'Silva further noted active bending to 70 degrees with full extension compared to 0-130 degrees on the right. *Id.*

Before rendering his opinions, Dr. D'Silva qualified them by noting that they were limited secondary to the fact that he noted significant inconsistencies during Petitioner's physical exam which suggested symptom magnification and less than full effort. Specifically, Dr. D'Silva noted that Petitioner's complaints of pain were out of proportion to his examination; that is, Petitioner's subjective complaints were inconsistent with Dr.

14IWCC0340

D'Silva's objective findings. He noted discrepancies during range of motion testing and a positive Hoover sign which was significant for lack of full effort. *Id.*

In light of these qualifications, Dr. D'Silva opined that Petitioner had non-specific left knee pain and that his (Dr. D'Silva's) findings did not correlate with Petitioner's subjective complaints as he explained and the symmetry in Petitioner's thigh and calf despite a four-year history of pain after his injury at work. *Id.* He recommended no further diagnostic testing, indicated that no further surgery was medically necessary based on the October 2008 operative report (although his opinion might change if he could view intraoperative pictures), and he recommended a "qualified" functional capacity evaluation based on his inconsistent examination and symptom magnification so that validity could be determined. *Id.* Ultimately, Dr. D'Silva opined that Petitioner magnified his symptoms and that they were unrelated to the injury at work, Petitioner was at maximum medical improvement, and he could return to unrestricted work at any time. *Id.*

Dr. D'Silva later reviewed the intraoperative photographs and provided a supplemental report dated November 27, 2012. RX2. He indicated that the pictures were grainy, but grossly still identifiable. *Id.* The first picture portrayed the undersurface of the patella, followed by the medial compartment, including identification of the medial meniscus. *Id.* The second page of photographs portrayed the anterior notch and the anterior cruciate ligament, as well as what appeared to be shaving of the undersurface of the patella, the medial femoral condyle, and the trochlear groove. *Id.* He indicated that nothing in those intraoperative pictures would change his prior opinions as stated in his original June 29, 2011 report. *Id.*

Continued Medical Treatment

Petitioner testified that he returned to Dr. Nenno on February 5, 2013, at which time he again recommended surgery, but now indicated that it should be a full knee replacement. The medical records reflect that Petitioner presented at that visit reporting increasing problems, medial and anterior left knee pain, swelling, ability to walk only a short distance without discomfort, and that stairs were "awful." PX2 at 40-41. Dr. Nenno diagnosed with chronic left knee pain and noted that his prior arthroscopy showed significant chondromalacia in the knee in the patellofemoral joint. *Id.* He administered a cortisone injection and indicated that Petitioner was now in need of more aggressive treatment to relieve his complaints, a total knee replacement. *Id.*

Additional Information

Petitioner testified that he wants the recommended surgery because he needs to regain his health. He explained that in the past 5 ½ years he gained about 60 lbs., has experienced bouts of depression related to the pain, and has been unable to bend down to do things or perform activities like gardening, mowing the lawn, or housekeeping.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's claimed current condition of ill-being in the left knee is causally related to the injury sustained at work on November 2, 2007. In so concluding, the Arbitrator relies on the credible testimony of Petitioner, the opinions of Dr. Nenno as reflected in Petitioner's treating medical records, and the first three Section 12 examination reports authored by Dr. Zoellick at Respondent's request.

While Petitioner had prior left knee surgery, he worked without need for medical treatment or time off work for years before November 2, 2007. On that date, Petitioner fell causing an aggravating injury to his left knee resulting in the need for arthroscopic surgery in October 6, 2008. Dr. Nenno and Respondent's first Section 12 examiner, Dr. Zoellick, agree on this point. After a period of post-operative physical therapy, Petitioner's left knee condition failed to improve. Dr. Nenno recommended Synvisc injections, a treatment option with which Dr. Zoellick agreed. Petitioner underwent these injections in May of 2009 to little avail. He continued to report knee pain that was localized to the patellofemoral region through August 14, 2009 at which time Dr. Nenno first recommended a second diagnostic arthroscopy or some form of a partial knee replacement depending on the intraoperative findings during that recommended surgery. Dr. Zoellick examined Petitioner a third time on February 9, 2010 and agreed that Petitioner had chondromalacia patella, but disagreed with the particular surgery recommended by Dr. Nenno opining that, instead, Petitioner would benefit from patellofemoral resurfacing.

When Petitioner returned to Dr. Nenno on May 4, 2010—one year and seven months after his first surgery, which showed intraoperative findings of significant chondromalacia of the medial facet of the patella, significant cartilaginous loose fragments within the knee, a significant plica formation along the medial femoral condyle, but otherwise fairly well-maintained medial and lateral compartments and anterior and posterior cruciate ligaments at the time—his complaints were broader and encompassed the whole knee. Dr. Nenno disagreed with the recommendation for patellofemoral resurfacing offering what appears to be a conservative approach explanation for his surgical recommendation. That is, Dr. Nenno noted that the purpose of the recommended arthroscopy was to evaluate whether Petitioner had significant arthritis in the rest of the knee, which would render the patellofemoral resurfacing recommended by Dr. Zoellick unsuccessful, and would then require the partial knee replacement he alternatively recommended.

By June 18, 2010, Dr. Nenno adjusted his surgical recommendation somewhat and indicated that, if his proposed exploratory arthroscopy was not approved, he would undertake Dr. Zoellick's approach with a patellofemoral arthroplasty and stated that a complete knee replacement might be required if the other compartments in Petitioner's left knee showed significant changes. In the Arbitrator's view, the difference of opinion between these two physicians regarding the method of treating Petitioner's complaints lies in their expertise, but supports a finding that Petitioner indeed had a continuing problem that was causally related to his injury at work.

Then Respondent selected another Section 12 examiner, Dr. D'Silva, and sent Petitioner for a fourth evaluation on June 29, 2011. Dr. D'Silva disagreed with both Dr. Nenno and Dr. Zoellick's assessments and noted that his examination showed symptom magnification by Petitioner and a mismatch between his objective findings on examination and Petitioner's subjective reports. He opined that Petitioner had non-specific left knee pain and attributed all of Petitioner's complaints (to the extent that he found them to align with his findings) to be unrelated to any injury at work.

In addition to finding Petitioner to be credible at trial (based on the consistency of his testimony at trial with the reports that he made to Dr. Nenno and Dr. Zoellick), the Arbitrator finds that Dr. D'Silva's opinions in this case are not persuasive. She declines to assign any weight to Dr. D'Silva's opinions given that he only examined Petitioner on one date, whereas his treating physician and even Respondent's first Section 12 examiner had the opportunity to examine Petitioner on at least three occasions over a period of years during which time their clinical and objective findings corroborated Petitioner's subjectively reported symptoms. Indeed, Dr. Nenno and Dr. Zoellick's consistently indicated that Petitioner required continued medical treatment even when they disagreed on exactly which medical approach to take to help resolve Petitioner's symptomatology. In light of the record as a whole, Dr. D'Silva's opinions are simply not persuasive.

Finally, the Arbitrator notes that the initial surgical approach recommended by Dr. Nenno and that recommended by Dr. Zoellick seem to carve apart Petitioner's knee. That is, Dr. Nenno and Dr. Zoellick agree that Petitioner's 2008 intraoperative findings suggest patellofemoral deterioration that is attributable, in part, to his injury at work. Their medical approaches diverge when Dr. Nenno suggests exploration of the remainder of Petitioner's knee and Dr. Zoellick indicates that Petitioner's symptoms would likely only be resolved by a resurfacing, but he does not address the other compartments of Petitioner's knee. Dr. Nenno does not specifically opine that Petitioner's deteriorating left knee condition outside of the patellofemoral region is causally related to the aggravating injury that he sustained at work. However, the Arbitrator finds that this is not dispositive in finding that Petitioner's left knee condition is causally related to his 2007 injury at work.

Again, the Arbitrator finds Petitioner's testimony at trial to be credible and it is notable that he spent almost five years since his first surgery (closer to six years since his injury) undergoing various conservative treatments to alleviate his left knee pain, he moved from one state to another and back again, and he underwent no less than four Section 12 examinations at Respondent's request in two different states over those years before any advanced medical treatment (i.e., Synvisc injections, surgery) recommended was approved. The Arbitrator finds it to be a reasonable proposition given the facts in this case that Petitioner's entire left knee condition has deteriorated significantly during that period of time, and notes that no evidence was produced that any degenerative condition in any other compartments beyond the patellofemoral region were caused solely by Petitioner's pre-existing left knee condition or any intervening injury. Indeed, while parsing out a body part in this manner is entirely appropriate, particularly given the divergence in medical approaches for how to best treat the area of concern on which both doctors agree (i.e., the patellofemoral region), there is no evidence in the record to support the proposition that Petitioner's symptoms manifesting elsewhere in the knee are due to anything other than deterioration attributable at least in part to the *sequelae* of Petitioner's 2007 injury at work. A deterioration that, Dr. Nenno now opines, will hopefully resolve through an even more aggressive surgery than he originally recommended: a total knee replacement.

Thus, based on the totality of the evidence, the Arbitrator finds that Petitioner has established by a preponderance of credible evidence that his current left knee condition of ill-being is causally related to his accident at work on November 2, 2007.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained in the foregoing causation analysis, the Arbitrator finds that Petitioner's claimed current left knee condition of ill-being is related to the accident sustained at work on November 2, 2007. Again, while Dr. Nenno and Dr. Zoellick disagree on the exact surgery that should be performed, the Arbitrator finds the opinions and treatment recommendations of Dr. Nenno to be reasonable given the record as a whole. Thus, the Arbitrator awards the prospective medical care requested by pursuant to Section 8(a) of the Act in the form of the recommended total left knee replacement surgery prescribed by Dr. Nenno as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

In support of the Arbitrator's decision relating to Issue (L), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The parties have stipulated that Petitioner was temporarily and totally disabled from November 3, 2007 through March 6, 2011. Thus, the Arbitrator awards this period of temporary total disability benefits. However, Respondent disputes that Petitioner was disabled from March 7, 2011 through July 23, 2013. As explained in detail above, the Arbitrator finds that Petitioner has established a causal connection between his current left knee condition and his injury at work. Moreover, Petitioner's treating medical records reflect that Petitioner was placed off work by Dr. Nenno pending approval of surgery and there is no indication that Petitioner has yet reached maximum medical improvement with regard to his left knee condition from Dr. Nenno. Thus, the Arbitrator finds that Petitioner is entitled to additional temporary total disability benefits from March 7, 2011 through July 23, 2013.

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

Virginia "Jenny" Gietl,

Petitioner,

14IWCC0341

vs. NO: 10 WC 27060

Lincoln Land Community College,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 5, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GIETL, VIRGINIA "JENNY"
Employee/Petitioner

Case# **10WC027060**

14IWCC0341

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

On 7/5/2013, 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:

1590 SGRO HANRAHAN & BLUE LLP
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0075 POWER & CRONIN LTD
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STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0341

VIRGINIA "JENNY" GIETL
Employee/Petitioner

Case # 10 WC 27060

v.

Consolidated cases:

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 10, 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] 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 **January 27, 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 **$44,746.64**; the average weekly wage was **$860.51**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$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 **$32,683.54** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibits 5, 8, 11 and 12, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act. Respondent is entitled to a credit for medical bills paid by its group carrier under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $573.67/week for 26 4/7 weeks, commencing 07/30/2010 through 09/13/2010, 09/20/2010 through 11/01/2010, 09/27/2011 through 11/19/2011, and 01/23/2012 through 03/05/2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the sum of $516.31/week for a further period of 82 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the 20% loss of use to each hand.

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

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

Signature of Arbitrator

06/25/2013
Date

JUL 5 - 2013

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

14IWCC0341

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

VIRGINIA "JENNY" GIETL
Employee/Petitioner

v. Case # 10 WC 27060

LINCOLN LAND COMMUNITY COLLEGE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDING OF FACT

On January 27, 2010, Petitioner, Virginia "Jenny" Gietl, was employed by Respondent, Lincoln Land Community College, as a Veterans Financial Aid Advisor. Petitioner was 63 years of age at the time of the claimed repetitive trauma accident. She worked for Respondent for approximately 27 years. Petitioner was originally hired to work in the Respondent's book store for two and a half years before being transferred to the Veterans' Affairs department. Petitioner testified that she served Veterans Affairs from that time until her retirement on May 31, 2012.

Evidence submitted at trial showed that Petitioner's position required repetitive hand motions. The job description submitted by both parties requires "computer competency." (Petitioner's Exhibit (PX) 2; Respondent's Exhibit (RX) 5). Petitioner testified that she worked on the computer for approximately seven and a half hours out of a nine hour day. This included, but was not limited to, answering e-mails from students or other college employees and entering data into the computer for financial aid. She also used a calculator alongside the computer frequently. Additionally, Petitioner would be on the phone often. She testified that she would often have the phone tucked into her neck while on the computer during most of the work day. She also had to enter data into the computer for student records or financial aid.

On February 26, 2010, Petitioner was referred to neurologist Dr. M.L. Mehra, for symptoms that resembled that of carpal tunnel syndrome, by her family physician, Dr. Daniel O'Brien. (PX 3). Starting in 2009, Petitioner testified that her hands would get numb and tingle regularly, and she would drop things. She had lost grip strength in both hands. Petitioner told Dr. Mehra that she was experiencing these symptoms for a year or two. Dr. Mehra noted that Petitioner had "[m]arked atrophy of the right and to some extent the left thenar muscle." (PX 3). During his deposition, Dr. Mehra testified that the median nerve was compressed. (PX 4, pp. 8-9). Dr. Mehra's clinical impression was severe denervating, right worse than left, carpal tunnel syndrome. He then recommended a surgical decompression. (PX 3). In a letter dated July 6, 2010, Dr. Mehra wrote a work restriction letter for Petitioner. In the letter, Dr. Mehra stated that

Petitioner's carpal tunnel syndrome "is directly related to the repetitive hand movements she does at her work at Lincoln Land [Community] College." (PX 3).

Petitioner then presented to Dr. Reuben Bueno's office on March 30, 2010, and was seen by Dr. Brian Derby. Dr. Derby noted that certain activities Petitioner performed, like typing most of the day, exacerbated her symptoms. Dr. Derby recommended surgery, and reported that the proposed surgery would be "workmen's comp." (PX 6).

Petitioner returned to Dr. Bueno's office on July 15, 2010, and saw another doctor in that office, Dr. Ryan Diederich. He noted that a right carpal tunnel surgery would be scheduled first, and then a month later, they would perform a left carpal tunnel release. Petitioner agreed to all procedures and verbalized understanding of all the risks involved with carpal tunnel release surgery. (PX 6).

Petitioner underwent surgery for her right hand on July 30, 2010. She was discharged home and returned for a check-up visit on August 17, 2010. Petitioner complained of stiffness and some discomfort with movement, mostly in her thumb. Dr. Bueno recommended that she discontinue the use of the splints because it was causing persistent redness. He then referred Petitioner to the hand therapy department to start motion exercises. Petitioner was kept off work at this time. (PX 6).

Petitioner returned to Dr. Bueno on August 24, 2010, complaining of pain and achiness in her right palm. Worried about hampering her ability to perform daily activities without the use of both hands, Dr. Bueno rescheduled her left carpal tunnel release surgery. Additionally, he gave her a compression glove to suppress the swelling in her thenar area and wrist. On September 7, 2010, Petitioner returned for a follow-up visit. She still experienced some pillar pain and achiness. Dr. Bueno told Petitioner that she would have to start on an anti-inflammatory sooner rather than later to combat potential swelling. Petitioner had been off work since the July 30 surgery, and at the September 7, 2010 evaluation, Dr. Bueno released Petitioner to return to work regular duty effective September 13, 2010. (PX 6).

Petitioner underwent left carpal tunnel release surgery on September 20, 2010. Dr. Bueno then prescribed Norco for her pain and scheduled a follow-up visit. This visit occurred on September 28, 2010, and Petitioner's chief complaint described that day was pain in the forearm. Petitioner was not yet released to return to work from her left carpal tunnel surgery on this date. Petitioner had her sutures removed on October 12, 2010. Dr. Bueno also noted that he would keep Petitioner off work at this time until November 1, 2010. (PX 6).

Petitioner returned to Dr. Bueno for another follow-up evaluation on October 26, 2010. Dr. Bueno noted that Petitioner may "be in that group of patients who is predisposed to getting carpal tunnel, and repetitive activities may have played a role in the development of the carpal tunnel..." Additionally, Dr. Bueno told Petitioner that if she returned to performing the repetitive activities that caused her carpal tunnel syndrome, "she may demonstrate signs of recurrence." Dr. Bueno reported that Petitioner's repetitive activities may have played a role in the development of her condition. (PX 6).

On her eight week post-operative visit on November 18, 2010, Petitioner returned to Dr. Bueno with complaints of persistent pain and swelling. Additionally, she stated that she returned to work, but she still had continuing throbbing pain that radiated up her arm. Dr. Bueno was concerned that Petitioner was developing complex regional pain syndrome. He recommended that Petitioner attend hand therapy three times per week, and that she use her hand as much as possible. When she returned on December 2, 2010, Petitioner had made significant improvement with the pain and swelling in her left hand, thereby ruling out complex regional pain syndrome. (PX 6).

Petitioner returned to Dr. Bueno's office on February 3, 2011. She continued to have pillar pain and swelling in her left hand despite continued therapy. She was also experiencing a recurrence of the symptoms she had prior to her left carpal tunnel release. Dr. Bueno noted that Petitioner's " return to work at the same workstation that she had been at before, leaving her hands in an extended position and pressure on the carpal tunnel, may be exacerbating these symptoms." Petitioner returned on February 17, 2011, and Dr. Bueno again noted that her work may have exacerbated her symptoms. He noted that Petitioner was continually working with a computer and mouse throughout the day, and with that amount of time at the computer, her wrist and hands could have been in a position which could have exacerbated some of her symptoms. (PX 6).

On May 11, 2011, Petitioner returned to Dr. Mehra with complaints of continued pain in her hands. Dr. Mehra noted that she still had atrophy of both thenar muscles. Her Tinel and Phalen signs were positive for carpal tunnel syndrome. He then diagnosed Petitioner with post carpal tunnel syndrome with incomplete recovery. Dr. Mehra noted that her carpal readings were not within normal limits but recommended that they wait a year before re-exploration. (PX 3).

On August 3, 2011, Petitioner sought a second opinion from Dr. Mark Greatting. When asked on the intake form whether her symptoms interfered with or were aggravated by her job, Petitioner indicated "yes." Dr. Greatting, noting that Petitioner had recurrent bilateral carpal tunnel syndrome, reported that it would be reasonable to proceed with another right carpal tunnel release. If that surgery relieved her pain, they would proceed with another left carpal tunnel release. She underwent this surgery on September 27, 2011. (PX 9).

Petitioner returned to Dr. Greatting for a follow-up visit on October 12, 2011. She reported that her hand felt much better and the numbness has improved. Dr. Greatting recommended that she not lift anything over five pounds, but she could increase her activities as tolerated. He kept her off work at this time (she had been off work since the September 27, 2011 surgery at this point). (PX 9).

On November 23, 2011, Petitioner's symptoms had markedly improved. Dr. Greatting released Petitioner to return to work the following Monday. (PX 9). However, Petitioner is only claiming temporary total disability (TTD) benefits for this particular time off commencing with the September 27, 2011 surgery until November 19, 2011. (See Arbitrator's Exhibit 1). It was determined at the November 23, 2011 evaluation that if Petitioner did well with the right hand while at work, Dr. Greatting would proceed with left carpal tunnel release surgery. (PX 9).

When Petitioner returned to Dr. Greatting's office on January 5, 2012, she stated that she could use her right hand without restrictions. Noting the success of the surgery on her right hand, Dr. Greatting scheduled a carpal tunnel release on her left hand. This surgery was performed on January 23, 2012. When Petitioner returned for follow-up evaluation on February 7, 2012, her pain and numbness had significantly improved and was almost resolved. Dr. Greatting kept Petitioner off work from her surgery on January 23, 2012 until March 5, 2012. (PX 9).

When asked during his deposition whether Petitioner's job duties caused or contributed to her bilateral carpal tunnel syndrome, based on his review and understanding of Petitioner's job description and his understanding of her job duties, Dr. Mehra testified that professions requiring repetitive hand movement, like typing, contribute to carpal tunnel syndrome. He further testified that Petitioner informed him she performed a lot of repetitive hand movement with her job. (PX 4, p. 14). As stated, *supra*, Dr. Mehra reported in his July 6, 2010 letter that Petitioner's carpal tunnel syndrome "is directly related to the repetitive hand movements she does at her work at Lincoln Land [Community] College." (PX 3).

Dr. Bueno testified during his deposition that, based on Petitioner's job history provided to him, and her resulting medical problems, that Petitioner's duties on a keyboard most of the work day may have contributed to her carpal tunnel syndrome. (PX 7, p. 9).

Dr. Greatting testified during his deposition that he did not discuss Petitioner's job activities with her much during the course of his treatment of her. He did, however, review Petitioner's job description. (PX 10, p. 11). When asked whether he had an opinion as to whether prolonged office work with keyboarding, writing and telephone use could cause or contribute to carpal tunnel syndrome, Dr. Greatting testified that if a patient's symptoms are "a lot worse or aggravated while doing their work activities" then he generally believes that the patient's work activities at least aggravate the problem. (PX 10, p. 12). As stated *supra*, when asked on Dr. Greatting's intake form whether her symptoms interfered with or were aggravated by her job, Petitioner indicated "yes." (PX 9).

Petitioner presented for evaluation at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act") with Dr. Henry Ollinger on June 17, 2010. Dr. Ollinger reviewed Petitioner's job description and took an oral history of her job duties. (RX 1). Dr. Ollinger diagnosed Petitioner with osteoarthritis at the bases of both thumbs and bilateral carpal tunnel syndrome. (RX 2, p. 14). Dr. Ollinger did not believe that Petitioner's job duties with Respondent caused or aggravated her bilateral carpal tunnel syndrome. (RX 2, pp. 15-16). Dr. Ollinger testified that Petitioner's work was clerical in nature and did not have any of the clear factors he looks for when diagnosing repetitive trauma injuries like carpal tunnel syndrome. The doctor noted that Petitioner's job was not high force and did not require lifting of heavy weights. He also noted that Petitioner's job did not require prolonged flexion or extension of her wrists. (PX 2, pp. 16-17). Dr. Ollinger testified that he believed Petitioner's bilateral carpal tunnel syndrome was caused by her innate lifestyle and the medical risks associated with her age and gender, in addition to the osteoarthritis in her thumbs. (RX 2, pp. 18-19).

In his report, Dr. Ollinger reported that Petitioner's keyboarding was not "hand intensive" and followed this statement with a parenthetical that stated, "as would be for a persons (sic) doing continued prolonged medical or legal transcription or pure data entry as the only job requirement." Dr. Ollinger testified that if there is "prolonged, continued and...high volume keying, which by nature would be text keying because it is two-handed, it can be a factor in a carpal tunnel case." (RX 2, pp. 31-32).

On May 7, 2013, Dr. Ramsey Ellis conducted a medical records review at the request of Respondent. Dr. Ellis' diagnosis of Petitioner, based on the records review, was that of post right and left carpal tunnel release for recurrent carpal tunnel syndrome, as well as bilateral thumb osteoarthritis. Dr. Ellis did not believe that Petitioner's conditions were related to her work duties, specifically because "carpal tunnel syndrome has only been linked to highly repetitive flexion and extension of the wrists coupled with forceful grasping or the prolonged use of hand-held vibratory tools." Dr. Ellis believed that Petitioner's bilateral carpal tunnel syndrome was related to her age and gender. (RX 3).

On cross-examination, Petitioner testified that she starting noticing her symptoms "more and more" in 2009, but that she did not know at the time that she was indeed suffering from carpal tunnel syndrome. When asked if she had come to recognize that she suffered these symptoms for twenty years, Petitioner testified that she could have had some symptoms over this period, but not nearly as severe as the symptoms she reported in 2009-2010. She also testified that during the period asked about, she did not even know what carpal tunnel syndrome was.

Petitioner testified she was initially reluctant to return to work after her second surgeries but did so anyway. Petitioner testified that she retired shortly thereafter because she believed she needed to retire, despite wanting to work longer. Petitioner testified that she enjoyed her job. She testified that her hands and wrists today are "good," and that if she would have known they would have felt this good she would have reconsidered retirement.

Petitioner offered into evidence a series of medical bills she claims she incurred as a result of the treatment received for the injuries claimed at bar. (See PX 5, 8, 11, & 12).

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that Petitioner's bilateral carpal tunnel syndrome, and the subsequent recurrent bilateral carpal tunnel syndrome, arose out of and in the course of her employment by Respondent based on the medical records and deposition testimony of Drs. Mehra, Bueno, and Greatting, as well as the credible testimony of Petitioner. Dr. Mehra's letter of July 6, 2010 demonstrates this connection based on discussions with Respondent. Dr. Bueno and Dr. Greatting also testified that, within a reasonable degree of medical certainty, the repetitive motions that Petitioner performed while at work as described to them may have brought on the

pain and numbness in her hands, which in turn exacerbated her bilateral carpal tunnel syndrome to the point of necessitating surgical releases.

Respondent has tendered two expert witnesses. The Arbitrator does not find these witnesses to be as persuasive as the doctors that treated and interacted with Petitioner. Dr. Ollinger testified that he believed Petitioner suffered from bilateral carpal tunnel syndrome; he just did not believe her job duties caused or aggravated it. Dr. Ollinger did concede that "prolonged, continued and...high volume keying, which by nature would be text keying because it is two-handed...can be a factor in a carpal tunnel case." (RX 2, pp. 31-32). While Dr. Ollinger did not believe Petitioner's duties brought her to the level of repetitive typing that could cause carpal tunnel syndrome, the Arbitrator finds that the majority of evidence, including Petitioner's credible testimony, indicate that she did in fact spend most of her time using a keyboard. The records of Dr. Bueno and Dr. Derby further indicate that certain activities Petitioner performed, like typing most of the day, exacerbated her symptoms. (See PX 6). Additionally, the Arbitrator finds the opinion contained in the records review by Dr. Ellis is not as persuasive, as Dr. Ellis did not meet with Petitioner and looked only at the records submitted to him.

Further, the Arbitrator finds that Petitioner was a credible witness at trial. On direct examination, Petitioner testified in great detail as to her job duties and the process by which her position and her overall department operates. On cross-examination, when repeatedly asked if Petitioner had carpal tunnel symptoms over the past several years, she calmly and in a forthcoming manner testified that she has had various hand and wrist symptoms over the years, but did not even know what carpal tunnel syndrome was until around 2009-2010, when her symptoms progressed to the point of requiring treatment. Petitioner worked for Respondent for approximately 27 years, and performed the same repetitive duties for 25 of those years until her retirement in May 2012. Petitioner was open and forthcoming, and endeavored to be truthful during her entire testimony, and great weight is placed in this regard.

Based on the testimony and medical evidence submitted at trial, the injuries arose from and are causally connected to Petitioner's employment.

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

Petitioner is claiming Respondent is liable for the following medical bills:

- Dr. Mehra: $3,201.00 (PX 5)
- SIU Healthcare (Dr. Bueno and Hand Therapy): $10,729.88 (PX 8)
- Springfield Clinic (Dr. Greatting): $12,818.00 (PX 11)
- Clinical Radiologist: $51.00 (PX 12)

The treatments for Petitioner's injuries are reasonable and necessary. Therefore, Respondent shall pay the aforementioned amounts which represent the reasonable expenses in the treatment of Petitioner's injuries, subject to the medical fee schedule, Section 8.2 of the Act.

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

Petitioner was temporarily and totally disabled for various periods throughout the course of her treatment, totaling 26 4/7 weeks of benefits. Petitioner was off work from her first right carpal tunnel release from July 30, 2010 (the date of surgery) through September 13, 2010 (when she was released by Dr. Bueno). She was next off work due to her first left carpal tunnel release from September 20, 2010 (the date of surgery) through November 1, 2010 (when she was released by Dr. Bueno). Petitioner suffered a recurrence of her carpal tunnel syndrome, and underwent two more surgical releases to each side. She was off work from the second right carpal tunnel release from September 27, 2011 (the date of surgery) through November 19, 2011 (the date Petitioner claims she returns, despite a formal subsequent release by Dr. Greatting on November 28, 2011). She was next off work due to her second left carpal tunnel release from January 23, 2012 (the date of surgery) through March 5, 2012 (when she was released by Dr. Greatting). Respondent shall pay Petitioner the amount of compensation representing her total TTD benefits for the aforementioned periods, pursuant to Section 8(b) of the Act.

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

As stated, *supra*, Petitioner's bilateral carpal tunnel syndrome was at the very least aggravated by her repetitive work duties. This necessitated bilateral carpal tunnel surgical releases. When Petitioner's symptoms persisted following these surgeries, it was established that she then suffered from recurrent bilateral carpal tunnel syndrome, for which she underwent two more surgical releases to each side.

Petitioner testified that currently, her hands and wrists are "good." She testified that she believed she needed to retire a couple months after returning to work following her final surgery. Dr. Bueno in fact warned Petitioner following her first two surgeries that continued repetitive duties like the ones she was performing could cause a recurrence of her bilateral carpal tunnel syndrome, which did in fact happen after the first two surgeries. However, her symptoms eventually alleviated some time after the second surgeries and her retirement, and she testified that she would not have retired had she known how good the results would have been. Therefore, her decision to retire, while not recommended by a physician, is also not entirely unreasonable given the circumstances.

Based on the foregoing, the Arbitrator finds that Petitioner has suffered the 20% loss of use to each hand pursuant to Section 8(e) of the Act, and she is awarded permanent partial disability benefits accordingly.

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

Darryl Lamb,

Petitioner,

14IWCC0342

vs. NO: 13 WC 16892

Westaff/ Select Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 29, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,000.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen Mathis

Mario Basurto

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

LAMB, DARRYL
Employee/Petitioner

Case# **13WC016892**

14IWCC0342

WESTSTAFF/SELECT STAFFING
Employer/Respondent

On 10/29/2013, 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:

2046 BERG & ROBESON PC
STEVE W BERG
1217 S 6TH ST PO BOX 2485
SPRINGFIELD, IL 62705

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0342

DARRYL LAMB
Employee/Petitioner

Case # 13 WC 16892

v.

WESTAFF/SELECT STAFFING
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **September 16, 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. [ ] Is Petitioner entitled to any prospective medical care?

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

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

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On **March 24, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$17,160.00**; the average weekly wage was **$330.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of **$1,100.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,100.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 2 and as delineated in the Memorandum of Decision of Arbitrator, as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $220.00/week for 22 weeks, commencing 04/16/2013 through 09/16/2013, as provided in Section 8(b) of the Act.

Penalties and attorney's fees are not imposed upon Respondent.

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.

B. Zt

Signature of Arbitrator

10/25/2013
Date

ICArbDec19(b)

OCT 29 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

14IWCC0342

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DARRYL LAMB
Employee/Petitioner

v. Case # 13 WC 16892

WESTAFF/SELECT STAFFING
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Darryl Lamb, testified that on March 24, 2013, he was working for Respondent, Westaff/Select Staffing. Respondent is a temporary employment agency, and Petitioner was working for a cleaning company called New Air at the Caterpillar, Inc. (CAT) plant in Decatur, Illinois. New Air had a contract with CAT. Petitioner noted he had been working about seven months at the CAT facility through New Air. During his entire tenure with Respondent, Petitioner worked through New Air. His job duties from Monday to Thursday were general "clean up." On Sunday, his job was "maintenance" and he would be scraping paint off windows in the primer booth. Petitioner indicated he worked seven hours per day, Monday through Thursday, and then a 12 hour shift on Sunday, starting at 7:00 a.m.

On March 24, 2013 (a Sunday), Petitioner testified he was scraping paint off of the glass windows. Petitioner was using a seven inch scraper to scrape the paint off the glass, as well as a water-Windex solution to help break down the paint. He testified that it was very difficult to scrape the paint. At trial, Petitioner demonstrated the arm motions of scraping the paint in question, and it was noted that considerable arm effort was involved in performing the scraping motions. At about 9:30-10:00 a.m., Petitioner testified that he felt a "pull" in his left shoulder. He had been scraping paint since his shift began at 7:00 a.m. He indicated that he stopped scraping and told his manager, Kenny Cox with New Air, that he pulled something in his shoulder. Petitioner stated that his instructions were to report any injury to the New Air supervisor, which was Mr. Cox. Petitioner testified that upon telling Mr. Cox of his injury, Mr. Cox replied that Petitioner would be "ok" and then he left on his golf cart. Petitioner testified that Mr. Cox did not write anything down concerning his reporting of an accident, nor did Mr. Cox provide Petitioner any forms or paperwork concerning the reporting of a work accident.

On approximately the following Monday, Petitioner testified that he telephoned Respondent, and left several messages with a gentleman there about calling him back regarding his work accident. He testified he never indeed spoke with his supervisor with Respondent, Bonnie Knuth. After he never received any phone responses, Petitioner testified that he sent Ms. Knuth a letter via certified mail on April 12, 2013, informing her of his work accident. (See Petitioner's Exhibit (PX) 1).

Petitioner completed the day at work on March 24, 2013, but he used his right arm instead of his left arm the rest of the day in performing his work duties. Petitioner stated that he worked the following week after March 24, 2013. Petitioner testified that he believed he suffered from a simple strain-type injury, and therefore did not seek immediate medical care and continued to work. Petitioner was subsequently laid off from employment. When the pain persisted, Petitioner testified that he then sought treatment at St. Mary's Hospital on April 13, 2013. At St. Mary's, Petitioner gave a history of the March 24, 2013 incident at work, in that he felt a pulling sensation in his left shoulder when scraping paint off of a window. X-rays were taken that day, and a diagnosis was made of shoulder sprain. (PX 3). Petitioner denied any intervening injury to his shoulder between the claimed date of accident and the date he sought care at St. Mary's. Petitioner also denied any prior symptoms or injuries to his left shoulder prior to the claimed date of accident. Petitioner is left hand dominant.

Dr. Steven Taller from St. Mary's referred Petitioner to his primary care provider, Family Nurse Practitioner (FNP) Jessica Sullivan, at Community Health Improvement Center. (PX 3; PX 4). On April 16, 2013, FNP Sullivan recommended an MRI, prescribed pain medication, and took Petitioner off of work. (PX 4). Petitioner underwent the MRI on April 19, 2013 at Decatur Memorial Hospital, which revealed a full thickness rotator cuff tear. (PX 4). Petitioner was again evaluated by FNP Sullivan on May 22, 2013. (PX 4). FNP Sullivan referred Petitioner to Dr. John Britt, an orthopedic surgeon. Dr. Britt performed surgery to Petitioner's left shoulder on June 14, 2013, consisting of an open left rotator cuff repair, an arthroscopic left Neer acromioplasty, and an arthroscopic exam to the left glenohumeral joint. The post-operative diagnosis was a focal full-thickness non-retracted small left rotator cuff tear (supraspinatus) and focal stable anterior labral tear to the left shoulder joint. (PX 7). Petitioner was kept off of work or given modified duty restrictions of no lifting with the left arm per Dr. Britt, and as of the date of trial, those restrictions were still in place. (PX 5; PX 7). Petitioner returned to FNP Sullivan's office on August 12, 2013, and further pain medication was prescribed. (PX 4). Petitioner is currently in post-operative physical therapy, and attends therapy sessions four times per week. (PX 8). Petitioner denied any subsequent injury to his left shoulder following the surgery.

Petitioner testified that he has received a payment from Respondent in the amount of $1,100.00, but that no other benefits have been provided to him. He further testified that none of the medical bills incurred have been paid. He denied having health insurance through Respondent when he was employed there. Petitioner offered a series of medical bills into evidence that he claims he incurred as a result of the injury. (PX 2). Petitioner testified that the medical bills from St. Mary's are not itemized. He testified that the bill from service date June 10, 2013 was for pre-operative blood and lab work. He also noted an emergency room bill, and believed said charge was due to an episode where his therapist believed she saw puss in his arm and had to make sure it was not infected.

Bonnie Knuth testified at Respondent's request. She works for Respondent as a supervisor. She confirmed that Respondent is a temporary agency. She noted that Petitioner was one of the individuals that she supervised and placed in a job. Ms. Knuth indicated that there was policy and

procedure with regard to reporting a workers' compensation injury. She indicated that the safety examination sheet was filled out by Petitioner at the time he applied for employment. (See RX 1). She indicated that paragraph 7A on that sheet notes that if a work injury occurs, it should be reported to the client's supervisor on duty, and then to immediately call the staffing supervisor. Ms. Knuth indicated that she was the staffing supervisor. She noted on the form that Petitioner indicated that he understood 7A to be correct. Ms. Knuth testified that she never received a message that Petitioner tried to call her. The first indication she had that Petitioner was claiming a workers' compensation injury was with receipt of the April 12, 2013 letter he sent to her. (See PX 1). After receiving that letter, she testified that she tried to contact Petitioner on a number of occasions and left a message on one occasion. She testified that she never received a return call. She testified that she also never heard from New Air that Petitioner was claiming an injury.

Petitioner testified that he lives with his mother, and that he asked his mother when he was out during the dates in question whether he received a phone call from Ms. Knuth, and his mother replied that he did not. Concerning Respondent's Exhibit 1, Petitioner testified that when he initially met with Ms. Knuth about the job with Respondent, he was required to sign numerous forms, and that said forms were not explained in detail. He confirmed that his signature was on Respondent's Exhibit 1, but that he does not recall that particular form, as there were many forms he had to complete.

CONCLUSIONS OF LAW

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

On March 24, 2013, Petitioner was an employee of Respondent, who was working for an organization called New Air at the CAT plant located in Decatur, Illinois. On that date, Petitioner was using a scraper to scrape paint off of equipment glass. He testified that the paint was difficult to remove and it took considerable effort to scrape the paint off of the glass. Petitioner demonstrated the scraping motion at trial, and the Arbitrator made note of the arm movements of which Petitioner was engaged when scraping. As Petitioner was scraping the paint, he felt a pain and pulling sensation in his left shoulder. Corroborating history of Petitioner's injury appears in the medical records at St. Mary's Hospital, Community Health Improvement Center (FNP Sullivan), and records from the treating orthopedic surgeon, Dr. John Britt. Petitioner also submitted a written accident report to Respondent since his supervisor did not initiate any kind of report when the accident occurred. Mr. Cox was not called as a witness to refute Petitioner's testimony. Further, both Petitioner and Ms. Knuth acknowledged that the first person to whom an injury should be reported would have been the supervisor with New Air, which was Mr. Cox. Ms. Knuth testified that the next reporting step would have been to report the injury to her, and that she did not receive notice until Petitioner sent his letter of April 12, 2013. (See PX 1). Petitioner testified that he tried calling Ms. Knuth before he sent the letter, and left messages with a male employee to return his call. Petitioner testified that the messages were never returned. The letter from Petitioner gives a detailed and corroborating account of his accident, as well as Petitioner's statement that Mr. Cox did nothing when notified of the injury. Further, that letter corroborates Petitioner's believable and reasonable testimony that he initially thought he suffered nothing more than a strain-type injury, and continued working until the pain progressed to the point where he sought medical care.

Petitioner testified that he had pain contemporaneously with the scraping incident and that he had no prior injuries to or problems with his left shoulder before his accident of March 24, 2013. The Arbitrator

found Petitioner to be a credible witness at trial. He testified in an open and forthcoming manner, including on cross-examination. He appeared to be endeavoring to give the full truth during his testimony. Great weight is placed on Petitioner's credibility when determining the conclusions concerning the issue of accident. Therefore, the Arbitrator finds that Petitioner suffered an accident on March 24, 2013 that arose out of and in the course of his employment by Respondent.

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

As indicated above, Petitioner credibly testified that prior to his accident of March 24, 2013, he was not experiencing any difficulty with, nor had he had any injuries to, his left shoulder. Petitioner explained in his accident report submitted to Respondent that he had originally thought he had just pulled a muscle and was hoping that the condition would improve on its own. Petitioner was reluctant to obtain medical care because he had no health insurance. (See PX 1).

When Petitioner's condition did not improve and actually continued to worsen, Petitioner initially sought treatment at St. Mary's Hospital, where he was diagnosed with a shoulder sprain. Those records indicate that the medical condition was associated with Petitioner's accident at work on March 24, 2013.

Petitioner treated at Community Health Improvement Center, where his condition was associated with his work injury of March 24, 2013. After an MRI of his left shoulder revealed a torn rotator cuff, Petitioner was referred on to an orthopedic specialist. Petitioner's treating orthopedic surgeon, Dr. Britt, related Petitioner's complaints to his work injury where he was scraping windows. Dr. Britt performed surgery on Petitioner's shoulder on June 14, 2013, and at the time of trial, Petitioner was still undergoing post-operative treatment for his condition.

The Arbitrator finds Petitioner's testimony to be credible that he felt immediate pain while scraping the paint on the window at work on March 24, 2013, and further finds that Petitioner did not have any intervening injuries involving his left shoulder between that incident and his date of surgery, as well as the date of trial. The Arbitrator thus finds that Petitioner's current condition of ill-being is causally related to his March 24, 2013 accident.

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

Petitioner's Exhibit 2 consists of various medical bills that have previously been provided to Respondent. The Arbitrator finds the following bills to be reasonable and necessary and related to Petitioner's accident of March 24, 2013. Respondent is ordered to pay these bills pursuant to the medical fee schedule set forth in Section 8.2 of the Illinois Workers' Compensation Act, 820 ILCS 305/8.2. The awarded medical bills (set forth in Petitioner's Exhibit 2) are as follows:

PROVIDER	DATE	AMOUNT	DESCRIPTION
Central Illinois Emergency Physicians	4-13-13	$243.00	Emergency room visit
Decatur Memorial Hospital	4-19-13	$2,549.57	MRI related charge
Decatur Radiology	4-19-13	$ 368.00	MRI related charge
Community Health Improvement	4-15-13	$ 15.00	FNP Sullivan visit

(this payment was made by Petitioner and should be reimbursed to Petitioner)

Wal-Mart	4-16-13	$ 18.17	Prescribed medication
	4-16-13	$ 4.00	Prescribed medication

(these amounts were paid by Petitioner and should be reimbursed to Petitioner)

Wal-Mart	5-22-13	$ 18.17	Prescribed medication
		$ 4.00	Prescribed medication

(these amounts were paid by Petitioner and should be reimbursed to Petitioner)

Community Health Improvement Ctr.	4-16-13	$ 104.00	FNP Sullivan
	5-22-13	$ 104.00	FNP Sullivan
St. Mary's Hospital	4-13-13	$1,230.56	X-rays
St. Mary's Hospital Clinic	6-10-13	$ 76.57	Pre-surgery work-up
Clinical Radiologist	6-10-13	$ 56.50	Pre-surgery x-ray
St. Mary's Hospital	6-14-13	$ 66.99	Pre-surgery work-up
St. Mary's Hospital	6-14-13	$36,522.28	Surgery
Central Illinois Assoc.	6-14-13	$ 3,100.00	Anesthesia for surgery
Community Health Improvement	5-22-13	$ 53.00	FNP Sullivan
St. Mary's Hospital	6-10-13	$ 974.01	Pre-surgery lab work
Community Health Improvement	8-12-13	$ 104.00	FNP Sullivan

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

As a result of his injury of March 24, 2013, Petitioner was taken off work by FNP Sullivan at Community Health Improvement Center effective April 16, 2013. Petitioner was continued off work through his visit with orthopedic specialist, Dr. Britt. Petitioner was off work per Dr. Britt following surgery, and as of the date of trial, was on modified restrictions of no lifting of the left arm. Petitioner was laid off from Respondent in April 2013. Petitioner credibly testified that he has not been released to full duty work and is still undergoing treatment following his shoulder surgery. He is presently undergoing physical therapy for his shoulder.

Therefore, the Arbitrator finds that Petitioner is temporarily and totally disabled as a result of his injury of March 24, 2013, from the dates of April 16, 2013 through September 16, 2013, the date of trial. Temporary total disability (TTD) benefits are accordingly awarded for this period. Respondent shall be allowed credit for TTD benefits paid in the amount of $1,100.00. (See Arbitrator's Exhibit 1).

Issue (M): Should penalties or fees be imposed upon Respondent?

The Arbitrator does not find Respondent's denial of this claim to be unreasonable or vexatious, and therefore does not award penalties or attorney's fees against Respondent.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0343

vs. NO: 10 WC 22752

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,200.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **10WC022752**

08WC008037
11WC037713

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0343

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0343

BEVERLY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # 10 WC 22752

v.

Consolidated cases: 08WC8037&11WC37713

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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] 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 December 18, 2007, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**31,091.23**; the average weekly wage was $**653.69**.

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

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

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

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 435.79/week for 10-3/7 weeks, from July 23, 2010 through October 3, 2010, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $392.21/week for a further period of 99.45 weeks, as provided in Sections 8(e)(9) and 8(e)(10) of the Act, because the injuries sustained caused 15% loss of the left arm, 15% loss of the right hand, and 15% loss of the left hand, subject to a credit of 47.5 weeks of permanent partial disability under Section 8(e)(17) of for Petitioner's previous settlements for her left and right hands.
- The respondent shall pay Petitioner the sum of $2,643.00 for medical expense.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.
- The respondent shall further hold Petitioner harmless with respect to payments made by BlueCross BlueShield to Petitioner's medical providers for treatment related to her accidental injury and with respect to payments made by its non-occupational disability carrier pursuant to Section (j) of the Act.

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

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

Gerald A. Granada
Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0343

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. For 19 of those years, she worked as a parts inspector. Petitioner is diabetic, and has been for twenty-five years, though she testified that her diabetes is well-controlled through medication. Additionally, she also has taken medication for a thyroid problem for a long time.

Petitioner described her job in detail. As a receiving inspector, she would start by getting a box of parts which had been delivered, open it up, take the parts out and take them back to her desk. Petitioner's job was to check 32 parts in every delivery. She did this for either eight hours or ten hours per day. She testified that she did not have to rush while performing her job. Some of the parts she inspected had threaded holes and she would have to test the size and depth of these with a thread gauge. As a right-handed individual, she would do this by holding the part in her left hand with her wrist bent inwards and inserting the thread gauge with her right hand and twisting the thread gauge with her right hand in a rotating fashion. The thread gauge had two ends, one a "go" end and the other a "no go" end; she would first insert and twist the "go" end and then twist it out and insert and twist the "no go" end for each part. This process would take approximately two minutes to check each part. She demonstrated that her elbows would be bent while she performed this work.

Some of the parts she would inspect were small plastic pieces, and she would use calipers to measure them. There were different sizes of calipers, some of them six inches, some twelve inches, and some of them fourteen inches. She would hold the caliper in her right hand with her four fingers wrapped around the bottom and she extends her right thumb to slide the gauge to measure the outer dimension of the part. She would bend her right wrist back and forth in order to get the caliper to fit into the hole. Her left hand would pinch the part between her index finger and thumb and hold her hand and wrist steady. This process would take her approximately 30 seconds to adjust the caliper and get the measurement.of the part.

Other parts were inspected using a height gauge and an indicator. A height gauge is a large hand tool that she usually operated with her right hand and only seldomly with her left hand. While measuring with the height gauge, she would move her wrist back and forth to move her hand up and down to make sure that she measured the correct height.

After checking one box of parts, she would get the next box and then check 32 parts out of that. She testified that after checking 32 pumps, her right hand would get tired and she sometimes would use her left hand to turn the thread gauge.

Petitioner acknowledged that she did not do just one thing all day long when working as a receiving inspector. He job duties consisted of getting the boxes of parts she needed to inspect, opening it, selecting 32 parts to inspect, and inspecting them either with a thread gauge, a caliper, or a height gauge, depending upon the part. She would then return the parts to the box and decide whether or not to accept them or reject them.

Petitioner testified that she had previously developed carpal tunnel syndrome in both hands in approximately the year 2000. She had surgery to correct carpal tunnel syndrome in both hands at that time, but did not have any medical treatment for her left elbow. The medical records reflect that these surgeries were performed in 1994. (Px#7). She filed a workers' compensation claim for this and did receive a settlement for that claim. The amount of permanent disability in the settlement was 15% loss of use of the right hand and 10% loss of use of the left hand.

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In 2010, she began to develop a severe burning sensation in her left hand and her left pinky finger was numb, and she also felt pain in her right hand. PA Locey referred for an EMG which was performed on March 3, 2010 by neurologist Dr. Thomasz Kosierkiewicz. Dr. Kosierkiewicz interpreted the study as positive for recurrent carpal tunnel syndrome bilaterally and also positive for cubital tunnel syndrome at the left elbow. (Px#7). On June 2, 2010, she sought medical treatment with Dr. Frank Lee at the Bonutti Clinic, who recommended surgery for bilateral carpal tunnel syndrome and cubital tunnel syndrome in her left elbow. (Px#7).

Respondent had Petitioner examined by Dr. Evan Crandall on June 30, 2010. Dr. Crandall felt that Petitioner's exam was negative for carpal tunnel syndrome on the right and positive only for an ulnar Tinel's sign on the left. He performed another EMG, which he reported was consistent only with previously treated carpal tunnel syndrome and no evidence of ulnar neuropathy at the elbow or wrist. He concluded that because the Petitioner had diabetes, thyroid disease, fibromyalgia, previous thoracic outlet syndrome surgery, and previous carpal tunnel syndrome, that she could not possibly benefit from an additional surgery. (Rx#2).

On July 23, 2010, Dr. Lee performed a left carpal tunnel re-release with external neurolysis and a left cubital tunnel release. On August 19, 2010, Dr. Lee performed a right re-current carpal tunnel re-release with external neurolysis. On November 12, 2010, Petitioner saw Dr. Lee again, and he noted that she had increased grip which was continuing to improve. She reported ongoing numbness in her left small finger and expressed concern that her grip was getting worse. Dr. Lee felt she had done well with her releases and had minimal numbness in her fingers and felt the weakness in her grip was very slight. (Px#7).

Petitioner obtained a separate examination with Orthopedist Dr. Corey Solman on June 12, 2013. Dr. Solman examined Petitioner and noted that her Tinel's signs over her left elbow and both wrists were negative with the exception of a mild Tinel's sign over the superficial radial nerve at the left wrist. He also noted no numbness or tingling to light touch in the left hand except for the fifth digit. (Px#9).

Dr. Solman concluded that Petitioner did develop carpal tunnel syndrome again in both hands as a result of her work related duties and also left cubital syndrome. He acknowledged that her work duties were not the only factors which led to the development of these conditions but opined that despite her diabetes that her work duties were an aggravating factor. He also opined that the residual numbness she had in her left small finger was related to chronic nerve damage from her cubital tunnel syndrome. (Px#9).

Petitioner testified that her right hand has improved following the surgery. At the present time, however, she testified that her pinky on her left hand feels dead, her other fingers go to sleep when she rubs them, and she still feels burning in her left hand. She drops things from her left hand that will just slide right out.

CONCLUSIONS OF LAW

1. With regard to the issues of whether the Petitioner sustained an injury which arose out of and in the course of her employment with Respondent and whether her current condition of ill-being is causally connected to this injury, the Arbitrator finds that the Petitioner has met her burden of proof. Petitioner worked as a parts inspector for Respondent for many years and there is no dispute that this job required frequent movement of her hands and frequent gripping with her hands. The bulk of her work day was spent inspecting parts by using either a thread gauge, a caliper, or a height gauge, and each tool required repetitive motions with her hands.

The thread gauge required rapid twisting of her hands while gripping the parts. The caliper required gripping and extension of the thumb and also bending of the wrist. The height gauge also required bending of her wrist to move her hand back and forth. Petitioner developed carpal tunnel syndrome in 1994 and had surgical releases bilaterally. Respondent's examining physician, Dr. Crandall, does not dispute that Petitioner's job required repetitive hand motions, but rather opined that Petitioner's symptoms were residual from her previous carpal tunnel syndrome. His conclusion, however, ignores the fact that Petitioner returned to her job following her surgical releases and worked at a job which required frequent gripping and repetitive hand motions for sixteen years before she again began to experience symptoms from carpal tunnel syndrome. The Arbitrator is persuaded by the opinion of Dr. Solman that Petitioner's job duties served to contribute to the development of the recurrence of her bilateral carpal tunnel syndrome and also to the development of her cubital tunnel syndrome in the left elbow. The Arbitrator therefore finds that Petitioner did sustain an accident which arose out of and in the course of her employment and that her current condition of ill-being with respect to her hands and left elbow are causally connected to this injury.

2. With regard to the issue of temporary total disability, the Arbitrator finds that Petitioner was temporarily totally disabled from July 23, 2010 through October 3, 2010, a period of 10-3/7 weeks. Petitioner underwent surgery on her left hand and elbow on July 23, 2010 and on her right hand on August 19, 2010. On September 21, 2010, Dr. Lee released her to return to work on October 4th. Respondent shall therefore pay to the Petitioner the sum of $435.79 per week for a period of 10-3/7 weeks, pursuant to Section 8(b) of the Act.

3. With regard to the issue of medical expense, the Arbitrator finds that the Petitioner's medical care was reasonable and necessary to relieve the effects of her injury. Petitioner submitted the bills from her medical treatment and these show that the following providers have unpaid balances in the following amounts:

1) Anesthesia Care of Effingham (DOS:7/23/10 & 8/19/10):	$2,160.00
2) Bonutti Orthopedic Clinic (DOS: 8/19/10):	$ 400.00
3) Marshall Clinic (DOS: 7/21/10):	$ 83.00
Total:	$2,643.00

The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $ 2,643.00 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

4. With regards to the nature and extent of the disability, the Arbitrator finds that the Petitioner has sustained a loss of 15% of her right hand, 15% of her left hand, and 15% of her left elbow, pursuant to Sections 8(e)(9) and 8(e)(10) of the Act. Petitioner sustained recurrent bilateral carpal tunnel syndrome and cubital tunnel syndrome in her left elbow. She is right hand dominant. She testified that she has significant pain and numbness in her left hand, especially her 5th finger, and will occasionally drop things. Dr. Lee's records confirm that she has lost some strength in her left hand. Dr. Solman concluded that the ongoing numbness in her left 5th finger is a result of the cubital tunnel syndrome at her left elbow. Respondent shall receive a credit for the amount of weeks paid for her previous settlements. Petitioner had previously settled a claim for bilateral carpal tunnel syndrome with Respondent for 15% of the right hand and 10% of the left hand.

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Respondent shall therefore pay to the Petitioner the sum of $392.21 per week for a period of 99.45 weeks, pursuant to Sections 8(e)(9) and 8(e)(10) of the Act, less the Respondent's credit for the prior settlement of 15% of the right hand (28.5 weeks of PPD) and 10% of the left hand (19 weeks of PPD), leaving the Petitioner 51.95 weeks of permanent partial disability benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0344

vs. NO: 08 WC 08037

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **08WC008037**

10WC022752
11WC037713

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0344

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0344

BEVERLEY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # **08** WC **8037**

v.

Consolidated cases: **10WC22752/11WC37713**

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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 December 18, 2007, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**32,558.53**; the average weekly wage was $**656.42**.

On the date of accident, Petitioner was **64** years of age, married with **0** dependent children.

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

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

Respondent shall be given a credit of $**8,032.39** for TTD, $**0** for TPD, $**0** for maintenance, and $ **0** for other benefits, for a total credit of $**8,032.39**.

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 437.61/week for 22-6/7 weeks, from December 21, 2007 – January 7, 2008; February 21, 2008 – April 28, 2008; June 11, 2008 – June 26, 2008 and from February 11, 2009- April 9, 2009, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $393.85/week for a further period of 107.5 weeks, as provided in Section 8(e)(12) of the Act, because the injuries sustained caused 50% loss of the right leg.
- The respondent shall pay Petitioner the sum of $ 6,176.29 for medical expense.
- Respondent shall be given a credit of 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.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.

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

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

Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0344

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. On December 18, 2007 she was going in to work when she slipped on ice and slipped on ice and slid into a steel pole, striking her right knee on the pole. She described that she struck her knee hard and felt pain and burning in her knee.

Petitioner testified that before this injury, she had not received any medical attention for her right knee. She did not have any problems with respect to her right knee at the time of the injury. She did recall an incident which occurred where she struck her right knee while she was at work in January 2006. She recalled that she tripped on a bolt sticking out of the floor and fell to her knees, but this resolved without medical treatment.

She went to the emergency room on December 20, 2007 (Px#1) and later went to Crossroads Family Medicine, where she saw a physician's assistant, Ms. Sherry Locey, who referred her to an orthopedic specialist, Dr. Behrooz Heshmatpour. The records from PA Locey's office show that she restricted Petitioner to light duty on December 20, 2007 and on January 7, 2008 she released her to work without restrictions.(Px#2).

When Petitioner saw Dr. Heshmatpour, he recommended surgery, which was performed on February 21, 2008. (Px#3). According to Dr. Heshmatpour's operative report, he observed generalized chondromalacia of the patella, fairly advanced loss of cartilage and chondromalacia of the medial femoral condyle, significant loss of cartilage and chonromalacia of the lateral tibial plateau and lateral femoral condyle, and a complex tear of the lateral meniscus. He debrided the torn section of the meniscus, performed a chondroplasty of the lateral tibial plateau and lateral femoral condyle, and a lateral release of the patella. (Px#5).

Two weeks after her surgery, on March 6, 2008, Petitioner called Dr. Heshmatpour and expressed concern about swelling in her leg and foot with pain in her calf. The doctor recommended she go to an emergency room at St. Anthony's Hospital. (Px#2). At the emergency room, it was noted that she had pain and swelling in her leg, but a Doppler study was negative for blood clots. (Px#5). On March 31, 2008, Dr. Heshmatpour recommended that Petitioner could gradually go back to work with a cane. On April 28, 2008, she again saw Dr. Heshmatpour and reported residual pain though she was doing great. He noted that she would have residual pain and would eventually need a knee replacement but that she was doing well enough that she could go back to work, though she should not walk or stand for protracted periods of time and should interrupt standing or walking to sit down and rest. (Px#3).

Respondent had Petitioner examined by Dr. Christopher Kostman, of Orthopedic & Sports Medicine Clinic, on April 29, 2008. Dr. Kostman's reported that since Petitioner's injury she reported her right knee had catching, popping with no true locking, and also giving way. After her arthroscopy, she had improvement of popping and catching but no improvement of her pain or giving way symptoms. Dr. Kostman concluded that Petitioner sustained a lateral meniscus tear as a result of her injury on December 18, 2007 and that arthroscopy to repair meniscus was reasonable and necessary. He concluded, however, that her patellofemoral arthritis, lateral joint line arthritis and chondromalacia were unrelated to her injury, and the surgical procedure related to these conditions (chondroplasty of the lateral femoral condyle, tibial plateau, medial femoral condyle and lateral retinacular release) was also unrelated. (Rx#1).

On June 11, 2008, Petitioner phoned Dr. Heshmatpour's office and complained that she was still having a significant amount of swelling and pain in the calf and that her knee pain was unchanged and she was also having swelling in the knee. Dr. Heshmatpour told Petitioner to contact her family physician to make sure that

14IWCC0344

she hasn't developed a blood clot. (Px#3) Petitioner went to see her physicians' assistant, Sherry Locey who recommended she go to the emergency room and restricted her from working. (Px#2).

At the emergency room at St. Mary's Good Samaritan Hospital, a Doppler study did not detect any blood clots. An MRI of Petitioner's right leg showed a large amount of edema throughout her gastrocnemius muscle with two well-circumscribed fluid collections and also moderate edema within subcutaneous tissues. (Px#6). PA Locey continued to see Petitioner and restrict Petitioner from work through June 30th due to pain and swelling in her right leg. (Px#2).

Petitioner sought additional treatment from Dr. Peter Bonutti for her right knee on November 11, 2008. She testified that she did this because her knee continued to be in pain; after the first surgery by Dr. Heshmatpour the back part of her knee stopped hurting but the front part continued to be in pain.

The records of Dr. Bonutti show that he saw Petitioner on November 11, 2008 for pain in her right knee that has become progressively worse since February 2008. He noted that she had two traumas in the past, a direct blow to the patella in January 2006 when she fell on both knees and a direct blow to both knees in December 2007 when she fell on both knees, and that she also developed a blood clot following surgery performed by Dr. Heshmatpour. He recommended she undergo a total knee replacement. (Px#7).

At Respondent's request, Dr. Kostman performed a second exam which occurred on January 7, 2009. Dr. Kostman, concluded that none of Petitioner's medical treatment which occurred after his first exam on April 29, 2008 was related to her work injury, that she was at maximum medical improvement with respect to the injury and did not need any work restrictions. (Rx#1).

Dr. Bonutti performed surgery to provide her with a total knee replacement on February 11, 2009. On April 2, 2009, he recommended that she could return to work in one week without restrictions but she should limit repetitive squatting and lifting. (Px#7). Petitioner returned to work on April 10, 2009. Petitioner had a one year follow-up exam with Dr. Bonutti on February 16, 2010, where he stated that she had excellent results from the knee replacement. (Px#7).

Petitioner sought an evaluation from Orthopedist Dr. Corey Solman on June 12, 2013. Dr. Solman. Dr. Solman noted that Petitioner reported that after she injured her right knee on December 18, 2007 that she experienced pain, catching, and popping in the knee. His exam revealed a range of motion in her right knee of 0 to 125 degrees, no signs of instability, good strength, and mild tenderness over the anteromedial and anterolateral joint lines and retropatellar tendon area. He opined that Petitioner had pre-existing osteoarthritis changes and chondromalacia in the right knee but she her injury could have caused or advanced the changes in chondromalacia which accelerated the osteoarthritis which led to the need for a total knee replacement. He further explained that Petitioner's pains in the retropatellar tendon area are common for people who undergo total knee replacements, and can be the result of a buildup of scar tissue around the patellofemoral joint and the retropatellar fat pad which causes tightness and some popping and some catching. (Px#9).

At the present time, Petitioner testified that she experiences pain in the front of her right knee when going up and down stairs, and therefore goes one step at a time. She also experiences a similar pain when she squats or kneels to pray, and can only kneel for about five minutes before she has to stand. She can walk without pain on a level surface, but testified that after twenty minutes she starts to feel some weakness in her knee and must stop.

14IWCC0344

CONCLUSIONS OF LAW

1. With regard to the issue of whether Petitioner's current complaints are causally connected to her injury, the Arbitrator finds the Petitioner sustained her burden of proof. There is no dispute that Petitioner sustained an accident which arose out of and in the course of her employment when she slipped on ice and struck a steel pole with her right knee, or that the surgery performed by Dr. Heshmatpour to repair the lateral meniscus tear was caused by this injury. The facts demonstrate that Petitioner was in a condition of good health prior to her injury and did not have any pain or other symptoms related to her right knee. After the injury, however, she consistently had pain in her knee which was not relieved by her surgery by Dr. Heshmatpout. The Arbitrator is persuaded by the opinion of Dr. Kostman that Petitioner's pre-existing condition of chondromalacia and osteoarthritis in her right knee was aggravated by her injury when she struck her right knee on a steel pole. The aggravation of this condition led to the need for her total knee replacement.

2. With regard to the issue of Temporary Total Disability, the Arbitrator finds that the Petitioner was temporarily and totally disabled from December 21, 2007 through January 7, 2008, and again from February 21, 2008 through April 28, 2008, and again from June 11, 2008 through June 26, 2008, and again from February 11, 2009 through April 9, 2009, a combined period of 22-6/7 weeks. Petitioner was restricted to light duty by PA Locey on December 20, 2007 and released to return to work on January 8, 2008. Thereafter, she underwent surgery on February 21, 2008 and was released to return to work full duty – with limits on her walking and standing – on April 28, 2008. She was again restricted from work on June 11, 2008 through June 30, 2008, by PA Locey while she was experiencing pain and swelling in her right leg, though by the parties' stipulation Petitioner actually returned to work on June 27, 2008. Petitioner was restricted from working again by Dr. Bonutti after her total knee replacement on February 11, 2009 and later returned to work on April 10, 2009. Accordingly, Respondent shall pay to the Petitioner the sum of $437.62 per week for a period of 22-6/7 weeks.

3. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment was reasonable and necessary to relieve the effects of her work injury. In addition, the Arbitrator also concludes that Petitioner's medical treatment in March and June 2008 for pain and swelling in her right leg is causally related to her injury. On March 6th and again on June 11th, Petitioner developed pain and swelling in her leg, sought medical treatment, and was directed to go to the emergency room to be evaluated for blood clots. Though no blood clots were ever confirmed, the condition was felt to be related to her prior surgery and the treatment was ordered to evaluate her for post-operative clotting. Petitioner submitted the bills for her medical treatment and these reveal that the following providers have unpaid balances for the treatment of her right knee in the following amounts:

1)	Amsol Anesthesia (DOS: 2/11/09):	$ 700.00
2)	Anesthesia Care of Effingham (DOS: 2/11/09)	$ 2,590.00
3)	Bonutti Orthopedic Clinic (DOS: 2/11/09):	$ 727.00
4)	Fairfield Memorial Hospital (DOS: 2/18-3/27/09):	$ 266.56
5)	Marshall Clinic (DOS: 2/4/09 – 3/9/09):	$ 210.00
6)	St. Anthony's Memorial Hosp. (DOS: 3/6/08):	$ 239.00
7)	St. Anthony's Memorial Hosp. (DOS: 2/4 – 2/11/09):	$ 467.21
8)	St. Mary's Good Samaritan Hosp (DOS: 6/11/08 & 8/4/08:	$ 976.52

14IWCC0844

These bills total $6,176.29. The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $6,176.29 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

4. With regards to the nature and extent of the disability, the Arbitrator finds that Petitioner has sustained an injury which has resulted in a loss of 50% of her right leg, pursuant to Section 8(e)(12) of the Act. Petitioner sustained an injury to her right knee which resulted in a tear of her lateral meniscus which was repaired by arthroscopic surgery and which also aggravated her pre-existing osteoarthritis and led to a total knee replacement. Respondent shall therefore pay to the Petitioner the sum of $393.85 per week for a period of 107.5 weeks, as provided in Section 8(e)(12) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Beverly Thomason (nka Beverly Clements),

Petitioner,

14IWCC0345

vs. NO: 11 WC 37713

Airtex Products, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,400.00. 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: MAY 0 5 2014

DLG/gal
O: 4/24/14
45

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMASON, BEVERLY (NKA CLEMENTS)
Employee/Petitioner

Case# **11WC037713**

10WC022752
08WC008037

AIRTEX PRODUCTS INC
Employer/Respondent

14IWCC0345

On 8/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
CHRISTOPHER MOSE
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0345

BEVERLY THOMASON (nka CLEMENTS)
Employee/Petitioner

Case # 11 WC 37713

v.

Consolidated cases: 08WC8037&10WC22752

AIRTEX PRODUCTS, 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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on July 9, 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] 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 July 27, 2011, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,180.12**; the average weekly wage was $**657.31**.

On the date of accident, Petitioner was **67** years of age, married with **0** dependent children.

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

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

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

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 438.21/week for 17 weeks, from August 8, 2011 through November 21, 2011 and again from November 29, 2011 through December 11, 2011, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay Petitioner the sum of $394.39/week for a further period of 50 weeks, as provided in Sections 8(d)(2) of the Act, because the injuries sustained 10% loss of a person as a whole.
- The respondent shall pay Petitioner the sum of $1,262.80 for medical expense.
- The respondent shall have a credit for the amount paid for the short term disability by it's non-occupational disability carrier and its group health insurer, pursuant to Section 8(j) of the Act.
- The respondent shall further hold Petitioner harmless with respect to payments made by BlueCross BlueShield to Petitioner's medical providers for treatment related to her accidental injury and with respect to payments made by its non-occupational disability carrier pursuant to Section (j) of the Act.

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

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

Signature of Arbitrator

8/21/13
Date

AUG 2 2 2013

14IWCC0345

FINDINGS OF FACT

Petitioner was employed by Respondent for 33 years as a parts inspector in the receiving department. As a parts inspector, she would start by getting a box of parts which had been delivered, open it up, take the parts out and take them back to her desk. Petitioner's job was to check 32 parts in each delivery and she did this for the bulk of her day. Petitioner recalled that in approximately 2000 she underwent surgery on her right shoulder to repair a torn rotator cuff. She testified that this surgery resolved her complaints in her right shoulder. In the early part of 2011, however, she began to experience pain in her right shoulder that went down her right arm.

Petitioner sought medical treatment from Dr. Frank Lee of the Bonutti Clinic on March 8, 2011 because of pain in her right shoulder radiating down her arm for several months. The records of the Bonutti Clinic show that Petitioner sought treatment there on March 08, 2011 for right shoulder pain which had been radiating down her arm for four months and was worse with usage. She had previously undergone a rotator cuff repair several years prior in 2000 and had done well following that, but was not having pain. Dr. Lee provided her with a cortisone injection into her right shoulder, which provided partial relief. Dr. Lee ordered an MRI and arthrogram and this was performed on March 30, 2011. It showed through and through tears of both the supraspinatus and infraspinatus tendons. (Px#7).

On April 27, 2011, Petitioner again saw Dr. Lee. He provided a second injection for what he termed a chronic tear of the rotator cuff and felt that she may need surgery if the injection failed to help her pain. Petitioner testified that the first one helped for a little while but the second injection only helped until she got home. She testified that she was experiencing burning pain in her right shoulder and she could feel her heart beating in her whole arm. She was able to work, however, though her arm was hurting.

On June 6, 2011, Petitioner again saw Dr. Lee for her right shoulder. She expressed her desire to avoid surgery if possible, and the doctor provided her with another injection into her shoulder and told her to schedule another appointment once she determined how the injection did. (Px#7).

Petitioner testified that on July 27, 2011, she was using a pallet jack to move skids that contained boxes of parts. She was trying to get to a particular box of parts that was in the middle of a group of skids. She was pulling one skid out but it caught onto another skid, and she jerked it to try to free it when her shoulder popped and began to hurt worse. After this incident, Petitioner testified that she left the pallet just like it was so she could show her foreman. She recalled that after she got home from work that afternoon, she Dr. Lee for an appointment and went to see him the next day.

The records from the Bonutti Clinic show that at 10:26 a.m. on July 27, 2011, Petitioner phoned the clinic and stated that she is now having a lot of pain and redness in the shoulder and wanted to know what she should do. They further show that a nurse informed Dr. Lee at 3:06 p.m. that she wanted to schedule an appointment for Petitioner to see him the next day. Dr. Lee responded in the affirmative at 5:12 p.m. (Px#7).

When Petitioner saw Dr. Lee on July 28, 2011, she reported that she was doing well until yesterday when she injured her right shoulder at work trying to move a skid that was stuck; she pulled on the skid that was caught on another skid. Dr. Lee gave her a prescription for Tylenol and Ultram because of the recent flare up and restricted her from working through August 2, 2011. He asked Petitioner to call the next week and advise him whether her shoulder was better or not, and if not he would schedule surgery to repair her rotator cuff. Petitioner phoned on August 1st and informed Dr. Lee that her shoulder had not improved. He recommended surgery and this was performed on August 12, 2011. (Px#7).

14IWCC0345

In the operative report, Dr. Lee stated that he performed a subacromial decompression, a distal clavicle excision, a mini-open repair of a large rotator cuff tear, and removal of a loose bony body. He noted that a portion of the rotator cuff fibers were attached to the loose bone fragment and it was difficult to tell whether this represented a chronic or acute phenomenon. (Px#7).

Prior to this surgery, Respondent had Petitioner evaluated by Dr. Peter Mirkin of Tesson Ferry Spine & Orthopedic Center on August 8, 2011. Dr. Mirkin reviewed the records which reflected that Petitioner underwent an open rotator cuff repair with an acromioplasty and excision of the distal clavicle on August 8, 2000, and the records of Dr. Heshmatpour which reflected that Petitioner complained of weakness in her right shoulder on December 11, 2000 and reports that she was doing well though with some discomfort at an unspecified date in "early 2001." Dr. Mirkin concluded that Petitioner had degenerative shoulder pain from a strain injury. He felt her examination was benign but reserved further comment until he could review the results of a recent MRI. (Rx#3).

Petitioner returned to work on November 22, 2011 just before Thanksgiving. Petitioner testified that she had difficulty performing her job, however, because lifting boxes of parts caused her right arm to hurt. She estimated that the boxes of parts she would inspect weighed between 10 to 15 pounds. She stopped working because of the difficulty she had, and she returned to work on November 29, 2011 working at a different job performing gauge inspection. She testified that some of the gauges were heavy and also she had to set up the work table and that doing this hurt, so she decided to retire, which she did on December 19, 2011.

Petitioner obtained an examination from Orthopedist Dr. Cory Solman on June 12, 2013. His examination of her right shoulder revealed reduced range of motion in abduction (90 degrees) and external rotation (45 degrees), and strength was measured at 4/5 for her external rotators and her supraspinatus. He felt this was good functional range of motion and good functional strength, and since she has retired she does not need to build up her strength to her pre-injury level. The exam of the left shoulder was normal. He concluded that will continue to have pain in her right shoulder which she should treat by icing it, taking anti-inflammatories, avoiding inciting activities, and engaging in strengthening exercises, though she may need an occasional cortisone injection (Px#9). He felt that with her chronic repetitive work she developed a re-tear of her rotator cuff, and also felt that she re-injured the shoulder when she pulled on the skid which could have produced an acute on chronic injury. (Px#9).

Petitioner testified that at the present time she gets throbbing pain at the top of her right shoulder if she is active with her right arm, such as when she uses a vacuum cleaner. Trying to comb her hair is difficult because she will drop the comb. She does not curl her hair herself because she will drop a curling iron; her granddaughter sometimes will curl it for her. She did not describe any other activities which produced pain, though she said she is no longer active since she retired. She takes Motrin every morning because of pain in her right shoulder and Aleve sometimes in the evening for her right shoulder. When the weather is rainy she will notice an achiness at the top of her right shoulder.

Respondent produced its Workers' Compensation Manager, Mr. Jeff Jake, to testify on its behalf. He testified that he recalled speaking with Petitioner at approximately 11:45 a.m., just prior to his lunch hour, on July 27, 2011. According to his testimony, he went to the receiving area to pick up flu shots which had arrived when Petitioner called him over. He stated that Petitioner told him that she wanted to let him know that she had a doctor's appointment scheduled for the next day for her shoulder and that it was Work Comp. According to him, he asked her what injury this was related to and she informed him that it was from when she had her surgery nine years ago. He replied that it would probably be too long ago for her to continue to treat for it and

14IWCC0345

he would check to see if she received a settlement for it. He claimed that he contacted her after lunch to notify her that her prior claim for her right shoulder was a closed claim and that she could not treat for it, but offered to provide her with family/medical leave paperwork. According to him, she came to his office later that day to obtain this paperwork. Per his testimony, she reported an injury to her foreman when she returned to work on August 2nd, alleging that she injured her shoulder while pulling a pallet jack. Mr. Jake acknowledged that he did not go to investigate the scene after Ms. Clements alleged that she injured her shoulder pulling a pallet jack and did not observe a pallet stuck on another pallet, nor did he ever discuss the alleged accident with Petitioner's foreman or her co-workers. He is not responsible for the investigation of work accidents, as that is handled by a different person, Rod Holman.

On Rebuttal, Petitioner denied that she spoke with Mr. Jake before she sustained an injury to her right shoulder while pulling a pallet jack on July 27, 2011. She testified that after this occurred he came into the receiving area and she showed him how she hurt her shoulder, and she left the skids where they were after she hurt her shoulder trying to separate them. According to her, he told her that she could not file another claim because she had previously settled a claim for her right shoulder and so she walked away from him. She further testified that later in the day she showed Airtex' investigator Ron Holman and her foreman Mike White how her accident occurred. She recalled that she called Dr. Lee's office later in the day after she got off of work.

CONCLUSIONS OF LAW

1. With regard to the issue of whether Petitioner sustained an accident which arose out of and in the course of her employment, the Arbitrator finds the Petitioner has met her burden of proof. The medical records from Dr. Lee's office corroborate Petitioner's testimony that she injured her right shoulder while working on July 27, 2011 which aggravated her condition. Petitioner testified that while she had ongoing pain in her right shoulder before this date, it became aggravated when she pulled on a skid which had caught on another skid. The records from Dr. Lee's office prior to that date show that Petitioner complained of pain in her right shoulder but that she did not want to have surgery. Dr. Lee consistently offered her the option of surgery to repair a rotator cuff tear if he could not control her pain with injections before this event; and Petitioner consistently demurred.

The testimony of Respondent's workers' compensation manager, Jeff Jake, is not persuasive because it does not fully explain the events of the day of the alleged accident. He claimed that Petitioner spoke with him on July 27, 2011 at 11:45 a.m. to inform him that she wanted to re-open an old claim for an injury to her right shoulder and did not mention an accident, and he did not receive notice of any claim of an accident until several days later. He further acknowledged that he is not responsible for the investigation of alleged work injuries, but rather this is the responsibility of Ron Holman. He did not offer any explanation as to why Ron Holman would have reviewed the scene with Petitioner later in the afternoon of July 27th, as Petitioner testified, if she did not report an accident until several days later. Respondent failed to produce either Ron Holman, Petitioner's foreman Mike White, or any other witnesses who could have addressed Petitioner's allegations that she sustained an accident on that date. Petitioner testified that after she sustained the accident she left the skid she had been pulling where it was and showed both Ron Holman and Mike White how her injury had occurred, yet Respondent did not present either of these gentlemen to testify on its behalf.

Petitioner testified that she did not call Dr. Lee's office for an appointment until after she got home from work that afternoon. The records from Dr. Lee's office show that she phoned for her appointment at approximately 10:26 that morning, however, and informed the nurse that she was having more problems with her shoulder that had begun that day. While Mr. Jake testified that Petitioner informed him at approximately 11:45 that morning that she already had an appointment with the doctor the next day, the records from the Bonutti Clinic show that

the appointment was not made until after 3:00 p.m. at the earliest. The records from the Bonutti Clinic are more consistent with the Petitioner's testimony than they are of Mr. Jake's. While the nurse's note regarding Petitioner's phone call at 10:26 that morning do not record that she had an injury that morning, there is no indication that the nurse was taking a full history from the patient and would have asked about or even recorded any mention of a new injury. Petitioner did provide a full history and did claim that she sustained an injury while pulling on a skid when she saw Dr. Lee the next day. The nurse's notes, however, do contradict Mr. Jake's claim that Petitioner told him that she had already made an appointment to see Dr. Lee.
For the reasons set forth above, the Arbitrator finds that Petitioner did sustain an accident which arose out of and in the course of her employment with Respondent on July 27, 2011.

2. The Arbitrator finds that Petitioner's current condition of ill-being is causally connected to her injury which occurred on July 27, 2011. Having found that Petitioner sustained an accident on July 27, 2011, the treatment following this accident, including her surgery two weeks later, is causally related to this accident. The medical records from Dr. Lee's office indicate that Petitioner's symptoms increased following her accident and she could no longer tolerate the pain. Whereas before she was trying to avoid surgery, after the accident she felt that she needed to undergo surgery. The Arbitrator is persuaded by the opinion of Dr. Solman that Petitioner's injury was an acute event, which aggravated her chronic condition, caused it to worsen, and required surgery.

3. With regard to the issue of Temporary Total Disability, the Arbitrator finds that Petitioner was temporarily totally disabled from August 8, 2011 through November 21, 2011 and again from November 29, 2011 through December 11, 2011, a period of 17 weeks. Dr. Lee restricted Petitioner from working on July 28, 2011 and did not release her to return to work until November 22, 2011. Petitioner testified that she attempted to perform her job but this caused increased pain and she was again off of work from November 29, 2011 through December 11, 2011, and returned to work on December 12, 2011 and retired a few days later. At Arbitration, Petitioner stipulated to a period of TTD which commenced on August 8, 2011. Respondent shall therefore pay to the Petitioner the sum of $438.21 per week for a period of 17 weeks, pursuant to Section 8(b) of the Act.

4. With regard to the issue of medical expenses, the Arbitrator finds that the Petitioner's medical treatment was reasonable and necessary to relieve the effects of her work injury. Petitioner submitted the bills for her medical treatment and these reveal that the following providers have unpaid balances for the treatment of her right knee in the following amounts:

1) Bonutti Orthopedic Clinic (DOS: 3/08/11-12/08/11):	$ 594.00
2) Marshall Clinic (DOS: 8/09/11):	$ 214.00
3) St. Anthony's Memorial Hosp. (DOS: 8/12/11):	$ 454.80

These bills total $1,262.80. The remaining medical expense was paid by Petitioner's group health insurance. The parties have stipulated that this group health insurance is covered by Section 8(j) of the Act. Respondent shall therefore pay to the Petitioner the sum of $1,262.80 for medical expense pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall also hold Petitioner harmless with respect to the payments made by the group health insurer.

5. With regards to the nature and extent of the disability, the Arbitrator finds that Petitioner has sustained an injury which has resulted in a loss of 10% of a person as a whole, pursuant to Section 8(d)(2) of the Act.

14IWCC0345

Petitioner sustained an injury to her right shoulder, which resulted in a recurrent tear of her rotator cuff which was repaired by a mini-open surgery. She has loss of strength and range of motion and residual pain. Because of her ongoing symptomology, she felt she could not continue to work at her normal job and chose to retire. Respondent shall therefore pay to the Petitioner the sum of $394.39 per week for a period of 50 weeks, as provided in Section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ruthelma C. Attig,

Petitioner,

14IWCC0346

vs. NO: 11 WC 36447

Murphysboro Unit District 186,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ATTIG, RUTHELMA C
Employee/Petitioner

Case# **11WC036447**

14IWCC0346

MURPHYSBORO UNIT DISTRICT 186
Employer/Respondent

On 9/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0250 HOWERTON DORRIS & STONE
STEVE STONE
300 W MAIN ST
MARION, IL 62959

1337 KNELL & KELLY LLC
MATT BREWER
504 FAYETTE ST
PEORIA, IL 61603

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0346

RUTHELMA C. ATTIG
Employee/Petitioner

v.

MURPHYSBORO UNIT DISTRICT 186
Employer/Respondent

Case # **11** WC **36447**

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 **08/16/13**. By stipulation, the parties agree:

On the date of accident, **12/06/10**, 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 $**22,309.56**, and the average weekly wage was $**429.03**.

At the time of injury, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

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 **$257.41**/week for a further period of **37.5** weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **7.5% loss of use of the person as a whole**.

Respondent shall pay reasonable and necessary medical services of $39,107.36, subject to the fee schedule and as provided in Sections 8(a) and 8.2 of the Act, with Respondent receiving credit for any bills which Respondent has already paid.

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

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

Signature of Arbitrator

9/9/13
Date

SEP 10 2013

14IWCC0346

FINDINGS OF FACT

Petitioner works for Respondent as a teacher's aide. She has worked for the Respondent for 26 years since 1987. There is no dispute that on December 6, 2010, the Petitioner was working for the Respondent when a student collided with her in the school hallway. This incident caused the Petitioner to experience pain in her neck and lower back. Petitioner had previously sustained a neck injury for which she was still receiving medical treatment. This claim is focused on Petitioner's injury to her lower back.

On the day of the accident, following the incident described above, the Petitioner sought treatment at the emergency room of Memorial Hospital. The records from that medical provider confirms Petitioner's complaints of pain to her neck and low back. They indicate Petitioner was directed to follow up with her neurosurgeon.

On January 27, 2011, Petitioner underwent an MRI at the recommendation of her treating physician, Dr. Taveau. The MRI revealed disc degeneration and facet arthropathy with possible impingement and radiculopathy at L5-S1, L4-5 and L3-4.

Petitioner ultimately came under the care of neurosurgeon, Dr. Gerson Criste. Dr. Criste diagnosed Petitioner with lumbosacral spondylosis without myelopathy. Dr. Criste treated Petitioner initially with a series of epidural steroid injections. Dr. Criste followed up the injections with radiofrequency denervation. Petitioner testified that this treatment gave her relief after having undergone the procedure twice.

Dr. Frank Petkovich testified on behalf of the Respondent via evidence deposition on Ju;y 1, 2013. He conducted a review of the Petitioner's medical records but did not actually examine the Petitioner in person. Dr. Petkovich opined that based on his review of the medical records, the Petitioner sustained a soft tissue injury with a temporary exacerbation of a degenerative lumbar disk disease.

Petitioner did not lose any time from work due to this incident. She testified that she has physical limitations with bending, bathing, using stairs, painting her nails or standing for long periods of time. Her testimony during cross examination and the medical records offered by Respondent confirm that the Petitioner had complaints of low back problems in the past.

CONCLUSIONS OF LAW

1. The Arbitrator finds that the Petitioner has met her burden of proof regarding whether her current condition of ill-being is causally connected to her undisputed work accident on December 6, 2010. This finding is supported by the Petitioner's uncontroverted testimony and the treating medical records. The Arbitrator finds persuasive the MRI and operative reports indicating Petitioner's diagnosis of lumbosacral spondylosis without myelopathy.

2. Petitioner's medical treatment for her lower back condition was reasonable and necessary to address her condition. The Arbitrator notes the Petitioner's credible testimony about her treatment, including her injections and her radiofrequency denervation procedures – all of which appears to have helped in minimizing her back complaints. Accordingly, Respondent shall pay any and all medical expenses incurred by Petitioner in relation to her back treatment as evidenced in the blue tabbed section of Petitioner's Exhibit number 1, subject to the fee

14IWCC0346

schedule and in accordance with Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for any expenses it has already paid.

3. Petitioner has sustained a 7.5% loss of use of the person as a whole as the result of this accident. This finding is based on: the medical evidence indicating Petitioner's diagnosis of lumbosacral spondylosis without myelopathy; Petitioner's medical treatment, which included injections and two procedures of radiofrequency denervation; and Petitioner's continued physical complaints, which were both credible and unrebutted.

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

Karen Ramey,

Petitioner,

14IWCC0347

vs. NO: 11 WC 07818

State of Illinois, Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 2013 is hereby affirmed and adopted.

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

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

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAMEY, KAREN
Employee/Petitioner

Case# **11WC007818**

14IWCC0347

ST OF IL DEPT OF HUMAN SERVICES
Employer/Respondent

On 9/6/2013, 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 0.05% 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:

1824 STRONG LAW OFFICES
HANIA SOHOUL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

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

4993 ASSISTANT ATTORNEY GENERAL
ANDREW SUTHARD
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 6 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0347

Karen Ramey
Employee/Petitioner

Case # **11** WC **007818**

v.

State of Illinois Department of Human Services
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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Springfield**, on **July 10, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 19, 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 **$83,304.00**; the average weekly wage was **$1602.00**.

On the date of accident, Petitioner was **55** 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.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits at the maximum PPD rate of **$669.64/week** for **12.65** weeks, because the injuries sustained caused the **5%** loss of use of left arm, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical expenses of **$2,065.00** subject to the Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act.

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

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

Nancy Lindsay — Signature of Arbitrator

9.3.13 — Date

SEP 6 - 2013

The disputed issues are accident, notice, causal connection, medical expenses and nature and extent. Petitioner was the only witness testifying at arbitration. She alleges an injury to her left elbow stemming from an accident on August 19, 2010.

The Arbitrator finds as follows:

Petitioner testified she is employed by Respondent as a supervisor in Social Security Disability Claims – Unit 7. Petitioner testified she has been employed with the State of Illinois since 1977. Her job duties, currently, and at the time of her accident, consist of supervising a unit of disability adjudicators.

Petitioner presented to the office of Dr. Widicus on October 18, 2010 complaining of left elbow pain after hitting it on a file cabinet at work two and a half months earlier. Petitioner told the doctor she thought it would get better but it was getting worse instead. Petitioner complained of radiating pain down her forearm and a feeling of increasing weakness. Dr. Widicus noted Petitioner was right hand dominant. Petitioner was referred to Dr. Watson. (RX 2)

Petitioner reported her injury to Respondent on October 19, 2010. According to the Employer's First Report of Injury Petitioner injured herself on August 19, 2010 when she was walking and turned a corner striking her left elbow on the corner of a cubicle. (RX 1) In her own Notice of Injury Petitioner stated she hit her left elbow on a cubicle corner while walking through the unit. She immediately experienced excruciating pain and her arm had remained painful and weak since then. (RX 1)

Petitioner presented to Dr. Watson at Watson Orthopaedics on October 20, 2010. As part of the visit Petitioner completed an Injury Report Form. In it Petitioner explained that she was walking within her unit and when she turned she hit her elbow on the corner of a cubicle resulting in excruciating pain. Petitioner further stated her elbow hurt for over two weeks and then began to get better. However, it continued to hurt when doing certain things and her arm felt like it was getting weaker. (PX 3)

According to the history noted in Dr. Watson's records, Petitioner injured her left elbow several weeks earlier at work when she struck the lateral aspect of her elbow against a cubicle wall. Petitioner described ongoing and persistent pain which was worse with lifting and power gripping. The pain also radiated into the dorsal aspect of her forearm and proximally into the arm. On physical examination Petitioner was tender about the lateral epicondyle. X-rays revealed no bony abnormalities. Petitioner was diagnosed with lateral epicondylitis and given an injection into her elbow. Petitioner was advised to return if necessary. (PX 3)

By letter dated December 10, 2010 Respondent notified Petitioner that her claim for workers' compensation benefits had been denied as 'there were no unsafe issues contributing to her elbow condition and the cause of her symptoms appeared to be idiopathic or unknown.' (PX 3)

Petitioner returned to see Dr. Watson on January 5, 2011 reporting some improvement in her left elbow but complaining of ongoing radiating pain into the lateral triceps area with ongoing tenderness about the

lateral epicondyle. She also experienced some de-pigmentation and fat atrophy from the cortisone injection. Dr. Watson recommended physical therapy and a return visit in three weeks. (PX 3)

Dr. Watson re-examined Petitioner on February 7, 2011 noting persistent left arm pain primarily along the distal lateral triceps and brachial radialis. Petitioner reported ongoing pain since her accident. While her lateral epicondylar pain had primarily resolved after two injections Petitioner noted ongoing pain with elevation of her shoulder and elbow in a flexed and pronated position. Dr. Watson was able to reproduce the symptoms in the office. Dr. Watson suspected some scar tissue or a contusion. He gave her another injection and recommended another visit in three weeks. (PX 3)

When Petitioner returned to see Dr. Watson on March 1, 2011 she reported no change in her symptoms and her physical examination was unchanged. Dr. Watson ordered an MRI scan. (PX 3)

Petitioner met with Dr. Watson on May 2, 2011 at which time her complaints and examination remained unchanged since her previous visit. Dr. Watson noted the MRI had not been authorized by workers' compensation so Petitioner was going to try and get it scheduled through her personal insurance. In the meantime, Petitioner was advised she could continue working. (PX 2)

Petitioner underwent the MRI on May 10, 2011. According to the report, soft tissue T2 signal abnormality involving the origin of the common extensor tendon and adjacent soft tissues was noted. The findings were consistent with tendinitis/partial tear of the origin of the common extensor tendon. The radial collateral ligament was not optimally visualized on the MRI and if there was any concern about an injury to that ligament an MRI arthrogram was recommended. (PX 2)

After the arthrogram Petitioner followed up with Dr. Watson on May 17, 2011 who noted the scan was indicative of a partial thickness tear with tendinitis of the common extensor tendon. Reluctant to recommend surgery, Dr. Watson recommended a second opinion with Dr. Christopher Maender. (PX 2)

Dr. Maender examined Petitioner on June 22, 2011. At that time he believed Petitioner's problem was two-fold: lateral epicondylitis and a radial nerve contusion. Dr. Maender recommended a trial of Mobic, a counterforce brace, and exercises. He wished to see her again in six weeks. (PX 2)

Petitioner returned to see Dr. Maender on August 3, 2011. Petitioner reported improvement after the last visit for approximately three weeks and then she returned to baseline. Petitioner described a lot of pain over the area about one handbreadth above her lateral epicondyle and pain with getting her hand behind her head and engaging in overhead activities. On physical examination Petitioner experienced pain with forward flexion up above ninety degrees. She had positive Neer and Hawkins impingement signs with good strength to her rotator cuff in all positions but pain when stressing them. She was most exquisitely tender right above the lateral epicondyle in the area previously described. Dr. Maender's diagnoses were impingement syndrome and parascapular shoulder pain and left radial nerve pain from direct compression that has not improved. Dr. Maender had no recommendations for the radial nerve, including surgical solutions. He recommended she continue using the anti-inflammatory and protect it; however, Petitioner expressed no interest in trying the brace. Dr. Maender believed Petitioner's shoulder complaints were due to compensation and he recommended some therapy. (PX 2)

Petitioner was again examined by Dr. Maender on September 13, 2011. Petitioner reported that some of the physical therapy exercises exacerbated her pain and were, therefore, stopped. Petitioner was still

experiencing pain in the radial nerve area along with a new complaint of burning. Dr. Maender gave Petitioner a second injection as he believed most of her pain was coming from extensor musculature. (PX 2)

Petitioner completed her physical therapy on September 22, 2011 (PX 2) and returned to see Dr. Maender on October 12, 2011. He noted improvement in her condition and recommended that she continue with conservative measures and avoid aggravating activities. If she had an acute exacerbation, he recommended she use the wrist brace. (PX 2)

Dr. Maender last examined Petitioner on December 7, 2011 at which time Petitioner reported ongoing pain along her left lateral epicondylar region. The doctor noted Petitioner had done a lot of work on Thanksgiving and the area was really painful and swollen thereafter. She reported diminished strength and pain when driving, along with occasional burning. On physical exam, Petitioner was tender directly over the lateral epicondyle and proximal to it. He did not really notice tenderness over the radial nerve. His diagnosis remained left lateral epicondylitis which he described as "persistent." He also noted some radial nerve irritation but it did not seem to be contributing to her pain that day. He again recommended exercises and avoidance of aggravating activities. She was told this could recur off and on for many years and that she needed to work on her strengthening exercises. If it ever gets bad enough, they can discuss available options at that time. (PX 2)

Petitioner has had no further medical care since December 7, 2011.

At arbitration Petitioner testified that she is 58 years old with three adult children. Petitioner graduated from college and has been employed by Respondent as a public service administrator supervisor. In that position Petitioner supervises adjudicators who decide social security disability claims. According to Petitioner, it is a very stressful job.

Petitioner testified that she was working late on the evening of August 19, 2010. While she normally worked until 4:30 there were three times each month when she was required to work until 6:00 p.m. Petitioner would receive "comp time" for working the additional hours. Petitioner testified she was walking into a co-worker's cubicle to put some papers in an adjudicator's tray when she turned and hit her left elbow. She stated around 5:30 p.m. she walked into a cubicle within Unit 7 to put "a piece of paper" in the employee's in-box. After she put the paper into the in-box she turned to the left and struck her left elbow on either the cubicle trim or a standing file cabinet. She stated she immediately felt excruciating pain, to the point it made her cry. She stated she continued to work, but did not immediately report her injury. Petitioner testified she gave oral notice to her supervisor, Jim Neposrehlan, on August 27, 2010, after her symptoms had not subsided.

On cross-examination Petitioner admitted she filled out certain forms when filing her workers' compensation claim. She was shown three forms – Illinois Form 45, Employee's Notice of Injury, and the Supervisor's Report of Injury. (RX 1) She acknowledged she had to call into Caresys to provide claim information, which is contained in the Illinois Form 45. She also acknowledged she filled out and signed the Employee's Notice Injury. Further, she agreed she provided the Supervisor's Report of Injury to her supervisor for him to fill out. She agreed all forms showed the time of injury to be 3:30 p.m., not after hours as she had testified. The Supervisor's report also indicates oral notice was not given until October 19, 2010. It is signed by Jim Neposrehlan and Petitioner confirmed his signature on the document when testifying at arbitration.

Petitioner testified she was not certain if she struck her arm on a file cabinet or cubicle trim because the two were close together. She stated hitting her elbow made a sound, but could not remember what kind of sound (such as if it was metallic or not). She agreed, however, both the cubicle and the file cabinet are stationary objects. She also stated neither was defective in anyway. Petitioner described the cubicle layout in detail, but did not note any deficiencies with the set up. She also did not describe any deviation from the standard, because, as she stated, she didn't know what standard cubicles were. She stated nothing in particular caused her strike her elbow; nothing was sticking out, and nothing fell on her. She testified she was walking within the unit, not running, and the accident did not happen under extenuating circumstances. She testified she was simply standing in the middle of the cubicle, turned around and struck her elbow on something.

Petitioner admitted she waited two months before seeking treatment. She stated her symptoms never improved so she decided to see Dr. Diana Widicus, her primary care physician on October 18, 2010. (RX 2)

Petitioner testified she underwent three injections but nothing more could be done. Surgery, according to her, is not an option due to the location of the nerve. Petitioner testified to occasional "excrutiating shooting pain" from the middle of her elbow up her arm about half-way. She also claims diminished grip strength. When sitting, gardening, or playing with her grandchildren she may experience a "jolt" which lasts a few seconds. It happens maybe 6-7 times per week but may occur more often which is why she occasionally stretches her arm a certain way. Petitioner further testified that she tries not to grab things as she is concerned she might drop them if she experiences a jolting episode. Petitioner testified to trouble putting her left arm out the car window when going through drive-up windows at banks and fast food restaurants so she does not frequent them as often as she used to.

Petitioner is right hand dominant.

Petitioner's medical bills are contained in PX 4 and consist of charges to the Orthopaedic Center of Illinois, Dr. Watson, and prescriptions. The Orthopaedic Center bill totals $1307.00. Dr. Watson's bill totals $748.00. Petitioner paid $10.00 for prescriptions. Petitioner testified her co-pays were paid by herself while her personal insurance covered the balances on the bills.

<u>The Arbitrator concludes:</u>

1. **Petitioner's Credibility**

   Petitioner was a credible witness concerning the details of her accident as she testified in detail and with clarity concerning the layout of Unit 7, her job duties, and the mechanism of injury. However, Petitioner was not as credible concerning the nature and extent of her injury as her testimony seemed somewhat exaggerated and dramatic as when she described "a lot of excruciating pain in her funny bone" with "shooting pain" that brought "tears to her eyes." The Arbitrator finds Petitioner believable regarding ongoing issues with her left arm but just not to the degree she claims.

2. **Accident**

Petitioner sustained an accident on August 19, 2010 that arose out of and in the course of her employment with Respondent. Petitioner testified that the cubicles are congested and there isn't a lot of space. Petitioner's job requires her to walk to various cubicles throughout the unit to deliver papers. No evidence was presented suggesting that the unit and the area(s) around the cubicles is open to the public. As such, and due to the demands and requirements of Petitioner's job, Petitioner is exposed to a risk of injury to a greater degree than that of the general public. While the first specific mention of placing a piece of paper in an "In Box" was made at arbitration Petitioner's history as found in Dr. Watson's Injury Report Form, history to Dr. Watson, and Employer's First Report of Injury are consistent with Petitioner's testimony. Any discrepancies in the time of the accident are minor and insignificant.

3. **Notice**

Prior to the arbitration hearing Petitioner completed a Request for Hearing form (AX 1) in which she indicated that notice was given to her section chief, Jim Neposrehlan, on/about August 27, 2010. Thus, Respondent was aware of the identity of the individual Petitioner would be claiming she provided notice to. Petitioner testified that she orally notified Mr. Neposrehlan approximately one week later. Petitioner's testimony to that effect was unrebutted as Mr. Neposrehlan did not testify.

Respondent challenges notice on the basis of the October 19, 2010 CMS documents (RX 1). Petitioner completed a Notice of Injury form on that date and identified Mr. Neposrehlan as the person to whom she reported her injury. She did not indicate the date or time. While Mr. Neposrehlan completed a supervisor's report and indicated he received oral notice on October 19, 2010, he also stated in the report that the accident occurred on "August 17, 2010." Petitioner's accident date is August 19, 2010. The Arbitrator reasonably infers that Petitioner either had another accident on August 17, 2010 or Mr. Neposrehlan incorrectly noted the date of accident. If the latter, the Arbitrator reasonably infers that if he made a mistake as to the date of accident he may have also made a mistake as to when notice was provided. Had he appeared at trial and testified, the matter might have been clarified. As such, Petitioner's testimony regarding oral notice being provided in late August of 2010 remains unrebutted.

4. **Causal Connection.**

Petitioner testified that after the accident, she went to see Dr. Widicus, who referred her to Dr. Watson. Dr. Watson took a history from Petitioner and in his records of October 22, 2010 stated that "she struck the lateral aspect of the elbow against a cubicle wall. She developed pain which has persisted to this day." (P X 3) Petitioner credibly testified that prior to the injury of August 19th, 2010 she had not sustained any injuries to her left elbow, and had never experience pain in her left elbow prior to the injury of August 19th, 2010. As such causation is established through Petitioner's credible testimony, the treating medical records, and a chain of events. Respondent

presented no evidence refuting causal connection; rather, its defense was based upon whether Petitioner's accident arose out of her employment.

5. **Medical Expenses.**

Having found in Petitioner's favor on the issues of accident and causal connection, Petitioner is awarded medical bills in the amount of $2,065.00 as set forth in PX 4 and subject to the Medical Fee Schedule. These bills include prescription charges of $10.00, services by Dr. Watson in the amount of $748.00, and outstanding charges to the Orthopaedic Center of Illinois ($1,307.00). All of these bills relate to treatment incurred by Petitioner as a result of her work injury. Respondent claimed no 8(j) credit.

6. **Nature and Extent**

Petitioner's elbow has been treated conservatively. No surgery has been recommended at this time. Petitioner was diagnosed with both lateral epicondylitis and a radial nerve contusion. While Dr. Maender believed Petitioner also had some shoulder impingement due to overcompensation, she seems to have recovered from it and has had no further treatment beyond some therapy nor did she testify to any ongoing shoulder problems.

Petitioner testified she was released from Dr. Maender's care on December 7, 2011. At that time Dr. Maender noted Petitioner complained of pain over her left lateral epicondyle, but also noted she had aggravated it "doing work over Thanksgiving." He diagnosed Petitioner with persistent left lateral epicondylitis with some non-contributing radial nerve irritation. At that time he recommended home exercises and avoidance of aggravating activities.

Petitioner testified she continues to experience shooting pains approximately 6-7 times per week with activities. She stated the pain can be "excruciating." She also complains of decreased grip strength and a tendency to drop things. Petitioner testified she has not returned to see Dr. Maender since she was released from his care. She further testified, despite her recurring pain, she has not sought medical treatment with any of her other doctors since being released in December of 2011.

Petitioner continues to work for Respondent on a full duty basis. She had no lost time from work nor has she been given any formal restrictions. She appears to be working without any problems except for some occasional pain and occasional dropping of papers.

Having found in Petitioner's favor on the issues of accident and causal connection, and based upon Petitioner's treatment records, the Arbitrator awards Petitioner permanent partial disability in the amount of 5% loss of use of the left arm pursuant to Section 8(e) of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Danny Burgess,

Petitioner,

14IWCC0348

vs. NO: 11 WC 47207

Tri County Coal, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 7, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURGESS, DANNY
Employee/Petitioner

Case# **11WC047207**

14IWCC0348

TRI COUNTY COAL LLC
Employer/Respondent

On 8/7/2013, 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 0.07% 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:

1539 DRUMMOND LAW LLC
PETE DRUMMOND
PO BOX 130
LITCHFIELD, IL 62056

0332 LIVINGSTONE MUELLER ET AL
DENNIS O'BRIEN
P O BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY BURGESS
Employee/Petitioner
v.
TRI COUNTY COAL, LLC
Employer/Respondent

Case # 11 WC 47207

14IWCC0348

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

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] 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 **November 26, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,474.03**; the average weekly wage was **$1,066.81**.

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

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$7,339.89** for other benefits, for a total credit of **$7,339.89**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $711.21/week for 26 2/7 weeks, commencing November 29, 2011 through May 30, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $640.09/week for 100 weeks, because the injuries sustained caused the 20% loss of use to the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

07/31/2013
Date

AUG 7 - 2013

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANNY BURGESS
Employee/Petitioner

14IWCC0248

v.

Case# 11 WC 47207

TRI COUNTY COAL, LLC
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Danny Burgess, was employed in the coal mining industry from 1974 until his retirement in 2012. (See Petitioner's Exhibit (PX) 5, Petitioner's Deposition Exhibit 3). He performed a variety of laboring duties during his mining tenure. Petitioner testified he worked for Respondent or a group of mines affiliated with Respondent for twelve years, or from approximately 1999-2012. (See also PX 5, Petitioner's Dep. Exh. 3). In 2011, Petitioner was classified as "INBY," which meant he could have been classified into any of the following jobs: roof bolter operator, mine operator, ram car operator, and "utilityman." (PX 1). Petitioner testified that he worked all of the foregoing jobs during his time classified as INBY with the exception of a mine operator. Petitioner testified at length concerning the duties of the three positions he worked when an INBY with Respondent, *i.e.*, a roof bolter, a ram car operator and a utilityman.

As a roof bolter, Petitioner testified that the primary goal of these duties was to install pins in the mine's roof so as to hold up and secure the roof. Petitioner testified that while a machine was used to perform most of the roof bolting work, there was also significant physical and overhead work involved. He testified that the machine could not manually put pins up into the roof, and that the worker performs this aspect of the job. He testified that not all pins placed in the roof fit like they should. He noted that if there was an eight foot pin, such a pin has a bent nature to it, and when pushed into the roof hole, the roof bolter employee would have to push it with his hand to straighten it out, using considerable force with his shoulders. Petitioner testified that the difficulty in pushing up the pins was also commensurate with how high the roof was, in that the lower the ceiling, the easier it was to insert the pin. He noted that there was significantly more manual labor involved with a high and ragged (or unsmooth) ceiling. Petitioner testified that the use of a pry bar was needed as a roof bolter to knock down loose rock overhead, and that said action required a lot of overhead shoulder use.

Petitioner testified that a "ram car" was essentially an underground dump truck used in Respondent's coal mine to transport mined coal to a conveyor belt. The ram car operator would drive this vehicle underground in the mine performing these transportation duties. Petitioner also testified that other

duties were associated with being a ram car operator. When one entry was mined out, the mining machine would then move into a new entry and set up to begin to load coal. Petitioner testified that the ram car operator would assist with the physical lifting aspects involved in these moves. Petitioner testified that said move would occur between twelve-to-fifteen times per eight-to-nine hour shift. Petitioner stated that ram car operators would also hang "curtains" (which he testified was overhead work), build "stoppings" (metal or concrete – which included overhead work), and hang miner cable (or at times just throwing the cable out of the way – again which Petitioner testified was overhead work). Petitioner also testified that if the "belt tail" needed shoveled, a ram car operator would perform this shoveling work at times. All of the aforementioned ancillary duties of a ram car operator involved considerable physical labor, according to Petitioner (about four-to-five hours per shift), and he further testified that all of these duties were hard on his shoulders.

Petitioner testified that the duties of a utilityman involved transporting bolting material for unloading, so that the roof bolters would have supplies for which to perform their roof bolting duties. The utilityman would also utilize a machine that used a bucket to scoop loose coal and "glob" away so that the area was cleaner for the incoming roof bolters. The utilityman would also spray a wet substance onto surfaces to keep the area non-combustible. The utilityman would make the spray material in question, by which he would dump 50 pound bags of rock dust into a metal pot and then mix water with it.

Petitioner testified that he performed all three of the aforementioned jobs with Respondent at varying times, performing the duties of a utilityman the least amount of time. Records offered from Respondent indicated that Petitioner performed the duties of ram car operator a majority of the time from January 2009 through November 2011, but that he also performed the duties of roof bolting and utilityman during that timeframe. (RX 10). Petitioner testified that just because a worker was classified at the beginning of the shift on one of the particular three jobs did not mean that at anytime throughout a shift said worker would be taken off the initial, labeled assignment and placed on one of the remaining two other job assignments. For example, Petitioner testified that if a worker was set to be a ram car operator and a roof bolter left work due to illness, the ram car operator could be placed as a roof bolter for the rest of the shift. When this occurred, the worker would still be classified in Respondent's records by the position he started in that shift (*e.g.*, a ram car operator transferred to a roof bolter position would still be classified as a ram car operator for that shift in Respondent's records). Petitioner testified that this change happened fairly regularly, and when it occurred it was usually just for a part of the shift.

John LeGrand testified on behalf of Respondent. Mr. LeGrand is a mine superintendant with Respondent and was a mine supervisor before that for 33 years. Mr. LeGrand listened to Petitioner's testimony at trial and believed it was "overstated." Mr. LeGrand testified that a ram car operator would only perform the physical labor aspect of the job for two hours or less per shift, as opposed to Petitioner's testimony that the physical work would consist of four-to-five hours per shift. Mr. LeGrand confirmed Petitioner's testimony that an INBY worker could change positions during a shift due to a worker leaving for health reasons, but that said change would not occur very often.

Petitioner is claiming a repetitive trauma injury to both shoulders with a manifestation date of November 26, 2011. Petitioner testified to pre-existing issues concerning his shoulders. Respondent also offered into evidence various accident reports and medical records relating to injuries Petitioner incurred to his shoulders (primarily his right shoulder), as well as various other body parts. (RX 3-8). Petitioner testified that all of the foregoing shoulder complaints indicated in Respondent's records resolved prior to his claimed manifestation date of November 26, 2011. He further testified that he had no "real" medical treatment to his shoulder before October 2011, with the exception of therapy or medication.

Petitioner testified that sometime in July 2011, he noticed severe bilateral shoulder pain when performing overhead work duties. In approximately August or September 2011, he presented to Dr. Brian Quarton concerning his shoulder complaints, and testified that he was in turn referred to orthopedic surgeon Dr. Rodney Herrin for these symptoms. (See also PX 5, p. 7; PX 3). Petitioner first presented to Dr. Herrin on October 6, 2011. (PX 3; PX 5, p. 7). Petitioner reported to Dr. Herrin that his shoulder complaints began approximately three months prior, and that he worked as a coal miner performing "quite a bit" of overhead work. (PX 5, pp. 8, 47). Dr. Herrin ordered physical therapy and a corticosteroid injection into each shoulder. (PX 5, pp. 10-11; PX 3). MRI testing was also performed. (PX 3; PX 4).

Petitioner underwent left shoulder surgery by Dr. Herrin on November 29, 2011. (PX 3). The surgery consisted of a left shoulder arthroscopy with repair of the supraspinatus tendon, a subacromial decompression, a distal clavicle excision, and debridement of tearing of the superior labrum. (PX 3; PX 5, p. 10). The post-operative diagnosis noted was left shoulder pain secondary to full-thickness attenuated tear of the supraspinatus and tearing of the superior labrum, as well as a symptomatic acromioclavicular (AC) joint.

Petitioner was taken off work by Dr. Herrin on the date of surgery for a then-undetermined period of time. (PX 3). Petitioner testified that he worked directly up until the date of surgery, but took a "personal day" the day before surgery. A note from Dr. Herrin dated January 26, 2012 indicated Petitioner was still held off of working per the doctor's order. Petitioner also underwent physical therapy following the left shoulder surgery. (PX 3).

Dr. Herrin authored a letter to Petitioner's counsel dated January 23, 2012. Dr. Herrin reported the following in that note: "The assumption is that [Petitioner's] employment is as a coal miner would involve overhead drilling of holes and installing roof bolts, hanging cables overhead (which weigh approximately 70 pounds per cable), building brattice walls and ceilings out of concrete block, which weigh approximately 40 pounds or more per block (for ventilation and running a ram car)." Dr. Herrin further reported as follows: "It is my opinion that the problems with both of [Petitioner's] shoulders are related to his work activities as a coal miner. It is my opinion that those activities would have caused or at least significantly contributed to the problem with each shoulder. The type of work that he does as a roof bolter would put significant stress on the shoulders, and this would place him at significant risk for injury to the rotator cuff." (PX 5, Petitioner's Dep. Exh. 2).

Petitioner underwent right shoulder surgery by Dr. Herrin on February 10, 2012. (PX 3). The surgery consisted of a right shoulder arthroscopy with repair of the supraspinatus tendon with suture anchors, a subacromial decompression and a distal clavicle excision. (PX 3; PX 5, p. 12). The post-operative diagnosis noted to Petitioner's right shoulder was pain secondary to significant articular-sided tear of the supraspinatus, subacromial impingement and a symptomatic AC joint. (PX 3).

Petitioner underwent a post-operative course of physical therapy, and was given work restrictions on March 9, 2012 of no use of the right arm and minimal use of the left arm, with no pushing, pulling, lifting or overhead work. The work restriction note also stated that if those restrictions could not be accommodated, then Petitioner was to remain off work at that time. Notes from Dr. Herrin dated April 19, 2012 and May 21, 2012 continued the work restrictions. (PX 3). Petitioner did not return to work during this time (RX 9), but testified he received "sickness/accident" pay until approximately May 24, 2012. (See also Arbitrator's Exhibit (AX) 1). Petitioner testified that he retired from Respondent's employment at the end of May 2012, as Respondent would not allow Petitioner to work with the restrictions in place by Dr. Herrin. A note signed by Petitioner indicates that he terminated his employment with Respondent

effective June 11, 2012. (RX 11). Mr. LeGrand testified that it was Respondent's policy to bring back and accommodate "almost all" injured workers with effective restrictions. He testified that workers returning with light duty restrictions can run ram cars, but he could not say for certain whether there were any light duty workers on ram cars currently that had restrictions of no overhead lifting.

Petitioner presented to Dr. Herrin on July 30, 2012. Petitioner noted on that visit that he still experienced some bilateral shoulder pain. Dr. Herrin noted that Petitioner was retired, so he did not offer any specific work restrictions, other than using the shoulders as tolerated. Dr. Herrin set a follow-up appointment to occur in the following eight weeks, and noted that if Petitioner was progressing satisfactorily at that time, then he would be released from care concerning his shoulder problems. (PX 3). Petitioner last presented to Dr. Herrin on September 10, 2012. Dr. Herrin released Petitioner on this date, noting he was "functioning fairly well" and for him to return on an "as-needed" basis. Petitioner was released at maximum medical improvement (MMI). (PX 3; PX 5, p. 37).

Dr. Herrin's deposition testimony was taken on September 20, 2012. (PX 5). Dr. Herrin confirmed his opinion noted in his January 2012 letter that Petitioner's bilateral shoulder conditions that required surgery were caused or contributed by Petitioner's work activities in Respondent's coal mine. (PX 5, pp. 9-10). Dr. Herrin testified that Petitioner only reported his roof bolting activities to the doctor, but that he learned of the specific work duties at issue, including Petitioner's overhead cable hanging duties, brattice wall and ceiling building and running a ram car, from a letter drafted by Petitioner's counsel. (PX 5, pp. 37-38). Dr. Herrin also testified as to some familiarity with Petitioner's work duties, as the doctor had previously worked in a coal mine before becoming a physician. (PX 5, p. 38).

On November 5, 2012, Petitioner presented to Dr. Mitchell Rotman for an evaluation at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). (RX 1, Dep. Exh. 2). Dr. Rotman's deposition testimony was taken on February 5, 2012. (RX 1). The doctor's diagnosis concerning Petitioner's shoulders was similar to that as referenced by Dr. Herrin, although Dr. Rotman added that he felt the existence of a bone spur could have caused rubbing and thinning of the rotator cuff. (RX 1, p. 14; RX 1, Dep. Exh. 2). Dr. Rotman reported that it was impossible to state with any reasonable degree of certainty that Petitioner's bilateral shoulder complaints were a direct result of his alleged work-related injuries without knowing what outside activities Petitioner may have been performing and without knowing the exact percentage of overhead work Petitioner was performing in the coal mine. Dr. Rotman also noted the following: "If Mr. Burgess was doing a lot of overhead work in July 2011, then that type of work could be an aggravating factor for an underlying chronic bilateral impingement condition. If, however, Mr. Burgess was not doing a lot of overhead work in July 2011, then that type of work would be considered an aggravating factor." (RX 1, Dep. Exh. 2). Dr. Rotman reiterated this point during his deposition, stating, "[a]nd if you're doing continuous overhead work for several hours a day, then that's the kind of job that would be an aggravating factor for a chronic condition like this." (RX 1, p. 20). The following exchange occurred between Petitioner's counsel and Dr. Rotman:

> [Q]: Would it be fair to say that if it were established that the claimant did a lot of heavy lifting, and particularly overhead work or just lifting generally with his shoulders, that it would tend to be an aggravating factor in his shoulders?
>
> [A]: If the lifting were shoulder level or above, it certainly would be an aggravating factor.
>
> (RX 1, pp. 24-24).

Dr. Rotman said he was unfamiliar with what would be involved in hanging cables or constructing brattice walls in coal mines (RX 1, p. 24). Dr. Rotman was also unaware of how much time Petitioner would spend performing the jobs in the mine as described by Petitioner's counsel, such as hanging cables. (RX 1 p. 28).

Petitioner testified concerning current symptoms he experiences with his shoulders, including continuing pain that is about the same level of intensity in each shoulder. Any reaching or lifting of the arms bothers Petitioner. He testified that his shoulder difficulties do not affect his hobbies. His shoulders ache at times during the night, and when this occurs, he takes extra strength Tylenol. He does not take any prescription medication. The most he allows himself to lift with his arms is fifteen pounds. He noted that this was not a restriction per his physician, but rather the threshold weight limit he notices regarding the level of pain intensity when lifting.

The parties noted at trial that all medical expenses regarding the treatment Petitioner received in this matter was paid through Respondent's group insurance pursuant to Section 8(j) of the Act.

CONCLUSIONS OF LAW

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

Issue (D): What was the date of the accident?; and

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

The Arbitrator finds that Petitioner sustained a repetitive trauma injury to his bilateral shoulders that arose out of and in the course of his employment with Respondent, and that his current condition of ill-being is causally related to the work injury. While Petitioner had pre-existing shoulder complaints before November 2011, the Arbitrator notes that these issues occurred in 1993, 1994, 1995 and 2007. Medical records from 1993 indicate that Petitioner injured his right elbow at work, and in the process suffered a right shoulder strain. He underwent some therapy and was given a prescription of ibuprofen for this injury. (RX 7). In 1994, Petitioner completed an accident report, noting he felt a right shoulder "pop" at work. No medical records are associated with this injury. (RX 5). Petitioner also experienced a right shoulder injury in mid-1995, where he was again diagnosed with a strain and prescribed medication. He was taken off work for one day for this incident. (RX 4; RX 8). In 2007, Petitioner noted a left shoulder contusion as a result of another ram car striking his ram car. No medical records are associated with this injury. (RX 6). Petitioner testified that he had no "real" medical treatment to his shoulder before October 2011, with the exception of therapy and medication prescription. The Arbitrator finds that Petitioner is correct in this regard. Petitioner testified to feeling bilateral shoulder pain with lifting in July 2011. Dr. Herrin's records support this contention. Petitioner continued performing his duties to the point where medical intervention was required. The Arbitrator finds that any pre-existing shoulder conditions up to this time were asymptomatic in light of the foregoing discussion concerning Petitioner's prior problems and minimal treatment.

While there is some dispute as to how much physical and overhead work Petitioner actually performed between 2009 and 2011, the evidence supports Petitioner's assertions that he was engaged in laborious duties while working for Respondent, and that said duties included regular and repetitive

overhead work. The records show that Petitioner worked as a ram car operator for the majority of time during this period. He testified to myriad other physical activities that were a part of this position, and that those physical duties were performed four-to-five hours per shift. Mr. LeGrand testified that these physical duty aspects of being a ram car operator as described by Petitioner would only be performed two hours or less per shift. Regardless of who is more accurate, the fact remains that Petitioner was performing regular physical activity with his arms as a ram car operator. Petitioner also worked as a utilityman and a roof bolter during this timeframe, albeit less than working as a ram car operator. The duties involved with these positions also involved repetitive and physical use of the arms, including overhead lifting. Furthermore, while Mr. LeGrand testified that it was not very often that a ram car operator would be transferred to the position of utilityman or roof bolter during a shift, he confirmed that said changing of positions did occasionally occur.

Both treating physician Dr. Herrin and examining physician Dr. Rotman believe that overhead work in coal mining could cause or contribute to the type of shoulder injuries suffered by Petitioner. Dr. Herrin, who testified to having some familiarity with coal mine work given he was a coal miner before his medical career began, noted that in addition to performing roof bolting, Petitioner had duties involving "hanging cables overhead (which weigh approximately 70 pounds per cable), building brattice walls and ceilings out of concrete block, which weigh approximately 40 pounds or more per block (for ventilation and running a ram car)." Dr. Herrin reported the following in light of his understanding of Petitioner's job duties: "It is my opinion that the problems with both of his shoulders are related to his work activities as a coal miner. It is my opinion that those activities would have caused or at least significantly contributed to the problem with each shoulder. The type of work that he does as a roof bolter would put significant stress on the shoulders, and this would place him at significant risk for injury to the rotator cuff." (PX 5, Petitioner's Dep. Exh. 2). Dr. Rotman said he was unfamiliar with what would be involved in hanging cables or constructing brattice walls in coal mines, and was further unaware of how much time Petitioner would spend performing the other jobs in the mine, such as hanging cables. (RX 1 p. 28).

The Arbitrator places great weight on the opinions of Dr. Herrin in this matter concerning causal connection and a manifestation of a work accident. Based on the foregoing facts, the Arbitrator finds that Petitioner has met his burden of proving repetitive trauma injuries to both shoulders that were caused or contributed by his coal mining duties, and that his current condition of ill-being is causally related to those work duties and resulting injuries.

The Arbitrator also finds that November 26, 2011 is an appropriate manifestation date for the claimed injuries. November 26, 2011 is the date that Petitioner stopped working in preparation for his surgery to his left shoulder. The definitive diagnoses regarding his bilateral shoulders had recently been issued by Dr. Herrin at that time. This was a date that a reasonable person in Petitioner's position would have realized his condition could have been related to his work duties with Respondent.

<u>Issue (K)</u>: What temporary benefits are in dispute? (TTD)

Petitioner was taken off work per Dr. Herrin on the day of his left shoulder surgery, November 29, 2011. Petitioner testified that he worked up through the date of his surgery, taking one "personal day" the day before surgery. Dr. Herrin kept Petitioner off work through the date of his right shoulder surgery, February 10, 2012, and continuing through March 9, 2012, when restrictions were noted of no use of the right arm and minimal use of the left arm, with no pushing, pulling, lifting or overhead work. Notes from Dr. Herrin dated April 19, 2012 and May 21, 2012 continued the work restrictions. Petitioner did not return to work during this time (RX 9), but testified he received "sickness/accident" pay until

approximately May 24, 2012. Petitioner testified that he retired from Respondent's employment at the end of May 2012, as Respondent would not allow Petitioner to work with the restrictions in place by Dr. Herrin. A note signed by Petitioner indicates that he terminated his employment with Respondent effective June 11, 2012. (RX 11). Mr. LeGrand testified that it was Respondent's policy to bring back and accommodate "almost all" injured workers with effective restrictions. He testified that workers returning with light duty restrictions can run ram cars, but that he could not say for certain whether there were any light duty workers on ram cars currently that had restrictions of no overhead lifting. Petitioner is claiming temporary total disability (TTD) benefits from November 28, 2011 through May 30, 2012. (See AX 1). The Arbitrator finds that May 30, 2012 is a reasonable date in which to terminate Respondent's liability for TTD benefits. Petitioner is not claiming any TTD due past this date, and in fact acknowledged retiring from Respondent at the end of May 2012. (See also RX 11, noting June 11, 2012 as the effective termination date).

Based on the foregoing, the Arbitrator awards Petitioner TTD benefits from November 29, 2011 (the date of his first surgery) through May 30, 2012, a period of 26 2/7 weeks. Respondent shall have a credit in the amount of $7,339.89 for non-occupational indemnity disability benefits that it paid. (See AX 1).

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

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning permanency. It is noted when discussing the permanency award being issued that no permanent partial disability impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), the Arbitrator notes that Petitioner's occupation as a coal miner was a "heavy" demand level position and quite labor-intensive. However, there exists a dispute as to whether Petitioner retired due to Respondent's unwillingness to accommodate his restrictions. Dr. Herrin did not address work restrictions during Petitioner's final evaluation with the doctor in September 2012, as it was noted Petitioner was retired. Mr. LeGrand testified that it was Respondent's policy to accommodate almost all workers with restrictions, and in fact several employees with Respondent are working with restrictions. However, he was not aware of any current ram car operators on restrictions who would be working with a restriction of no overhead lifting. The fact remains that Petitioner is retired, and nothing in the record indicates that he plans on looking for future employment. Based on the foregoing, only some weight is afforded this factor when determining the permanency award.

Concerning Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of injury), the record indicates that Petitioner was 56 years old on November 26, 2011. (See AX 1; AX 2, noting a birth date of July 2, 1955). At the time of trial, Petitioner was retired, and voiced no indication of returning to work in any capacity. The Arbitrator notes that in terms of future working years, especially given Petitioner's retirement, Petitioner is a somewhat older individual with fewer working years ahead of him than that of a younger worker, and thus will not have to work and live with the permanency of his condition as long. The Arbitrator gives weight to this factor when determining the permanency award.

Concerning Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), the Arbitrator again notes the dispute concerning the true cause of Petitioner's retirement. Petitioner testified that he retired after Respondent would not accommodate his restrictions. Nothing in the record indicates that he

looked for other employment opportunities within his restrictions. In fact, Petitioner did not even claim entitlement to TTD benefits past May 30, 2012, presumably because he was content with retirement. In light of the foregoing, the Arbitrator finds that there is not enough solid evidence to prove Petitioner's future earning capacity was diminished solely as a result of the work injuries. Only some weight is placed on this factor when determining the permanency award.

Concerning Section 8.1b(b)(v) of the Act (evidence of Petitioner's disability corroborated by the treating medical records), the Arbitrator notes Petitioner suffered repetitive trauma injuries to both arms that necessitated surgeries to each shoulder. The left shoulder surgery consisted of an arthroscopy with repair of the supraspinatus tendon, a subacromial decompression, a distal clavicle excision, and debridement of tearing of the superior labrum. The right shoulder surgery consisted of an arthroscopy with repair of the supraspinatus tendon with suture anchors, a subacromial decompression and a distal clavicle excision. The post-operative diagnosis to Petitioner's left shoulder was pain secondary to full-thickness attenuated tear of the supraspinatus and tearing of the superior labrum, as well as a symptomatic AC joint. The post-operative diagnosis to Petitioner's right shoulder was pain secondary to significant articular-sided tear of the supraspinatus, subacromial impingement and a symptomatic AC joint. (PX 3). Petitioner underwent post-operative physical therapy. As noted *supra*, the issue of permanent work restrictions is ambiguous because Petitioner retired while on work restrictions per Dr. Herrin, and Dr. Herrin never formally noted current work restrictions due to Petitioner's retirement. At Petitioner's final evaluation with Dr. Herrin, the doctor noted Petitioner was "functioning fairly well" and for him to return on an "as-needed" basis. Petitioner was released at MMI on this date, and the record indicates that Petitioner has not returned to Dr. Herrin since that time. Petitioner testified to current complaints with his shoulders, including pain and difficulty with reaching and lifting his arms. He testified that the level of pain is the same in each shoulder. He does not take prescription medication, but does take over-the-counter pain medication at times for his shoulder discomfort. His current shoulder limitations do not affect any of his hobbies. The Arbitrator finds Petitioner's complaints concerning his current disability credible and corroborated by the treating medical records. Accordingly, great weight is placed on this factor when determining the permanency award.

Based on the foregoing, the Arbitrator finds that Petitioner has sustained the 20% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act as a result of the bilateral shoulder injuries, and is awarded permanent partial disability benefits accordingly. *See Will County Forest Preserve Dist. v. Workers' Comp. Comm'n*, 2012 IL App (3d) 110077WC.

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

☒ Affirm and adopt with clerical correction	☐ 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

14IWCC0349

Danny Jarrett,

Petitioner,

vs. NO: 11 WC 04346

Pontiac Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission corrects the clerical error found within the Arbitrator's Decision. In the Order section of the Decision of the Arbitrator, second paragraph, the Commission corrects the clerical error to: "All claims for compensation made by Petitioner in this matter are hereby denied."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 5, 2013 is hereby affirmed and adopted.

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

DATED: MAY 0 5 2014

David L. Gore

Stephen J. Mathis

Mario Basurto

DLG/gal
O: 4/24/14
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JARRETT, DANNY
Employee/Petitioner

Case# **11WC004346**

14IWCC0349

PONTIAC CORRECTIONAL CENTER
Employer/Respondent

On 9/5/2013, 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 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0190 LAW OFFICES OF PETER F FERRACUTI
THOMAS M STOW
110 E MIN ST
OTTAWA, IL 61350

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

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

SEP 5 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0349

DANNY JARRETT,
Employee/Petitioner

v.

PONTIAC CORRECTIONAL CENTER,
Employer/Respondent

Case # 11 WC 04346

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 8, 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] 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

14IWCC0349

On **January 10, 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 alleged accident ***was*** given to Respondent.

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

In the year preceding the alleged injury, Petitioner earned **$63,794.12**; the average weekly wage was **$1,266.81**.

On the date of alleged accident, Petitioner was **55** years of age, ***married*** with **no** dependent children under 18.

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

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

Respondent shall be given a credit of $ **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

Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment with Respondent on **January 10, 2011.** Petitioner further failed to prove that his current claimed condition of ill-being was caused by any activities performed on behalf of Respondent.

All claims for compensation made by Respondent in this matter are hereby denied.

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

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

Joann M. Fratianni

Signature of Arbitrator JOANN M. FRATIANNI

August 30, 2013
Date

SEP 5 - 2013

14IWCC0349

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

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

Petitioner is employed as a correctional sergeant for Respondent. Petitioner testified his job duties have varied over 24 years based upon his assignments. Petitioner testified that he used keys to open and close doors and gates, used computers, engaged in pat downs of visitors and inmates, inspected vehicles, used telephones, engaged in service training of new officers and ongoing officers in enforcing and maintaining discipline, safety, sanitary, security and custodial matters. He was involved in monitoring inmate movement, performed safety inspections of rooms, cells, hallways, doors and windows. He directed correctional officers in their tasks, verified perimeter security and prepared reports of violations. He directly supervised yard and gym periods, supervised shift shakedowns, maintained movement log books, confirmed officers assigned to and relieved for meals and breaks, checked resident identification cards, secured the armory area prior to shift changes, made routine checks of tool accountability, confirmed daily security inspections were completed and forwarded documentation. He also monitored at risk inmates, verified the search of incoming inmates and property, verified staff completion of log books, ensured segregation inmates had necessary items and rights, and other tasks.

Petitioner testified he worked in the following areas of the facility: Armory, Training Center, Max Gatehouse, Chapel, Gymnasium, Administration Building, North Segregation, South Cell House, Healthcare, North Protective Custody, South Mental Health, South Segregation, on any of the 27 different towers, Program Building, Library, Gate 3, Visiting Rooms, and any other ground prison work other than Internal Affairs and Intelligence.

Petitioner testified each location presented different types of tasks and physical duties. Petitioner recalled being assigned to the South Protective Custody Unit for approximately 4 years at one point. Major Delong testified that Petitioner was mainly assigned to the Gatehouse and Sally Port in recent years. Petitioner testified he would perform correctional officer duties when he relieved them for lunch breaks. Those duties primarily involved using keys to give inmates items, to open cells, to hand cuff inmates and to open gates and doors to move inmates. Major Delong testified a sergeant may relieve a correctional officer, it is not primarily their responsibility and some times correctional officers do not receive lunch breaks and are simply paid extra for that inconvenience. Petitioner testified that he could relieve other officers up to 6 times a shift for 30 to 40 minutes at a time, while still being assigned to his regular positions.

Petitioner testified that during a 7-1/2 hour shift, he would turn hundreds of keys, using both hands, to open doors, cells and chuck holes. Petitioner testified he is right handed. Petitioner further testified that he used cranks to open all cells in a gallery at once, except for segregation units.

Petitioner claims he sustained an accidental injury to his elbows, wrists and arms due to repetitive work performed on behalf of Respondent that manifested on January 10, 2011.

Petitioner testified he first experienced symptoms in late 2010 when he was temporarily assigned as a lieutenant, overseeing a cell house that required him to deal with property and medical issues of inmates. In this position, he would take keys to open doors, was required to be present to open some doors, filled out move sheets, input visitor information on a computer, and performed inmate checks. Petitioner testified he would use computers for approximately one hour of a shift when assigned to a Cell House or a Gate House to check in visitors. Petitioner testified he would be reassigned to different areas every now and then.

Major Delong testified at the request of Respondent. Major Delong testified Petitioner was mainly assigned to the Gate House, where he would look up information on a computer, check visitor identification, pat down male visitors and staff, use a telephone and push buttons.

14IWCC0349

Major Delong testified Petitioner was also assigned to the Sally Port, where he would inspect paperwork, view vehicles entering and exiting the prison, and occasionally shake down those vehicles. When assigned to a Cell House, Petitioner would primarily instruct other correctional officers and speak with them concerning issues, but his primary task was not to physically assist them. Major Delong further testified he had no direct knowledge of how often Petitioner relieved correctional officers, how many keys he would turn in a day, or how many inmates he would be in contact with.

Petitioner sought treatment and came under the care of Dr. Joseph Newcomer, an orthopedic surgeon. Dr. Newcomer testified by evidence deposition (Px6) that he diagnosed Petitioner with bilateral carpal tunnel syndrome and cubital tunnel syndromes. Dr. Newcomer testified that he believed those syndromes were aggravated by the job activities performed by Petitioner. Dr. Newcomer felt that pulling and pushing on doors and the use of keys and computers were all problematic. Dr. Newcomer felt the opening and closing of a door once a day was aggravating on the nerve and these syndromes. When asked about Petitioner's specific job duties, Dr. Newcomer testified he did not have a job description, did not know what kind of doors he worked with, how often he would use keys or open doors, or how long he would use a computer. Dr. Newcomer testified he did not know the difference in duties between a correctional officer and a correctional sergeant. Dr. Newcomer testified he has not toured the prison, but felt he knew what kind of doors the prison uses and enjoys watching prison topic television shows such as "Lockup"

Dr. James Williams examined Petitioner. This examination was performed at the request of Respondent. Dr. Williams, an orthopedic surgeon, testified by evidence deposition. (Rx1) Dr. Williams testified that 99% of his practice involves treatment of upper extremities. He examined Petitioner on August 17, 2011 and reviewed a job description of a correctional sergeant with him. Petitioner informed him that for 23 years he has essentially been an assistant who turned keys for 2 to 2-1/2 hours a shift. He informed the doctor that while working the Gate House, he basically entered data in the computer, and that he did relieve others and performed key turning. Dr. Williams was of the opinion that Petitioner's job duties as explained to him, are not causative or aggravating to the diagnosed conditions of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

Dr. Williams testified that work tasks that caused such syndromes usually included grinding, meat cutting, using vibratory tools, typing for more than 6 hours daily, or instances of direct traumas.

Petitioner did undergo bilateral carpal tunnel and cubital tunnel surgical releases with Dr. Newcomer and testified at the hearing he has no current symptoms and his elbows were "good."

In order maintain a claim for repetitive trauma, a claimant must prove by a preponderance of credible evidence that his work involves repetitive activity that gradually causes deterioration of or injury to a body part. In this case, Petitioner testified to various positions he worked over 24 years as a correctional officer and correctional sergeant, and briefly as a correctional lieutenant. Petitioner testified his work tasks varied throughout the day, based on the areas he was assigned. In instances of use of his hands, Petitioner did not identify any as being repetitive. Neither did Dr. Newsomer.

Based upon the sum total of evidence before this Arbitrator, this Arbitrator finds that Petitioner failed to prove he sustained an accidental injury through any type of repetitive trauma or activity on January 10, 2011.

Based further upon the above, the Arbitrator finds the condition of ill-being as claimed to be not causally related to any accidental injury while in the employment of Respondent.

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?

See findings of this Arbitrator in "C" and "F" above. Based upon these findings, all claims made for medical expenses by Petitioner are herebv denied.

14IWCC0349

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C" and "F" above. Based upon these findings, all claims made for temporary benefits by Petitioner are hereby denied.

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

See findings of this Arbitrator in "C" and "F" above. Based upon these findings, all claims made for permanent partial disability benefits by Petitioner are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bill Sentel,

Petitioner,

14IWCC0350

vs. NO: 13 WC 05662

Continental Tire North America, Inc.,

Respondent.

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 the nature and extent of Petitioner's disability, evidentiary rulings, 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 corrects the clerical error found within the Arbitrator's Decision. In the Order section of the Decision of the Arbitrator, first paragraph, first line, the Commission corrects the clerical error to: "Respondent shall pay Petitioner permanent partial disability benefits of $618.59 per week for **101.525** weeks because the injuries sustained caused the 15% loss of use of the right arm, 15% loss of use the left arm, and 12 ½% loss of use of the left hand as provided in Section 8(e) of the Act."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 11, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $40,000.00. 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: MAY 0 5 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 4/24/14
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SENTEL, BILL
Employee/Petitioner

Case# **13WC005662**

14IWCC0350

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 9/11/2013, 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 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1312 BEMENT & STUBBLEFIELD
GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

0299 KEEFE & DEPAULI PC
ANDREW J KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0250

Bill Sentel
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # 13 WC 05662

Consolidated cases: n/a

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 William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on August 8, 2013. By stipulation, the parties agree:

On the date of accident (manifestation), February 18, 2012, 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 $50,997.62; the average weekly wage was $1,030.98.

At the time of injury, Petitioner was 57 years of age, married, with 0 dependent child(ren).

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

Respondent shall be given a credit of $2,160.15 for TTD, $0.00 for TPD, $0.00 for maintenance, and $21,650.65 for other benefits (permanent partial disability benefits), for a total credit of $23,810.80.

At trial, the parties stipulated that temporary total disability benefits were paid in full and that Respondent had made weekly advance payments of permanent partial disability benefits of $21,650.65.

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 permanent partial disability benefits of $618.59 per week for 99.65 weeks because the injuries sustained caused the 15% loss of use of the right arm, 15% loss of use of the left arm, and 12 1/2 % loss of use of the left hand as provided in Section 8(e) of the Act. Respondent shall be given a credit for weekly advance payments of permanent partial disability benefits of $21,650.65, as well as any subsequent advance payments of permanent partial disability benefits.

Respondent shall pay Petitioner compensation that has accrued from September 10, 2012, through August 8, 2013, and shall pay the remainder of the award, if any, in weekly payments.

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

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

William R. Gallagher, Arbitrator

September 6, 2013
Date

SEP 11 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of February 18, 2012, and that Petitioner sustained repetitive trauma to the bilateral upper extremities. There was no dispute as to the compensability of this case and the only disputed issue at trial was the nature and extent of disability.

Petitioner was hired by Respondent in 1992 and he worked for Respondent as a truck tire builder. Petitioner's job duties included pushing cassettes, splicing rubber by hand, hand stitching and lifting tread. Petitioner generally work nine to 12 hours per day. Over time, Petitioner developed symptoms in both upper extremities.

At the direction of the Respondent, Petitioner was examined by Dr. David Brown, an orthopedic surgeon, on April 12, 2012. At that time, Petitioner informed Dr. Brown of having a one year history of numbness/tingling in both hands, primarily the little and ring fingers as well as pain in both elbows. Dr. Brown examined Petitioner and opined that his findings were consistent with bilateral cubital tunnel syndrome and carpal tunnel syndrome of the left hand. Dr. Brown further opined that Petitioner's job as a truck tire builder was an aggravating factor for the development of the conditions he diagnosed.

Dr. Brown ordered nerve conduction studies which, when performed by Dr. Dan Phillips, confirmed his diagnosis. He initially treated the conditions conservatively with splints and medication. When Petitioner was seen by Dr. Brown on June 4, 2012, he advised that his symptoms had not improved. Dr. Brown performed surgery on July 12, 2012, which consisted of a right cubital tunnel release, ulnar nerve transposition and myofascial lengthening of the flexor pronator tendon. Dr. Brown performed surgery on August 2, 2012, which consisted of a left carpal tunnel release and left cubital tunnel release, ulnar nerve transposition and myofascial lengthening of the flexor pronator tendon.

Subsequent to the surgeries, Petitioner remained under Dr. Brown's care and received physical therapy. Dr. Brown released Petitioner to return to work without restrictions on September 10, 2012. At the time of that visit, Petitioner stated that he had a complete resolution of the numbness/tingling in his hands but still had some residual soreness in the elbows.

At the direction of Respondent, Petitioner was examined by Dr. Brown on November 14, 2012. Based on that examination, Dr. Brown opined that Petitioner had an impairment of one and one-half percent (1 1/2%) of the left upper extremity and one percent (1%) of the right upper extremity based on the AMA guidelines (Respondent's Exhibit 6). Petitioner's counsel objected to the admission into evidence of this report on the basis it was a Petrillo violation. The Arbitrator overruled this objection on the basis that Petitioner signed a medical authorization on February 18, 2012, which was never revoked by Petitioner (Respondent's Exhibit 5).

At trial, Petitioner testified that both elbows are tender to the touch and get sore, in particular, after he completes his shift at work. He also testified that his right little finger will go numb

when his elbow is fully extended. Petitioner also complained of some weakness in his left hand with a periodic complainant of some tingling with overuse. Petitioner agreed that he was able to perform all of his job duties and meet all of his production quotas.

Conclusions of Law

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 15% loss of use of the right arm, 15% loss of use of the left arm and 12 ½% loss of use of the left hand.

In support of this conclusion the Arbitrator notes the following:

Dr. Brown examined Petitioner and opined that there was an AMA impairment of one and one-half percent (1 1/2%) of the left upper extremity and one percent (1%) of the right upper extremity.

Petitioner is a truck tire builder and has worked in that capacity for approximately 20 years. This job does require the repetitive use of both upper extremities. Petitioner testified he still has symptoms in both upper extremities at the end of his shift.

At the time of the manifestation of these injuries, Petitioner was 57 years of age so he will have to live with the effects of this injury for the remainder of his working and natural life.

There was no evidence that this injury will have any effect on Petitioner's future earning capacity.

Petitioner was diagnosed with bilateral cubital tunnel syndrome and left carpal tunnel syndrome and these conditions required surgery. The cubital tunnel surgeries performed on both arms required transposition of the ulnar nerve and lengthening of the flexor pronator tendon. Petitioner still has some residual complaints that are consistent with the injuries he sustained.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Wisniewski,

Petitioner,

vs. NO: 10 WC 35835

14IWCC0351

Estes Express Lines,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, medical expenses, prospective medical care and whether the L4-L5 disc herniation is causally related 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 (1980).

The Commission affirms the Arbitrator's finding that a causal relationship exists for the left gluteal hematoma, contusions and back pain and affirms the Arbitrator's finding that Petitioner failed to prove a causal relationship exists for his L4-L5 disc herniation and right-sided radicular pain and need for surgery. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $846.26 per week for a period of 9-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act 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 have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $6,924.32 in TTD benefits.

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. 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: MAY 0 5 2014
MB/maw
o03/06/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

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

WIESNEWSKI, RONALD
Employee/Petitioner

Case# **10WC035835**

11WC017794

14IWCC0351

ESTES EXPRESS LINES
Employer/Respondent

On 7/8/2013, 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:

2333 WOODRUFF JOHNSON & PALERMO
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1109 GAROFALO SCHREIBER & HART ET AL
JOSEPH GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ronald Wisniewski
Employee/Petitioner

v.

Estes Express Lines
Employer/Respondent

Case # **10** WC **35835**

Consolidated cases: **11WC17794**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **11/2/2012 & 11/21/2012**
. 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. [x] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **2/29/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 with regard to his L4-L5 disc herniation ***is not*** causally related to the accident, although the left gluteal hematoma, contusions and back pain are causally related to such accident.

In the year preceding the injury, Petitioner earned **$66,008.28**; the average weekly wage was **$1,269.39**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$6,924.32** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

Petitioner is entitled to TTD benefits from **3/1/2008** through **5/4/2008**, or **9-2/7**weeks. (Arb.'s Ex 1)

ORDER

The Arbitrator has found that Petitioner's left gluteal hematoma, contusions and back pain are causally related to the accident. However, as the Arbitrator has found that the L4-L5 disc herniation/right-sided radicular pain and the need for surgery are not causally related to the 2/29/2008 accident, he denies the second period of TTD benefits, outstanding medical bills and prospective medical care.

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

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

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

Signature of Arbitrator

July 8, 2013
Date

JUL 8 - 2013

ICArbDec19(b)

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

Ronald Wisniewski,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10 WC 35835
	) Consol. With	11 WC 17794
Estes Express Lines,	)	
	)	
Respondent.	)	

FINDINGS OF FACT:

PETITIONER'S TESTIMONY:

It is stipulated between the parties that the petitioner incurred an accident while working for the Respondent on February 29, 2008. At the time of the February 29, 2008 accident, the petitioner was 59 years of age, married and had no dependent children under the age of 18. He is currently 64 years of age. The petitioner worked for the Respondent as a line haul driver (truck driver) hauling one or two trailers over the road. He worked for the Respondent in this capacity since July 10, 2000. Before that he worked for other companies as a truck driver. He has been a truck driver for 40 years. Before driving a truck he worked as a laborer in a steel plant, a laborer for bricklayers and as a furniture mover.

On February 29, 2008, after going into the dispatch office and turning in his bills from the freight he brought back, the petitioner walked out the door and fell down the stairs. The petitioner testified: "And I took one step out the door and that was it, feet in the air and down the stairs I went." The petitioner testified that the stairs were soaked with water.

The petitioner did not lose consciousness, but was pretty shaken up. He was seen that day at LaGrange Memorial Hospital where he was referred to his family doctor. He was seen at Willowbrook Medical Center on March 5, 2008 by Dr. Bilotta, a company doctor. There was a diagnosis of a left gluteal and upper back contusion. He then came under the care of Dr. Zindrick on March 18, 2008, after being referred by his family physician, Dr. Christopher Brenner. Dr. Zindrick performed an evacuation surgery to his left buttocks. On April 28, 2008, Dr. Zindrick released him to return to work as of May 5, 2008, and he did return to his normal work duties on that date. He noticed that that his back "wasn't right" as he performed his job and returned to see Dr. Zindrick on May 30, 2008. At that time, Dr. Zindrick recommended physical therapy and a follow-up appointment in one month. However, the petitioner did not undergo such physical therapy and did not return to Dr. Zindrick one month later.

The petitioner was paid TTD during the time he lost from work from March 1, 2008 through May 4, 2008. All of his medical bills for treatment rendered during that period were also paid by the respondent.

After May 30, 2008, the petitioner testified, the next time he saw a doctor for his back was more than 27 months later when he returned to see Dr. Zindrick on September 10, 2008. Dr. Zindrick took him off work. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job. He had had a nice run and made good money. He didn't have to deal with people, which was why he drove trucks in the first place.

During that 27 month period he also saw his family doctor, Christopher Brenner, "[m]aybe once every 2, 3 months."

The petitioner testified that during the intervening time, his back had gotten progressively worse until he couldn't take it anymore. He testified that the pain went down his right leg and his feet were numb. He did not sustain any new accidental injuries between May 30, 2008 and September 10, 2010.

During that 27 month period of time, the petitioner performed, for the most part, his regular work duties. The petitioner testified that at some point in time when his back was sore, he had spotters hook up and unhook the trailers for him so that he would not have to deal with the dollies. He testified that the dispatcher, Ish Thomas, "more or less took care of me."

When the petitioner worked during that intervening period (5/5/2008 - 9/9/2010) he leaned on one side and used the armrest more. He also leaned back to maneuver around while driving to get relief from the pain.

The petitioner testified that he normally works a 10-hour day and would normally drive 628 miles a day. The petitioner testified that the video of the job analysis (R's Ex 5) does not show all of the tasks that he is required to do. In addition to driving, he would also hook up trailers to be hauled. If two trailers were used, a dolly in the middle of the two trailers was required. Such dolly weighed over 3,000 pounds. He would hook the trailer to the dolly (P's Ex 12). As part of the procedure of hooking up the trailers, he would crank up the dolly legs on each trailer. This was fine in summertime but in wintertime "all that stuff froze up; so it was really hard to crank that stuff up and down." Sometimes it was necessary to crawl underneath the trailers to get to the dolly legs and to crank the dolly legs down so that the fifth wheel wouldn't miss the pin on the trailer and then go past the pin.

The petitioner also testified that once the trailer was retrieved, it was dropped on an open spot in the yard. He would then have to retrieve the dolly, pick up the dolly, put it on the back of a pintle hook and drag the dolly back to the trailer. He would then have to find the second trailer.

This required him to pick up the dolly once again and to put it on the pintle hook that is on the back of the first trailer. He positioned the trailers such that the lighter trailer was in the back and the heavier trailer was in the front. Then he would get the dolly, put it on the back of a pintle hook, lock it and drag it over to the trailer that had been dropped. He would back the tractor in front of the trailer and drop the dolly. He would lift the dolly off the hook and push it back a little in front of the other trailer and then go and find the heavier trailer. Then he would hook up that trailer. Once the trailers were hooked up, he would hook up all the hoses and the light cord, two safety chains and roll up the dolly legs on the back trailer, check the tires, check the air hoses and check all the lights. He would get under the first trailer to make sure the lock on the fifth wheel was locked. He also had to open the hood, inspect the engine and close the hood. Finally, he'd get in the truck, straighten out his logbook and write up whatever was required before leaving. These activities took up 5 - 10% of his day versus driving. (1/2 hour to 1 hour vs. 10-11 hour work days)

The petitioner testified that his back pain started right after the February 29, 2008 accidental injury and that the right leg pain came later on.

After September 10, 2010, he applied for and received short-term disability benefits and then he received long-term disability benefits. He has remained off work since September 10, 2010. Dr. Zindrick prescribed back surgery and he wants to have it performed.

The petitioner has had prior workers compensation claims filed with the Illinois Workers' Compensation Commission: case # 95 WC 22261, for injuries to his bilateral shoulders for which he received 45% loss of use of the left arm and 40% loss of use of the right arm; case #08 WC 04932 against Estes Express, when a sustained a hernia, for which he received 2% loss of use, man as a whole; and case #86 WC 25799 against JAM Trucking, which proceeded to arbitration, and was awarded 10% loss of use of a left arm and 10% loss of use of a left leg.

The petitioner admitted to being in a motor vehicle accident on January 14, 2011 on his way to Dr. Zindrick's office when he was rear ended by another vehicle. The other driver ripped her bumper off and his car was not damaged. On redirect examination, the petitioner testified that Dr. Zindrick's statement in the record that the petitioner sustained "No increased low back pain" after such motor vehicle accident was a fair statement.

TREATING RECORDS:

On February 29, 2008, the petitioner was first seen at LaGrange Memorial Hospital ER (P's Ex. 1) where the following history is recorded: "Patient slipped on steps at work and fell on his left buttocks and left arm. Pain to buttocks and back." He was advised to apply ice 20 minutes every hour for 2 days, get plenty of rest and to follow up with Dr. Brenner, his Primary Care Physician, in 2 - 3 days. He was prescribed Skelaxin, a muscle relaxant medication and Vicodin, a narcotic pain reliever. Both the cervical and lumbar areas of his spine were x-rayed. There was an impression of degenerative disc disease of the cervical spine and C7/T1 could not been seen. Also, the lumbar spine had six lumbar type vertebral bodies. There was a grade I retrolisthesis of L4 on L5. The alignment was otherwise normal. The vertebral body height and disc space height

was well maintained throughout. Anterior osteophytes were seen at all levels. Calcifications are seen over the course of the abdominal aorta. There was an Impression of degenerative disc disease of the lumbar spine without evidence of acute fracture.

On March 3, 2008, the petitioner presented at Willowbrook Medical Center (P's Ex #2) where he gave a history of slipping and falling down wooden stairs, and in the process, falling heavily on his low back and buttocks. The straight leg raising was 80 degrees bilaterally with only mild buttock discomfort on the left at the end range. The Lasegue maneuver was negative bilaterally. He also complained of upper thoracic pain. He was placed off work through March 5, 2008 as he was diagnosed with a left gluteal/upper back contusion. He had a large swelling over his left buttock.

On March 5, 2008, the petitioner followed up at Willowbrook Medical Center wherein he would continue to remain off work through March 10, 2008 due to his left gluteal/upper back contusion.

On March 10, 2008, the petitioner presented for follow up at Willowbrook Medical Center wherein he was prescribed a course of physical therapy three times a week for one week.

On March 12, 2008, the petitioner presented for follow up at Willowbrook Medical Center having undergone therapy that day. There was a resolving ecchymosis and the diagnosis remained a thoracic and buttock contusion.

On March 17, 2008, the petitioner followed up with Dr. Bilotta at Willowbrook Medical Center. At that time, he continued to have buttock and left lower extremity pain. The medical note also indicates significant tenderness to the left upper buttock. Exam revealed tenderness of the right buttock. The sensory, motor, and reflex examinations of the lower extremities were intact. The medical note also indicates: "There is a possibility that patient has some pressure on his sciatic nerve due to the hematoma that could be causing some of the radiated pain." The petitioner was instructed to continue physical therapy. The petitioner was kept off of work.

On March 18, 2008, the petitioner presented for initial examination with Dr. Michael Zindrick at Hinsdale Orthopedics (P's Ex 3). He indicated he fell down six stairs on February 29, 2008 while at work and sustained a contusion to the left buttocks and leg. He was in the process of leaving work to go home when the accident took place. The examination revealed severe ecchymosis and hematoma into his left buttocks and extending down the posterior thigh and up into the lumbar area and total gluteal area on the left side. He had a softball-sized lump in his left gluteus. The petitioner had a "mildly positive straight leg raise for causing discomfort into his buttock area." X-rays taken at LaGrange Memorial Hospital of his lumbar spine showed some degenerative changes. As such, he was diagnosed with partially resolved large gluteal hematoma on the left side. An MRI was ordered in order to evaluate the full extent of this issue.

On March 20, 2008, the petitioner presented for an MRI of the pelvis wherein the findings were notable for a large soft tissue hematoma overlying the left buttocks, and there was a moderate soft tissue edema towards the left. The findings were also suspicious for an undescended testicle.

On March 24, 2008, the petitioner presented for a follow-up appointment at Willowbrook Medical Center. The examination revealed a persistent hematoma on the left buttock, which was approximately the size of 1 - 2 golf balls. That same day, the petitioner followed up with Dr. Zindrick wherein it was decided the petitioner would undergo a left gluteal evacuation for the hematoma.

On March 26, 2008, the petitioner presented at Adventist Hinsdale Hospital (P's Ex. #5) where he underwent an evacuation of his left buttock hematoma. Dr. Zindrick wrote: "He was originally ecchymotic from his lumbar spine to his foot and across both buttocks." The post-operative diagnosis: "Deep post- traumatic hematoma of the left gluteus and buttock."

On April 7, 2008, the petitioner followed up with Dr. Zindrick, status post evacuation of the hematoma and indicated less pain. The wound was clean and dry, and the petitioner was able to walk without assistance. He would remain off work as he should not be moving around in his truck.

On April 28, 2008, the petitioner followed up with Dr. Zindrick at which time he noted some mild discomfort and fluid collection in the area. It was noted the ecchymosis was resolved. The wound was well healed, and he was able to return to work as of May 5, 2008.

On May 30, 2008, the petitioner presented for follow up with Dr. Zindrick. His Progress Notes that day state:

PRESENT HISTORY: The patient has had some increasing pain since he has been back to work into his low back and tailbone area. His gluteal area still is tingling and numb.

PHYSICAL EXAMINATION: The patient can toe-walk and heel-walk. He has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. He is tender over his gluteal region.

X-RAY FINDINGS: X-rays of his back show some minor degenerative changes. No other gross abnormalities are seen.

IMPRESSION: Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with hematoma and resolution of the contusion to his gluteus and buttock area.

RECOMMENDATIONS: Off work until Monday. Physical therapy, core stabilization, low back exercises, body biomechanics, and modalities as needed. Relafen 750 mg b.i.d. He was cautioned about GI upset. Return in a month.

On September 10, 2010, approximately 2 years and 3 months later, the petitioner followed up with Dr. Zindrick. He had complaints of increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." His symptoms were worse with sitting too

long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related in the course of time that he had his gluteal injury, it changed his posture while sitting and this was associated with increased back pain. He also associated significant lifting with the unhooking and loading of trucks coupled with driving extended distances as a means of making his back pain progressively worse. X-rays of his back show significant degenerative changes in his lumbar spine. As such, he was diagnosed with back pain with radiculopathy. Recommendations included an MRI of the lumbar spine and a trial of a Medrol Dosepak followed by Relafen with Norco for pain. He would remain off work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

On September 16, 2010, the petitioner presented for an MRI (P's Ex. #10) of the lumbar spine wherein the findings were notable for a reversal of a normal cervical lordosis with diffuse spondylotic changes, a right paracentral disk herniation at L4-5 with mild to moderate stenosis greater on the right, a left paracentral disc protrusion at L5-S1, and mild canal and neural foraminal stenosis at L1-2, L2-3, and L3-4.

On September 20, 2010, the petitioner had a telephone conversation with Dr. Zindrick's physician's assistant regarding his MRI results and the petitioner indicated that his medication was not helping to alleviate his pain. As such, he was prescribed with Naproxen and Norco.

On September 28, 2010, the petitioner requested a refill of Norco.

On October 1, 2010, the petitioner followed up with Dr. Zindrick, at which time he indicated he was having 40% back and 60% buttock and leg pain. Based on the MRI, the petitioner had a disk herniation at L4-5 on the right, which was consistent with his symptoms. As such, he was diagnosed with a right L4-5 disk herniation with low back pain and radiculopathy. Overall, the petitioner had multiple level degenerative disk disease, but his symptoms fit clearly with his disk herniation at L4-5 on the right. A trial of epidural steroid injections and a course of physical therapy were recommended. If he did not improve, surgical intervention was an option.

On October 14, 2010 and October 28, 2010, he was given transforaminal lumbar epidural steroid injections under fluoroscopic guidance by Dr. Bardfield.

On November 1, 2010, the petitioner presented for follow up with Dr. Zindrick wherein he would remain off work and recommendations included a repeat MRI of the lumbar spine.

On November 16, 2010, the petitioner returned to Dr. Zindrick when his back pain persisted. An EMG/NCV was prescribed and he was advised to remain off work.

On November 22, 2010, an EMG/NCV was performed and the findings were consistent with chronic polyradiculopathy L4 - S1, electrophysiologically with sensory motor polyneuropathy LLE.

On December 13, 2010, the petitioner returned to Dr. Zindrick. His back pain persisted and he continued to use medications and walked with a cane. A myelogram and post-myelogram CT

was prescribed at that time. He was to remain off work.

On January 3, 2011, a myelogram was performed. It revealed, at the L4 - L5 level, the following: "There is prominent posterior protrusion of disc material, greater towards the right. This causes bilateral foraminal stenosis, greater towards the right side . . . There is also mild bilateral bony foraminal stenosis present due to posterior osteophytes." At L5 - S1 level: "There is midline posterior osteophyte/disc complex without spinal stenosis. No significant foraminal stenosis is identified.

On January 14, 2011, the petitioner was seen by Dr. Zindrick and had been involved in a motor vehicle accident on the way to Dr. Zindrick's office. He had neck pain and right shoulder pain. X-rays of his cervical spine were taken which revealed multiple level degenerative disc disease and no acute fracture or injury seen. He had a painful range of motion of his neck with 50% restriction of motion with flexion, extension and rotation.

On February 25, 2011, the petitioner saw Dr. Zindrick and he concluded the petitioner had failed conservative care and he opined that surgery would be of benefit. He proposed to limit the surgery to L4 - L5 with the goal of trying to do a laminectomy and discectomy since his prognosis was guarded due to his multiple level degenerative disc disease. Dr. Zindrick noted that if the segment was found to be unstable, it can be fused at that time and but that he would try to avoid this.

On March 24, 2011, he saw Dr. Zindrick again at which time he was continued on medications and advised not to work. Dr. Zindrick continued his prescription for the L4 - L5 lumbar laminectomy and discectomy surgery.

When the petitioner was seen by Dr. Zindrick on May 3, 2011, June 17, 2011, August 9, 2011, September 30, 2011, December 2, 2011, January 20, 2012, March 16, 2012, April 13, 2012, July 13, 2012 May 25, 2012, and August 24, 2012, his diagnosis and prescription for surgery remained unchanged.

Although the petitioner testified that he saw his family doctor "[m]aybe once every 2, 3 months" during the period of June 2, 2008 until September 10, 2010, he did not offer Dr. Christopher Brenner's records into evidence.

DR. ZINDRICK'S TESTIMONY ON MARCH 14, 2011 (Petitioner's Exhibit #6)

Dr. Zindrick is Board Certified in Orthopaedic Surgery and in Spinal Surgery. He has numerous publications and presentations. He has authored chapters in scholarly medical texts and has served as a faculty member for numerous courses.

Dr. Zindrick testified that the petitioner had completed a Patient Assessment when he first saw him on 3/18/08. On the Patient Assessment, the petitioner indicated that his pain was located in his lower back, buttocks and left leg.

Dr. Zindrick testified regarding the history the petitioner provided to him and the findings, which are contained in his several records. Those findings are outlined in detail above with the summary of his treating records.

Regarding petitioner's back complaints and symptoms, Dr. Zindrick noted that when he first examined the petitioner on 3/18/08 he had a positive SLR test on the left. His primary attention was to the large hematoma on the left thigh, which required surgical evacuation. The petitioner returned to the full duties of a truck driver on 5/5/08. The petitioner returned to Dr. Zindrick on 5/30/08 at which time he complained of increasing pain in his low back and tailbone and tingling into his gluteal area after he returned to work.

The petitioner did not return to see him until 9/10/10, which was over two years later. At that time the petitioner gave a history of his back pain worsening within six months of his original injury and of pain radiating down his right leg. He noted that since his return to work, he changed his posture sitting more on his right side and noted an increase in pain when driving extended distances and lifting while unhooking and loading trucks.

In addition to the records through 11/12/10, Dr. Zindrick noted that another MRI was performed on 11/11/10 and the findings were essentially unchanged from the MRI performed on 9/16/10. The MRI's showed that petitioner had a herniated disc on the right at L4-5 as his primary pain generator, as well as pathology at L5-S1, a protrusion on the left side, and degenerative findings at all levels.

On 11/22/10, an EMG/NCV was performed which corroborated chronic polyradiculopathy at L4-S1. This confirmed his diagnosis of a herniated disc at L4-5.

He saw the petitioner again on 12/13/10 and 1/14/11. On 1/14/11, petitioner was treated for a cervical problem as he was rear ended while driving to his office on that date. There has been no further treatment for his cervical complaints.

On 1/3/11, a lumbar myelogram was performed which confirmed a prominent posterior protrusion of disc material on the right at L4-5. A herniated disc was not confirmed at L5-S1 on the left although there were findings of posterior osteophyte/disc complex without spinal stenosis.

On 2/5/11, Dr. Zindrick felt that the petitioner had failed conservative management (he underwent two ESI's which had increased his pain bilaterally) and recommended that the petitioner undergo surgery at L4-5 for a laminectomy and discectomy although kept open the option of performing a fusion depending on what he found when he performed the surgery.

It was Dr. Zindrick's opinion that the current condition of the petitioner's back is causally related to the 2/29/08 slip-and-fall down stairs, and was also aggravated by the petitioner's work activities following his return to work after being discharged from care on 5/30/08. He noted that the petitioner had back complaints from the time he saw him on 3/18/08, although they were left-sided. Also, according to the petitioner's history on 9/10/10, his back symptoms became

progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right while sitting, while doing extensive driving and while lifting while unhooking and hooking his truck. It was his opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at this time and had been unable to do so since he saw him on 9/10/10.

Finally, he noted that Hinsdale Orthopaedics had an outstanding bill for $19,992.00 for services rendered to the petitioner for treatment, which was causally related to the 2/29/08 accident.

During cross-examination, Dr. Zindrick admitted that when he first saw the petitioner, he did not review the records from Willowbrook Medical Center for 3/3/08 and 3/5/08, which indicated a diagnosis of left gluteal and upper back contusion. When he saw the petitioner on 3/18/08, he was unaware of any upper back contusion as most of the complaints pertained to the left thigh hematoma and the back.

He also admitted that when he performed the SLR test on 3/18/08, it was mildly positive on the left. There were no right-sided complaints until he saw the petitioner over two years later on 9/10/10.

He also admitted that MR images of the petitioner's lumbar spine were not originally taken; only MR images of the pelvis were originally taken in order to evaluate the hematoma.

Dr. Zindrick testified that September 10, 2010 was the first time the petitioner saw him and complained about the right side. At that time he noted petitioner's history of worsening low back pain within six months of his injury. Dr. Zindrick dated the onset of right leg complaints at six months post accident. However, he opined that the back complaints were aggravated by the petitioner's work activities following his return to work as a truck driver.

He opined that the petitioner's main problem is with a herniated disc at L4-5 on the right. This is different than his symptoms when he treated the petitioner in 2008 although he felt the petitioner did have discogenic back pain aggravated by return to work on 5/30/08.

He noted that a myelogram was performed 1/3/11, which confirmed his diagnosis of a right sided herniated disc at L4-5 but not at L5-S1 which had noted a protrusion on the left on the earlier MRI's.

He admitted that he did treat patients who have underlying degenerative disc disease who progress to the point where surgery is necessary without having suffered trauma. He noted that petitioner had a slip-and-fall down stairs, which started petitioner's low back symptoms. These problems were noted during his treatment in 2008. The problem then became aggravated with the petitioner's return to work. Prior to his accident, the petitioner had no complaints, only afterwards. The complaints worsened after he returned to work. Accordingly, his problem was related to the 2/29/08 accident and in part due to aggravating the condition further with his work

activities.

TESTIMONY OF DR. ZINDRICK AUGUST 13, 2012 (P's Ex. #7)

Dr. Zindrick testified for the second time on August 13, 2012. Dr. Zindrick previously testified on March 14, 2011 and indicated that the petitioner's lumbar spine condition was causally related to either the specific work accident on February 29, 2008 or from repetitive trauma following the petitioner's return to work in May of 2008.

Dr. Zindrick did not review the job video during the deposition, but did so prior to beginning his testimony. Dr. Zindrick testified that the video did not change any of the opinions contained in his prior testimony. He commented that the job video reinforced his prior opinion that the petitioner's current condition is causally related to the February 29, 2008 work accident. Furthermore, it was his opinions that the petitioner was a candidate for surgery and is presently unable to work are unchanged. He has been monitoring the petitioner's condition and it remains unchanged.

On cross-examination, Dr. Zindrick testified that the petitioner's condition is causally related to the initial work accident. In his prior testimony, he indicated that it could also be from repetitive trauma. Dr. Zindrick admitted that the petitioner's job duties, as depicted in the job analysis video, were not "repetitive."

On re-direct examination, Dr. Zindrick suggested that the activity that contributed to the petitioner's current condition of ill-being was driving 5-1/2 hours each way with underlying degenerative disc disease and while altering his sitting position. He testified that the petitioner's left buttock hematoma caused him to sit in an unusual fashion and was the cause of his current complaints.

In terms of exhibits entered into evidence, the petitioner presented the written job description from Genex. He also presented a copy of spec. sheet from Hyundai for a "HT Dolly." Opposing counsel claims that this is the dolly used by the petitioner. The sheet contains facts and figures regarding the dimensions and weight of the dolly.

TESTIMONY OF DR. BABAK LAMI ON MARCH 17, 2011 (Respondent's Exhibit #3)

Dr. Lami testified to his credentials as reported on his Curriculum Vitae, a copy of which is attached as a (deposition exhibit Respondents Ex. No. 1). Dr. Lami is Board Certified as an Orthopaedic Surgeon with an interest in pediatric and adult spinal surgery. He is a member of the North American Spine Society. He confines his practice entirely to treatment of the spine. He noted that he and his partner perform over 200 surgeries annually. He devotes over 90% of his time to care of patients. He further testified that he also conducts independent medical exams that are "pretty much 100 percent for - - at the request of the employers." Dr. Lami testified that in 2010, he conducted fewer than 200 independent medical examinations.

He testified to the history, findings and review of treating records as contained in his narrative

report (Respondent's Deposition Ex. No. 2) and as recited in the summary of treatment with Dr. Zindrick above. In addition, he reviewed the additional records from Dr. Zindrick, which he had not previously reviewed including the important second MRI and myelogram.

It was Dr. Lami's opinion that although the petitioner has a right-sided disc herniation at L4-5 and has restrictions, which would prevent him from working as a truck driver, this condition is not causally related to the 2/29/08 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left thigh for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick was a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While an MRI of the pelvis was taken shortly after the accident, an MRI of the lumbar spine was taken until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/5/08 - 9/10/10, at which time he saw Dr. Zindrick for right-sided back complaints including radiculopathy.

Dr. Lami opined that such right-sided complaints were completely unrelated to the original injury, which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of the petitioner's underlying degenerative disc disease.

Accordingly, Dr. Lami opined, this new problem was related to the petitioner's personal medical condition to his work. As far as any work activities aggravating his back, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so at this time, he would experience too much pain to be able to perform his work duties. He concluded that the petitioner's current back condition was unrelated to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010 based upon the following factors: 1) There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2) Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3) The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms, i.e., radiculopathy, immediately or shortly after that; and 4) Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick would have missed them.

On cross-examination, the following exchanges took place:

Q: Well, isn't there a medical note from September 2010 that indicates by history the patient reported experiencing pain down into his right leg within six months of the accident in February 2008?

A: There are no - - if he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg.

He has radicular symptoms due to a personal health issue and he waits until 2010 to see the doctor.

This is not consistent with a traumatic injury. More of progressive over time. In fact, the gentleman waits until 2010 to see the doctor. This is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset.

Q: But there is a medical note that indicates that he reported radicular-type symptoms going down the right leg within six months of the accident.

A: There is a note in 2010 that says what you just stated. (R's Ex. #3, Dep. PP. 30-31).

Dr. Lami did not dispute that the petitioner reported lower back pain to Dr. Zindrick on March 18, 2008. Dr. Lami opined that the February 29, 2008 accident did not aggravate or accelerate the petitioner's pre-existing degenerative disc disease. However, Dr. Lami conceded that someone falling down the stairs could cause a traumatic disc herniation. With respect to his work status, Dr. Lami recommended that the petitioner be placed on sedentary-type work with no bending or lifting more than 10lbs.

TESTIMONY OF DR. BABAK LAMI, M.D. DECEMBER 9, 2011 (Respondent's Exhibit #4)

Direct Examination

Dr. Lami testified that he had previously testified on March 17, 2011, at which time his CV was entered into evidence. At the time of this deposition, that CV was still up to date, he was still in the same practice, and in the same line of work. Dr. Lami recalled that at the time of his previous testimony, the petitioner had a condition of hematoma and some low back condition. Dr. Lami did not have any dispute as to the petitioner having right-sided radiculopathy in 2010. Dr. Lami reported that at the time of his previous deposition, he received a written job description and a video description.

Dr. Lami stated that his opinion was within a reasonable degree of medical and surgical certainty, and that throughout the deposition he would give all of his opinions within that standard.

Dr. Lami's medical report was entered into evidence at that time.

Dr. Zindrick also opined that the back pain could be coming from repetitive bouncing, doing repetitive bending, twisting, unhooking, and unloading the trucks. Dr. Lami reported that he did not agree with Dr. Zindrick's position. Dr. Lami found it interesting that Dr. Zindrick opined the petitioner had an acute injury, but in case it was not acute, he opined it would be repetitive.

Dr. Lami described asymptomatic disc herniations as somebody who does not have nerve pain going down his leg. So the disc herniation pushes on the nerve, which can cause pain going to the leg. That, he stated, would be symptomatic disc herniation. He also stated that an asymptomatic herniation could become symptomatic from different traumas including sneezing or twisting. However, it was possible that no particular trauma existed at all. If the symptoms came from a traumatic event, Dr. Lami opined, it would be reasonable for the symptoms to appear within days of the trauma. However, it would be unreasonable to say that the symptoms arrived within six months or a year down the line. From Dr. Lami's examination of the MRI report, it was his opinion that the problems the petitioner was having were degenerative rather than traumatic. However he did not personally review the MRI, so he was only able to give his opinion based on the review of the MRI report. He was only able to see the description by the radiologist. Based on that description, Dr. Lami opined it appeared to be a degenerative protrusion.

Written Job Analysis

Dr. Lami was given a copy of a written job analysis from Genex. He described the job summary as the driver taking a load from the origin site and delivering it to the destination, which was listed as St. Louis, switching the trailers with another driver, and bringing a new trailer back to the original location. The job usually lasted eleven hours per day, depending on traffic, five days a week. Based on that job description, Dr. Lami opined that there was nothing repetitive in nature that would cause the petitioner's symptoms. Rather, the petitioner was sitting in a cab, driving the truck. This was not, in Dr. Lami's opinion and most medical doctors' opinion, a repetitive action.

Dr. Zindrick described the petitioner's job as repetitive lifting, bending, twisting, unhooking and loading of trucks, and bouncing around in the cab of a truck in an altered sitting position. It was Dr. Zindrick's opinion that all those things could contribute to aggravation or worsening of the petitioner's back condition. Dr. Lami disagreed with that opinion. He believed that a factory line worker, who would be loading/unloading thirty times per minute, would have a repetitive motion. However, the petitioner was not engaging in any repetitive action here. He was driving most of the day, and was hooking and unhooking twice a day. In terms of discomfort from gluteal hematoma, Dr. Lami believed that was an unfounded opinion. Hematomas are very common and resolved, and the petitioner was asymptomatic. Because a hematoma is just a bleeding underneath the skin, which absorbs and goes away, there should not be any altered sitting position or discomfort from a hematoma. Further, the petitioner's hematoma had resolved by the time he was initially released from care in May of 2008.

Video Job Analysis

Dr. Lami had an opportunity to review the video job analysis. While watching the video, Dr. Lami noted that the driver backs up the truck and connects the electric cables to the trailer from the truck. This occurs at each changing, which would be twice a day. The driver uses the crank to lower the trailer, and he rotates his arm in cranking. Next, the driver opens the hood to inspect the engine and closes the hood. Then, the driver uses the crank in the reverse direction, the legs

are lowered to the ground and he is standing slightly bent, in this case he uses both arms while the cables are disconnected. Once the cables are tucked away, the driver drives the truck away, disconnecting the trailer. During all of these actions the driver was mostly standing. Dr. Lami noted that the driver did, at one point, flex his lower back to thirty, forty degrees to lift it up, but again, he was mostly standing. Once the driver arrives at his destination, he connects the trailers and reconnects the cables. At that time, he goes under the trailer, inspects the lower part, and uses the crank again. Dr. Lami noted that even though the petitioner had to engage in a cranking motion twice a day, there was nothing about that task that could have aggravated a preexisting back condition.

Regarding Dr. Zindrick's Report

Dr. Lami was asked about Dr. Michael Zindrick causation opinions. On direct examination, the following exchange took place:

Q: Doctor, I want to show you page 54 of the deposition from Dr. Zindrick that you previously reviewed. Would you please look at the answer portion of that page and read that into the record?

A: Dr. Zindrick said, "Well, the symptoms can change, and clearly he did not have right leg radiculopathy when he first saw me. He did have back pain. He had ongoing back pain that ultimately evolved into right leg discomfort or right leg pain and discomfort with a right-legged disc herniation. Now, traumas can result in weakening of the disc fibers, the annulus, and over time it can evolve into a full-blown disc herniation."

"So, between, as I mentioned earlier, the combination of the fall resulting in an ongoing chronic bachache, then this gentleman returns to his job of vibratory exposure, sitting abnormally, repetitive bending, twisting, lifting, loading and unloading trucks, hooking and unhooking trailers."

"A combination of those factors could very easily, and very consistent with medical knowledge of how disc herniations occur, result in the progressive disc herniation six months down the line and the onset of leg symptoms; and as time goes on, it's gotten worse."

Q: Now doctor, we've just discussed that you reviewed the written Job Analysis and the video Job Analysis for the Petitioner's job. Taking those into consideration, do you agree or disagree with Dr. Zindrick's opinion?

A: I don't agree, and I don't see how he can give this opinion based on reasonable medical and surgical certainty.

Q: Could you explain why you don't agree with that?

A: Because having degenerative changes in the general population is very common, and the degenerative changes can weaken the fibers of the disc. In addition, his previous MRI after his

injury showed diffuse spondylitic changes. Although there was a right-sided disc herniation at L4-L5, there was also left-sided (sic) disc herniation at L5-S1.

How can you tell me, based on a reasonable degree of medical certainty, that the fibers were weakened by a particular event, which didn't result in radiculopathy, not caused by degenerative changes, which are more consistent with natural history and the way he presented to providers?

So, the fact that the patient had no symptoms coming from the disc, no one can say, based on a reasonable degree of medical certainty, that anything was from that disc months or a year later. (R's Ex 4, pp. 19-21)

In conclusion, Dr. Lami opined that the petitioner's low back condition was not related to any injury or activities of employment, and that it was due to his personal health and degenerative changes.

Cross-Examination

Dr. Lami reported that the only examination he had of the petitioner was on November 12, 2010. His October 12, 2011 addendum was solely based on some additional medical records that he reviewed regarding the petitioner, the written job analysis with which he was provided, the videotape job analysis, and his review of Dr. Zindrick's deposition transcript.

Dr. Lami noted that during his original deposition, he did not disagree with Dr. Zindrick's diagnosis or his treatment options. Dr. Lami noted that at the time he saw the petitioner, he only knew that the petitioner was a truck driver. He was not aware at that time that the petitioner had to engage in hooking or unhooking of the truck as a part of his job description. Dr. Lami did not learn of these requirements until he saw the video following his evaluation of the petitioner.

Dr. Lami was asked to review the video job analysis once again. This time, his testimony was focused on the driver's cranking. Dr. Lami indicated that he did not know how much force was needed to operate the crank, since the video did not show any numbers. Therefore, the amount of force needed to move the crank could vary based on certain conditions including different weather conditions, the weight of the specific load or the different positions of the trailer. Even so, from the video, Dr. Lami opined that the force appeared to be not very significant either with one hand or two. He believed it was within the petitioner's capability. Dr. Lami reported that in terms of the other activities the driver was performing in the video, it was difficult to know how much force was being used since the video does not indicate any weight measurements. However, he agreed that the driver in the video appeared to be using some resistance, and force. Dr. Lami was hesitant to say that it was "possible" for the repetitive cranking the petitioner had to do had a cumulative effect on his back condition.

Dr. Lami agreed that the driver in the video had to move a three thousand pound dolly by lifting the front end of the dolly in order to connect it to the trailer, and then lifting it again to disconnect it. While doing this, the driver used both hands and arms and was bent over. When asked whether it was possible that the petitioner's lumbar condition resulted from the repetitive

action of working with the dolly over a period of two and a half years, having to maneuver, lift, push, pull, and place that dolly at least one hundred times, Dr. Lami opined that while anything was possible, he did not believe that lifting one hundred times in the period between May, 2008 and September, 2010 could cause the petitioner's back issues. Dr. Lami agreed that it was possible that his personal definition of repetitive activity was different from that of Dr. Zindrick's as well as any other doctor. However, he emphasized that he was giving his opinion based on a reasonable degree of medical and surgical certainty.

Dr. Lami was asked to review the job analysis. He noted that under the heading "pre-trip inspection", a driver was instructed to pull the hood forward to open by using his legs as leverage. He was to place his foot on a bumper of the truck and pull the hook back. He was to check the levels of fluid and push the hood shut when finished. In order to shut the hood, the driver was to use his leg and arms as leverage to prevent the hood from slamming thus. Under the "arriving to origin location" heading, a driver was advised that he may need to pick up the dolly in order to physically connect the dolly to the trailer. In order to do this, the driver was to use two hands, physically move the dolly (the dolly is on wheels) to the trailer, and connect the wires. Based on that description, Dr. Lami agreed that part of the petitioner's job was to physically move and connect the three thousand pound dolly.

Dr. Lami also opined that the hematoma that the petitioner had sustained on February 29, 2008 had resolved by the time Dr. Zindrick last saw him on May 30, 2008 (Yet, the May 30, 2008 Progress Note indicates that the petitioner experienced tenderness, tingling and numbness over the left gluteal region on that date).

Re-Direct Examination

Dr. Lami reported that as of the present date, December 9, 2011, he did not have any information or reason to dispute Dr. Zindrick's treatment of the petitioner. Further, he did not have any reason or basis to dispute his diagnosis of the petitioner's condition. However, Dr. Lami did not agree with Dr. Zindrick's opinion as to the cause of the petitioner's low back condition.

Dr. Lami was asked to review the "crank section" of the physical demand/ tools and equipment section of the job analysis. Based on his review, he stated that it took approximately three to fourteen pounds of force in order to move the crank. That three-to-fourteen pound range accounted for the variables that Mr. Januszkiewicz spoke about during his cross-examination. Further, Dr. Lami noted that the hood weighed about twenty-four pounds as described in the job description. Finally, Dr. Lami noted that although the dolly itself weighed three thousand pounds, Dr. Lami had never met anybody who could lift three thousand pounds, and he had never given anybody a three thousand pound lifting restriction when they went back to work. In other words, he reported that while the dolly itself weighed three thousand pounds, the driver is not actually lifting three thousand pounds. The dolly is on wheels.

Dr. Lami reported that he is a diplomat of the American Board of Orthopaedic Surgeons, and that he keeps up with his research and literature related to his practice.

Re-Cross Examination by Mr. Januszkiewicz

During re-cross examination, the following exchange took place:

Q: Doctor, again, it sounds like you're saying it's impossible that the repetitive activities in Mr. Wisniewski's case would have aggravated or exacerbated or accelerated his preexisting condition; correct?

A: Very close to it, yes.

Q: It's impossible from a medical standpoint, based on the question just asked you by counsel?

A: Correct. (P's Ex 4, pp. 55-56)

Dr. Lami agreed that the petitioner did not have to pick up the dolly itself and merely engaged in pushing and pulling the dolly that was on wheels.

CONCLUSIONS OF LAW:

F. IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that the left gluteal hematoma, contusions and back pain are causally related to the February 29, 2008, slip-and-fall accident.

However, the Arbitrator finds that the petitioner's L4-L5 disk herniation/right-sided radicular pain is not related to the February 29, 2008 accident.

On May 5, 2008, the petitioner returned to his regular-duty job of truck driver.

On May 30, 2008, Dr. Zindrick did not release the petitioner from his care and did not declare the petitioner to be at maximum medical improvement. However, since the petitioner did not seek treatment for his low back pain and his left gluteal hematoma from any doctor or medical professional, including Dr. Zindrick, until September 10, 2010, the Arbitrator concludes that Mr. Wisniewski was not in need of additional medical care for his accidental injuries.

The petitioner testified that at some point, Ish Thomas assigned a spotter to hook and unhook the trailers for the petitioner due to the petitioner's back pain.

The Arbitrator finds it significant that the petitioner did not treat for his low back with any doctor for a 27-month period of time. The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job.

Yet, the Arbitrator notes that the respondent paid the petitioner $6,924.32 in TTD benefits from March 8, 2008 through May 4, 2008.

Just prior to the gap in treatment, the petitioner saw Dr. Zindrick on May 30, 2008. Dr. Zindrick took a history that indicates the petitioner has had some increasing pain into his low back and tailbone area since he has returned to work, and that his gluteal area is still tingling and numb. X-rays of his back showed some minor degenerative changes. Upon conducting a physical examination, Dr. Zindrick found that the petitioner can toe-walk and heel-walk, but that he has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. Dr. Zindrick offered the following impression: "Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with a hematoma and resolution of the contusion to his gluteus and buttock area."

Although Dr. Zindrick's "impression" was diskogenic back pain, he did not conduct a straight leg raising test or order a lumbosacral MRI. Moreover, the petitioner was able to toe-walk and heel-walk.

On May 30, 2008, Dr. Zindrick kept the petitioner "[o]ff work until Monday", prescribed Relafen 750 mg. b.i.d., ordered physical therapy, core stabilization, low back exercises, body biomechanics and modalities as needed. Dr. Zindrick advised the petitioner to return to him in one month.

The petitioner did not undergo the recommended physical therapy and did not return to Dr. Zindrick 1 month later. He returned to Dr. Zindrick 27 months later, on September 10, 2010.

At the 9/10/10 appointment, the petitioner saw Dr. Zindrick for increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." He told Dr. Zindrick that his symptoms were worse with sitting too long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related that in the course of time that he had his gluteal injury, he had to change his sitting position. He put more weight on his right side, and this was associated with increased back pain. He also associated his progressively-worsening back pain with the significant lifting he performed when hooking and unhooking dollies, opening the truck hood and driving extended distances. X-rays of his back showed significant degenerative changes in his lumbar spine. Dr. Zindrick's offered the following impression: "Back pain with radiculopathy." Dr. Zindrick ordered an MRI of the lumbar spine and prescribed a trial of Medrol Dosepak followed by Relafen with Norco for pain. Dr. Zindrick opined that the petitioner was unable to return to work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

The petitioner testified that with the exception of seeing his family doctor, Dr. Christopher Brenner, "[m]aybe once every 2, 3 months" during this 27 month period, he did not see any other physicians for treatment between the June 2, 2008 and September 10, 2010. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

Dr. Zindrick is of the opinion that the petitioner's current back condition and need for surgery are causally related to the 2/29/2008 accident. The basis for Dr. Zindrick's opinion is that the petitioner had back complaints from when he saw him on 3/18/08, although they were left-sided. Also, according to petitioner's history on 9/10/10, his back symptoms became progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right side while sitting, as well as while doing extensive driving and lifting while unhooking and loading his truck. It was Dr. Zindrick's opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at that time and had been unable to do so since he saw him on 9/10/10.

Dr. Zindrick testified that traumas can result in weakening of disc fibers, the annulus, and over time it can evolve into full-blown disc herniation. (P's Ex 6, p. 54)

Dr. Zindrick admitted that when he first saw the petitioner on 3/18/2008, the SLR was only mildly positive at 80 degrees on the left, not the right where the herniation now exists at L4 - L5, where he proposed to perform a laminectomy and diskectomy and possible fusion. Further he admits that petitioner's symptoms are now right-sided where the main injury was to the left buttock on 2/29/2008. He also admits that petitioner was capable of performing his regular work duties for over two years before he sought additional care from him on 9/10/2010. He further admitted that when he saw the petitioner on that date, the petitioner described radicular symptoms, which had not developed for six months after his return to his regular work duties, but were not severe enough for him to seek any treatment until that date. He also admitted that he has treated patients who have underlying degenerative disc disease who progress to a point where surgery is necessary even though they have suffered no trauma.

In contrast to Dr. Zindrick's testimony is the testimony Dr. Babak Lami. It is Dr. Lami's opinion that petitioner's right-sided disc herniation at L4 -L5 is not causally related to the 2/29/2008 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left gluteus for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick is a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While a MRI was performed of the pelvis/gluteal region, an MRI of the lumbar spine was not performed until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/30/08 - 9/10/10 when he saw Dr. Zindrick again for right-sided back complaints including radiculopathy. Dr. Lami opined that these complaints were completely unrelated to the original injury which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of petitioner's underlying degenerative disc disease. Accordingly, this new problem related to petitioner's personal medical problem and was not related to his work.

In terms of aggravating his back by his work activities, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so, he would notice too much pain to be able to perform his work duties.

Dr. Lami concluded that the petitioner's current back condition was neither related to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010, based upon the following factors: 1. There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2. Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3. The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms immediately or shortly after that, radiculopathy; and 4. Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick, a spine surgeon, would have missed them.

Dr. Lami stated: "...[I]f he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg. He has radicular symptoms due to a personal health issue, and he waits until 2010 to see the doctor. This is not consistent with a traumatic injury, more of progressive over time. In fact, the gentleman waits until 2010 to go see a doctor. That is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset." (R's Ex. #3, Dep. P. 30).

The Arbitrator recognizes that on February 29, 2008, the petitioner's back and bottom struck the stairs so hard that he developed extensive bruising on his back and buttocks and a left gluteal hematoma the size of a softball. Initially, he exhibited mildly positive results for the left SLR test. The petitioner's therapist thought that the hematoma may be impinging on the sciatic nerve. The petitioner returned to full-duty work on May 5, 2008. On May 30, 2008, the petitioner did experience increasing pain in his low back and tailbone and tingling and numbness to his left gluteal area. Sometime thereafter, due to Mr. Wisniewski's back pain, Ish Thomas "lightened his load" at work.

However, there is no evidence that on February 29, 2008, the petitioner sustained an L4-L5 disc herniation with right-sided radicular pain.

The Arbitrator places great weight on the fact that other than the history he gave to Dr. Zindrick 2-1/4 years later and thereafter, the petitioner has not provided documentary evidence that his back pain began to worsen during the 6-month period after the accident, or that his radicular, right leg pain began at that time. The petitioner treated with Dr. Brenner every 2-3 months during 27-month period . . . and yet, he did not offer Dr. Brenner's records into evidence.

The Arbitrator draws the reasonable inference that Dr. Brenner's records do not support the petitioner's workers' compensation claim.

Furthermore, a review of the Adventist LaGrange Memorial Hospital reveals that although the petitioner treated for other conditions during this 27-month period, there is no mention of low back pain or radicular right leg pain in such records.

The Arbitrator notes that only one week after the petitioner reported to Dr. Zindrick that he experienced a "progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg", his attorney filed a claim.

Based on the foregoing, and by a mere preponderance of the evidence, the Arbitrator finds a causal relationship of the left gluteal hematoma, contusions and back pain to the accident of February 29, 2008, but no causal relationship between the petitioner's L4-L5 disc herniation/right-sided radicular pain to such accident. Consequently, the Arbitrator denies the second period of TTD, the medical bills and the prospective medical care.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Wisniewski,

Petitioner,

vs. NO: 11 WC 17794

14IWCC0352

Estes Express Lines,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, medical expenses, prospective medical care and whether the L4-L5 disc herniation is causally related 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 (1980).

The Commission affirms the Arbitrator's finding that Petitioner failed to prove he sustained repetitive trauma accidental injuries arising out of and in the course of his employment manifesting on September 10, 2010 and that Petitioner failed to prove a causal relationship exists. The Commission affirms the Arbitrator's denial of Petitioner's claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2013 is hereby affirmed and adopted.

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: MAY 0 5 2014
MB/maw
o03/06/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WIESNEWSKI, RONALD
Employee/Petitioner

Case# **11WC017794**

10WC035835

ESTES EXPRESS LINES
Employer/Respondent

14IWCC0352

On 7/8/2013, 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:

2337 WOODRUFF JOHNSON & PALERMO
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1109 GAROFALO SCHREIBER & HART ET AL
JOSEPH GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

14IWCC0352

___	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

Ron Wisniewski
Employee/Petitioner

Case # 11 WC 17794

v.

Consolidated Cases: 10 WC 35835

Estes Express
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 Brian Cronin, Arbitrator of the Commission, in the city of Chicago, on November 2, 2012 and November 21, 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. Is Petitioner's current condition of ill-being causally related to the injury?

G. What were Petitioner's earnings?

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

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

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

K. What temporary benefits are in dispute?

_____ TPD _____ Maintenance XXX TTD

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

M. Should penalties or fees be imposed upon Respondent?

N. Is Respondent due any credit?

O. Other Prospective Medical

FINDINGS

14IWCC0352

- On 09/10/2010, 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 not*** sustain an accident that arose out of and in the course of employment.
- Petitioner's current condition of ill-being ***is not*** causally related to the accident.
- In the year preceding the injury, Petitioner earned $66,008.28; the average weekly wage was $ 1,269.39.
- On the date of the accident, Petitioner was 62 years of age, ***married*** with 0 children under 18.

ORDER

- Compensation is denied. All other issues are moot. Please see decision for case 10 WC 35835.

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

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

Signature of Arbitrator

7/2/13
Date

ICArbDec p.2

JUL 8 - 2013

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

Ronald Wisniewski,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 17794
	) Consol. With	10 WC 35835
Estes Express Lines,	)	
	)	
Respondent.	)	

FINDINGS OF FACT:

PETITIONER'S TESTIMONY:

It is stipulated between the parties that the petitioner incurred an accident while working for the Respondent on February 29, 2008. At the time of the February 29, 2008 accident, the petitioner was 59 years of age, married and had no dependent children under the age of 18. He is currently 64 years of age. The petitioner worked for the Respondent as a line haul driver (truck driver) hauling one or two trailers over the road. He worked for the Respondent in this capacity since July 10, 2000. Before that he worked for other companies as a truck driver. He has been a truck driver for 40 years. Before driving a truck he worked as a laborer in a steel plant, a laborer for bricklayers and as a furniture mover.

On February 29, 2008, after going into the dispatch office and turning in his bills from the freight he brought back, the petitioner walked out the door and fell down the stairs. The petitioner testified: "And I took one step out the door and that was it, feet in the air and down the stairs I went." The petitioner testified that the stairs were soaked with water.

The petitioner did not lose consciousness, but was pretty shaken up. He was seen that day at LaGrange Memorial Hospital where he was referred to his family doctor. He was seen at Willowbrook Medical Center on March 5, 2008 by Dr. Bilotta, a company doctor. There was a diagnosis of a left gluteal and upper back contusion. He then came under the care of Dr. Zindrick on March 18, 2008, after being referred by his family physician, Dr. Christopher Brenner. Dr. Zindrick performed an evacuation surgery to his left buttocks. On April 28, 2008, Dr. Zindrick released him to return to work as of May 5, 2008, and he did return to his normal work duties on that date. He noticed that that his back "wasn't right" as he performed his job and returned to see Dr. Zindrick on May 30, 2008. At that time, Dr. Zindrick recommended physical therapy and a follow-up appointment in one month. However, the petitioner did not undergo such physical therapy and did not return to Dr. Zindrick one month later.

The petitioner was paid TTD during the time he lost from work from March 1, 2008 through May 4, 2008. All of his medical bills for treatment rendered during that period were also paid by the respondent.

After May 30, 2008, the petitioner testified, the next time he saw a doctor for his back was more than 27 months later when he returned to see Dr. Zindrick on September 10, 2008. Dr. Zindrick took him off work. Petitioner testified that he mentioned his back condition to his family doctor, but that his family doctor asked him how Dr. Zindrick was treating him.

The petitioner testified that the reason he didn't see a doctor for his back during this 27-month period was because he can't make money sitting at home and because he loves his job. He had had a nice run and made good money. He didn't have to deal with people, which was why he drove trucks in the first place.

During that 27 month period he also saw his family doctor, Christopher Brenner, "[m]aybe once every 2, 3 months."

The petitioner testified that during the intervening time, his back had gotten progressively worse until he couldn't take it anymore. He testified that the pain went down his right leg and his feet were numb. He did not sustain any new accidental injuries between May 30, 2008 and September 10, 2010.

During that 27 month period of time, the petitioner performed, for the most part, his regular work duties. The petitioner testified that at some point in time when his back was sore, he had spotters hook up and unhook the trailers for him so that he would not have to deal with the dollies. He testified that the dispatcher, Ish Thomas, "more or less took care of me."

When the petitioner worked during that intervening period (5/5/2008 - 9/9/2010) he leaned on one side and used the armrest more. He also leaned back to maneuver around while driving to get relief from the pain.

The petitioner testified that he normally works a 10-hour day and would normally drive 628 miles a day. The petitioner testified that the video of the job analysis (R's Ex 5) does not show all of the tasks that he is required to do. In addition to driving, he would also hook up trailers to be hauled. If two trailers were used, a dolly in the middle of the two trailers was required. Such dolly weighed over 3,000 pounds. He would hook the trailer to the dolly (P's Ex 12). As part of the procedure of hooking up the trailers, he would crank up the dolly legs on each trailer. This was fine in summertime but in wintertime "all that stuff froze up; so it was really hard to crank that stuff up and down." Sometimes it was necessary to crawl underneath the trailers to get to the dolly legs and to crank the dolly legs down so that the fifth wheel wouldn't miss the pin on the trailer and then go past the pin.

The petitioner also testified that once the trailer was retrieved, it was dropped on an open spot in the yard. He would then have to retrieve the dolly, pick up the dolly, put it on the back of a pintle hook and drag the dolly back to the trailer. He would then have to find the second trailer.

This required him to pick up the dolly once again and to put it on the pintle hook that is on the back of the first trailer. He positioned the trailers such that the lighter trailer was in the back and the heavier trailer was in the front. Then he would get the dolly, put it on the back of a pintle hook, lock it and drag it over to the trailer that had been dropped. He would back the tractor in front of the trailer and drop the dolly. He would lift the dolly off the hook and push it back a little in front of the other trailer and then go and find the heavier trailer. Then he would hook up that trailer. Once the trailers were hooked up, he would hook up all the hoses and the light cord, two safety chains and roll up the dolly legs on the back trailer, check the tires, check the air hoses and check all the lights. He would get under the first trailer to make sure the lock on the fifth wheel was locked. He also had to open the hood, inspect the engine and close the hood. Finally, he'd get in the truck, straighten out his logbook and write up whatever was required before leaving. These activities took up 5 - 10% of his day versus driving. (1/2 hour to 1 hour vs. 10-11 hour work days)

The petitioner testified that his back pain started right after the February 29, 2008 accidental injury and that the right leg pain came later on.

After September 10, 2010, he applied for and received short-term disability benefits and then he received long-term disability benefits. He has remained off work since September 10, 2010. Dr. Zindrick prescribed back surgery and he wants to have it performed.

The petitioner has had prior workers compensation claims filed with the Illinois Workers' Compensation Commission: case # 95 WC 22261, for injuries to his bilateral shoulders for which he received 45% loss of use of the left arm and 40% loss of use of the right arm; case #08 WC 04932 against Estes Express, when a sustained a hernia, for which he received 2% loss of use, man as a whole; and case #86 WC 25799 against JAM Trucking, which proceeded to arbitration, and was awarded 10% loss of use of a left arm and 10% loss of use of a left leg.

The petitioner admitted to being in a motor vehicle accident on January 14, 2011 on his way to Dr. Zindrick's office when he was rear ended by another vehicle. The other driver ripped her bumper off and his car was not damaged. On redirect examination, the petitioner testified that Dr. Zindrick's statement in the record that the petitioner sustained "No increased low back pain" after such motor vehicle accident was a fair statement.

TREATING RECORDS:

On February 29, 2008, the petitioner was first seen at LaGrange Memorial Hospital ER (P's Ex. 1) where the following history is recorded: "Patient slipped on steps at work and fell on his left buttocks and left arm. Pain to buttocks and back." He was advised to apply ice 20 minutes every hour for 2 days, get plenty of rest and to follow up with Dr. Brenner, his Primary Care Physician, in 2 - 3 days. He was prescribed Skelaxin, a muscle relaxant medication and Vicodin, a narcotic pain reliever. Both the cervical and lumbar areas of his spine were x-rayed. There was an impression of degenerative disc disease of the cervical spine and C7/T1 could not been seen. Also, the lumbar spine had six lumbar type vertebral bodies. There was a grade I retrolisthesis of L4 on L5. The alignment was otherwise normal. The vertebral body height and disc space height

was well maintained throughout. Anterior osteophytes were seen at all levels. Calcifications are seen over the course of the abdominal aorta. There was an Impression of degenerative disc disease of the lumbar spine without evidence of acute fracture.

On March 3, 2008, the petitioner presented at Willowbrook Medical Center (P's Ex #2) where he gave a history of slipping and falling down wooden stairs, and in the process, falling heavily on his low back and buttocks. The straight leg raising was 80 degrees bilaterally with only mild buttock discomfort on the left at the end range. The Lasegue maneuver was negative bilaterally. He also complained of upper thoracic pain. He was placed off work through March 5, 2008 as he was diagnosed with a left gluteal/upper back contusion. He had a large swelling over his left buttock.

On March 5, 2008, the petitioner followed up at Willowbrook Medical Center wherein he would continue to remain off work through March 10, 2008 due to his left gluteal/upper back contusion.

On March 10, 2008, the petitioner presented for follow up at Willowbrook Medical Center wherein he was prescribed a course of physical therapy three times a week for one week.

On March 12, 2008, the petitioner presented for follow up at Willowbrook Medical Center having undergone therapy that day. There was a resolving ecchymosis and the diagnosis remained a thoracic and buttock contusion.

On March 17, 2008, the petitioner followed up with Dr. Bilotta at Willowbrook Medical Center. At that time, he continued to have buttock and left lower extremity pain. The medical note also indicates significant tenderness to the left upper buttock. Exam revealed tenderness of the right buttock. The sensory, motor, and reflex examinations of the lower extremities were intact. The medical note also indicates: "There is a possibility that patient has some pressure on his sciatic nerve due to the hematoma that could be causing some of the radiated pain." The petitioner was instructed to continue physical therapy. The petitioner was kept off of work.

On March 18, 2008, the petitioner presented for initial examination with Dr. Michael Zindrick at Hinsdale Orthopedics (P's Ex 3). He indicated he fell down six stairs on February 29, 2008 while at work and sustained a contusion to the left buttocks and leg. He was in the process of leaving work to go home when the accident took place. The examination revealed severe ecchymosis and hematoma into his left buttocks and extending down the posterior thigh and up into the lumbar area and total gluteal area on the left side. He had a softball-sized lump in his left gluteus. The petitioner had a "mildly positive straight leg raise for causing discomfort into his buttock area." X-rays taken at LaGrange Memorial Hospital of his lumbar spine showed some degenerative changes. As such, he was diagnosed with partially resolved large gluteal hematoma on the left side. An MRI was ordered in order to evaluate the full extent of this issue.

On March 20, 2008, the petitioner presented for an MRI of the pelvis wherein the findings were notable for a large soft tissue hematoma overlying the left buttocks, and there was a moderate soft tissue edema towards the left. The findings were also suspicious for an undescended testicle.

On March 24, 2008, the petitioner presented for a follow-up appointment at Willowbrook Medical Center. The examination revealed a persistent hematoma on the left buttock, which was approximately the size of 1 - 2 golf balls. That same day, the petitioner followed up with Dr. Zindrick wherein it was decided the petitioner would undergo a left gluteal evacuation for the hematoma.

On March 26, 2008, the petitioner presented at Adventist Hinsdale Hospital (P's Ex. #5) where he underwent an evacuation of his left buttock hematoma. Dr. Zindrick wrote: "He was originally ecchymotic from his lumbar spine to his foot and across both buttocks." The post-operative diagnosis: "Deep post- traumatic hematoma of the left gluteus and buttock."

On April 7, 2008, the petitioner followed up with Dr. Zindrick, status post evacuation of the hematoma and indicated less pain. The wound was clean and dry, and the petitioner was able to walk without assistance. He would remain off work as he should not be moving around in his truck.

On April 28, 2008, the petitioner followed up with Dr. Zindrick at which time he noted some mild discomfort and fluid collection in the area. It was noted the ecchymosis was resolved. The wound was well healed, and he was able to return to work as of May 5, 2008.

On May 30, 2008, the petitioner presented for follow up with Dr. Zindrick. His Progress Notes that day state:

PRESENT HISTORY: The patient has had some increasing pain since he has been back to work into his low back and tailbone area. His gluteal area still is tingling and numb.

PHYSICAL EXAMINATION: The patient can toe-walk and heel-walk. He has pain on flexion beyond 45 degrees, extension beyond 10 degrees, and side bending beyond 20 degrees bilaterally. He is tender over his gluteal region.

X-RAY FINDINGS: X-rays of his back show some minor degenerative changes. No other gross abnormalities are seen.

IMPRESSION: Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with hematoma and resolution of the contusion to his gluteus and buttock area.

RECOMMENDATIONS: Off work until Monday. Physical therapy, core stabilization, low back exercises, body biomechanics, and modalities as needed. Relafen 750 mg b.i.d. He was cautioned about GI upset. Return in a month.

On September 10, 2010, approximately 2 years and 3 months later, the petitioner followed up with Dr. Zindrick. He had complaints of increased pain in his lower back. Dr. Zindrick wrote: "The patient currently describes he has had progressive worsening of low back pain and then within six months of his injury the pain radiating down his right leg has gotten progressively worse so this brings him back in to see me today." His symptoms were worse with sitting too

long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related in the course of time that he had his gluteal injury, it changed his posture while sitting and this was associated with increased back pain. He also associated significant lifting with the unhooking and loading of trucks coupled with driving extended distances as a means of making his back pain progressively worse. X-rays of his back show significant degenerative changes in his lumbar spine. As such, he was diagnosed with back pain with radiculopathy. Recommendations included an MRI of the lumbar spine and a trial of a Medrol Dosepak followed by Relafen with Norco for pain. He would remain off work. Dr. Zindrick opined: "It appears that his current complaints and symptoms are in fact related to his previous work-related injury."

On September 16, 2010, the petitioner presented for an MRI (P's Ex. #10) of the lumbar spine wherein the findings were notable for a reversal of a normal cervical lordosis with diffuse spondylotic changes, a right paracentral disk herniation at L4-5 with mild to moderate stenosis greater on the right, a left paracentral disc protrusion at L5-S1, and mild canal and neural foraminal stenosis at L1-2, L2-3, and L3-4.

On September 20, 2010, the petitioner had a telephone conversation with Dr. Zindrick's physician's assistant regarding his MRI results and the petitioner indicated that his medication was not helping to alleviate his pain. As such, he was prescribed with Naproxen and Norco.

On September 28, 2010, the petitioner requested a refill of Norco.

On October 1, 2010, the petitioner followed up with Dr. Zindrick, at which time he indicated he was having 40% back and 60% buttock and leg pain. Based on the MRI, the petitioner had a disk herniation at L4-5 on the right, which was consistent with his symptoms. As such, he was diagnosed with a right L4-5 disk herniation with low back pain and radiculopathy. Overall, the petitioner had multiple level degenerative disk disease, but his symptoms fit clearly with his disk herniation at L4-5 on the right. A trial of epidural steroid injections and a course of physical therapy were recommended. If he did not improve, surgical intervention was an option.

On October 14, 2010 and October 28, 2010, he was given transforaminal lumbar epidural steroid injections under fluoroscopic guidance by Dr. Bardfield.

On November 1, 2010, the petitioner presented for follow up with Dr. Zindrick wherein he would remain off work and recommendations included a repeat MRI of the lumbar spine.

On November 16, 2010, the petitioner returned to Dr. Zindrick when his back pain persisted. An EMG/NCV was prescribed and he was advised to remain off work.

On November 22, 2010, an EMG/NCV was performed and the findings were consistent with chronic polyradiculopathy L4 - S1, electrophysiologically with sensory motor polyneuropathy LLE.

On December 13, 2010, the petitioner returned to Dr. Zindrick. His back pain persisted and he continued to use medications and walked with a cane. A myelogram and post-myelogram CT

was prescribed at that time. He was to remain off work.

On January 3, 2011, a myelogram was performed. It revealed, at the L4 - L5 level, the following: "There is prominent posterior protrusion of disc material, greater towards the right. This causes bilateral foraminal stenosis, greater towards the right side . . . There is also mild bilateral bony foraminal stenosis present due to posterior osteophytes." At L5 - S1 level: "There is midline posterior osteophyte/disc complex without spinal stenosis. No significant foraminal stenosis is identified.

On January 14, 2011, the petitioner was seen by Dr. Zindrick and had been involved in a motor vehicle accident on the way to Dr. Zindrick's office. He had neck pain and right shoulder pain. X-rays of his cervical spine were taken which revealed multiple level degenerative disc disease and no acute fracture or injury seen. He had a painful range of motion of his neck with 50% restriction of motion with flexion, extension and rotation.

On February 25, 2011, the petitioner saw Dr. Zindrick and he concluded the petitioner had failed conservative care and he opined that surgery would be of benefit. He proposed to limit the surgery to L4 - L5 with the goal of trying to do a laminectomy and discectomy since his prognosis was guarded due to his multiple level degenerative disc disease. Dr. Zindrick noted that if the segment was found to be unstable, it can be fused at that time and but that he would try to avoid this.

On March 24, 2011, he saw Dr. Zindrick again at which time he was continued on medications and advised not to work. Dr. Zindrick continued his prescription for the L4 - L5 lumbar laminectomy and discectomy surgery.

When the petitioner was seen by Dr. Zindrick on May 3, 2011, June 17, 2011, August 9, 2011, September 30, 2011, December 2, 2011, January 20, 2012, March 16, 2012, April 13, 2012, July 13, 2012 May 25, 2012, and August 24, 2012, his diagnosis and prescription for surgery remained unchanged.

Although the petitioner testified that he saw his family doctor "[m]aybe once every 2, 3 months" during the period of June 2, 2008 until September 10, 2010, he did not offer Dr. Christopher Brenner's records into evidence.

DR. ZINDRICK'S TESTIMONY ON MARCH 14, 2011 (Petitioner's Exhibit #6)

Dr. Zindrick is Board Certified in Orthopaedic Surgery and in Spinal Surgery. He has numerous publications and presentations. He has authored chapters in scholarly medical texts and has served as a faculty member for numerous courses.

Dr. Zindrick testified that the petitioner had completed a Patient Assessment when he first saw him on 3/18/08. On the Patient Assessment, the petitioner indicated that his pain was located in his lower back, buttocks and left leg.

Dr. Zindrick testified regarding the history the petitioner provided to him and the findings, which are contained in his several records. Those findings are outlined in detail above with the summary of his treating records.

Regarding petitioner's back complaints and symptoms, Dr. Zindrick noted that when he first examined the petitioner on 3/18/08 he had a positive SLR test on the left. His primary attention was to the large hematoma on the left thigh, which required surgical evacuation. The petitioner returned to the full duties of a truck driver on 5/5/08. The petitioner returned to Dr. Zindrick on 5/30/08 at which time he complained of increasing pain in his low back and tailbone and tingling into his gluteal area after he returned to work.

The petitioner did not return to see him until 9/10/10, which was over two years later. At that time the petitioner gave a history of his back pain worsening within six months of his original injury and of pain radiating down his right leg. He noted that since his return to work, he changed his posture sitting more on his right side and noted an increase in pain when driving extended distances and lifting while unhooking and loading trucks.

In addition to the records through 11/12/10, Dr. Zindrick noted that another MRI was performed on 11/11/10 and the findings were essentially unchanged from the MRI performed on 9/16/10. The MRI's showed that petitioner had a herniated disc on the right at L4-5 as his primary pain generator, as well as pathology at L5-S1, a protrusion on the left side, and degenerative findings at all levels.

On 11/22/10, an EMG/NCV was performed which corroborated chronic polyradiculopathy at L4-S1. This confirmed his diagnosis of a herniated disc at L4-5.

He saw the petitioner again on 12/13/10 and 1/14/11. On 1/14/11, petitioner was treated for a cervical problem as he was rear ended while driving to his office on that date. There has been no further treatment for his cervical complaints.

On 1/3/11, a lumbar myelogram was performed which confirmed a prominent posterior protrusion of disc material on the right at L4-5. A herniated disc was not confirmed at L5-S1 on the left although there were findings of posterior osteophyte/disc complex without spinal stenosis.

On 2/5/11, Dr. Zindrick felt that the petitioner had failed conservative management (he underwent two ESI's which had increased his pain bilaterally) and recommended that the petitioner undergo surgery at L4-5 for a laminectomy and discectomy although kept open the option of performing a fusion depending on what he found when he performed the surgery.

It was Dr. Zindrick's opinion that the current condition of the petitioner's back is causally related to the 2/29/08 slip-and-fall down stairs, and was also aggravated by the petitioner's work activities following his return to work after being discharged from care on 5/30/08. He noted that the petitioner had back complaints from the time he saw him on 3/18/08, although they were left-sided. Also, according to the petitioner's history on 9/10/10, his back symptoms became

progressively worse within six months following the 2/29/08 accident and he noticed pain when unloading to his right while sitting, while doing extensive driving and while lifting while unhooking and hooking his truck. It was his opinion that these work activities also could or might have been causative factors in aggravating the underlying degenerative condition. He further opined that the petitioner was incapable of working as a truck driver at this time and had been unable to do so since he saw him on 9/10/10.

Finally, he noted that Hinsdale Orthopaedics had an outstanding bill for $19,992.00 for services rendered to the petitioner for treatment, which was causally related to the 2/29/08 accident.

During cross-examination, Dr. Zindrick admitted that when he first saw the petitioner, he did not review the records from Willowbrook Medical Center for 3/3/08 and 3/5/08, which indicated a diagnosis of left gluteal and upper back contusion. When he saw the petitioner on 3/18/08, he was unaware of any upper back contusion as most of the complaints pertained to the left thigh hematoma and the back.

He also admitted that when he performed the SLR test on 3/18/08, it was mildly positive on the left. There were no right-sided complaints until he saw the petitioner over two years later on 9/10/10.

He also admitted that MR images of the petitioner's lumbar spine were not originally taken; only MR images of the pelvis were originally taken in order to evaluate the hematoma.

Dr. Zindrick testified that September 10, 2010 was the first time the petitioner saw him and complained about the right side. At that time he noted petitioner's history of worsening low back pain within six months of his injury. Dr. Zindrick dated the onset of right leg complaints at six months post accident. However, he opined that the back complaints were aggravated by the petitioner's work activities following his return to work as a truck driver.

He opined that the petitioner's main problem is with a herniated disc at L4-5 on the right. This is different than his symptoms when he treated the petitioner in 2008 although he felt the petitioner did have discogenic back pain aggravated by return to work on 5/30/08.

He noted that a myelogram was performed 1/3/11, which confirmed his diagnosis of a right sided herniated disc at L4-5 but not at L5-S1 which had noted a protrusion on the left on the earlier MRI's.

He admitted that he did treat patients who have underlying degenerative disc disease who progress to the point where surgery is necessary without having suffered trauma. He noted that petitioner had a slip-and-fall down stairs, which started petitioner's low back symptoms. These problems were noted during his treatment in 2008. The problem then became aggravated with the petitioner's return to work. Prior to his accident, the petitioner had no complaints, only afterwards. The complaints worsened after he returned to work. Accordingly, his problem was related to the 2/29/08 accident and in part due to aggravating the condition further with his work

activities.

TESTIMONY OF DR. ZINDRICK AUGUST 13, 2012 (P's Ex. #7)

Dr. Zindrick testified for the second time on August 13, 2012. Dr. Zindrick previously testified on March 14, 2011 and indicated that the petitioner's lumbar spine condition was causally related to either the specific work accident on February 29, 2008 or from repetitive trauma following the petitioner's return to work in May of 2008.

Dr. Zindrick did not review the job video during the deposition, but did so prior to beginning his testimony. Dr. Zindrick testified that the video did not change any of the opinions contained in his prior testimony. He commented that the job video reinforced his prior opinion that the petitioner's current condition is causally related to the February 29, 2008 work accident. Furthermore, it was his opinions that the petitioner was a candidate for surgery and is presently unable to work are unchanged. He has been monitoring the petitioner's condition and it remains unchanged.

On cross-examination, Dr. Zindrick testified that the petitioner's condition is causally related to the initial work accident. In his prior testimony, he indicated that it could also be from repetitive trauma. Dr. Zindrick admitted that the petitioner's job duties, as depicted in the job analysis video, were not "repetitive."

On re-direct examination, Dr. Zindrick suggested that the activity that contributed to the petitioner's current condition of ill-being was driving 5-1/2 hours each way with underlying degenerative disc disease and while altering his sitting position. He testified that the petitioner's left buttock hematoma caused him to sit in an unusual fashion and was the cause of his current complaints.

In terms of exhibits entered into evidence, the petitioner presented the written job description from Genex. He also presented a copy of spec. sheet from Hyundai for a "HT Dolly." Opposing counsel claims that this is the dolly used by the petitioner. The sheet contains facts and figures regarding the dimensions and weight of the dolly.

TESTIMONY OF DR. BABAK LAMI ON MARCH 17, 2011 (Respondent's Exhibit #3)

Dr. Lami testified to his credentials as reported on his Curriculum Vitae, a copy of which is attached as a (deposition exhibit Respondents Ex. No. 1). Dr. Lami is Board Certified as an Orthopaedic Surgeon with an interest in pediatric and adult spinal surgery. He is a member of the North American Spine Society. He confines his practice entirely to treatment of the spine. He noted that he and his partner perform over 200 surgeries annually. He devotes over 90% of his time to care of patients. He further testified that he also conducts independent medical exams that are "pretty much 100 percent for - - at the request of the employers." Dr. Lami testified that in 2010, he conducted fewer than 200 independent medical examinations.

He testified to the history, findings and review of treating records as contained in his narrative

report (Respondent's Deposition Ex. No. 2) and as recited in the summary of treatment with Dr. Zindrick above. In addition, he reviewed the additional records from Dr. Zindrick, which he had not previously reviewed including the important second MRI and myelogram.

It was Dr. Lami's opinion that although the petitioner has a right-sided disc herniation at L4-5 and has restrictions, which would prevent him from working as a truck driver, this condition is not causally related to the 2/29/08 accident. His opinion was based on the fact that when the petitioner was first treated by Dr. Zindrick from 3/18/08 - 5/30/08, virtually all of Dr. Zindrick's attention was devoted to the large hematoma on the left thigh for which surgery was performed. Dr. Lami opined that any complaints of back pain were in reference to the hematoma the petitioner suffered. Also, he noted that Dr. Zindrick was a spine surgeon and that he did not perform any investigation of petitioner's back at that time. While an MRI of the pelvis was taken shortly after the accident, an MRI of the lumbar spine was taken until over two years later on 9/16/10. Furthermore, he noted that petitioner had returned to work and had performed his regular work duties from 5/5/08 - 9/10/10, at which time he saw Dr. Zindrick for right-sided back complaints including radiculopathy.

Dr. Lami opined that such right-sided complaints were completely unrelated to the original injury, which was confined to left leg complaints with no symptoms of radiculopathy at all at that time. The symptoms on 9/10/10 were entirely new and were consistent with the normal progression of the petitioner's underlying degenerative disc disease.

Accordingly, Dr. Lami opined, this new problem was related to the petitioner's personal medical condition to his work. As far as any work activities aggravating his back, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so at this time, he would experience too much pain to be able to perform his work duties. He concluded that the petitioner's current back condition was unrelated to the 2/29/2008 accident nor to his work activities from 6/2/2008 - 9/9/2010 based upon the following factors: 1) There had been no right-sided back complaints when petitioner was first treated in 2008 and he had no radicular symptoms at that time; 2) Any symptoms the petitioner had before 5/30/2008 were confined to the left leg and were mostly related to the hematoma; 3) The right leg radiculopathy did not manifest until over two years following his 5/30/08 discharge. If he had any significant injury to his spine he would have had symptoms, i.e., radiculopathy, immediately or shortly after that; and 4) Dr. Zindrick did not feel that any back complaints warranted further investigation in 2008 and if petitioner had any such symptoms, it is very unlikely Dr. Zindrick would have missed them.

On cross-examination, the following exchanges took place:

Q: Well, isn't there a medical note from September 2010 that indicates by history the patient reported experiencing pain down into his right leg within six months of the accident in February 2008?

A: There are no - - if he had an injury to his disc that resulted in right leg radiculopathy, the record immediately after his injury would have shown that he had symptoms to that leg.

He has radicular symptoms due to a personal health issue and he waits until 2010 to see the doctor.

This is not consistent with a traumatic injury. More of progressive over time. In fact, the gentleman waits until 2010 to see the doctor. This is not consistent with a traumatic injury. More of a personal health issue and a degenerative and a gradual onset.

Q: But there is a medical note that indicates that he reported radicular-type symptoms going down the right leg within six months of the accident.

A: There is a note in 2010 that says what you just stated. (R's Ex. #3, Dep. PP. 30-31).

Dr. Lami did not dispute that the petitioner reported lower back pain to Dr. Zindrick on March 18, 2008. Dr. Lami opined that the February 29, 2008 accident did not aggravate or accelerate the petitioner's pre-existing degenerative disc disease. However, Dr. Lami conceded that someone falling down the stairs could cause a traumatic disc herniation. With respect to his work status, Dr. Lami recommended that the petitioner be placed on sedentary-type work with no bending or lifting more than 10lbs.

TESTIMONY OF DR. BABAK LAMI, M.D. DECEMBER 9, 2011 (Respondent's Exhibit #4)

Direct Examination

Dr. Lami testified that he had previously testified on March 17, 2011, at which time his CV was entered into evidence. At the time of this deposition, that CV was still up to date, he was still in the same practice, and in the same line of work. Dr. Lami recalled that at the time of his previous testimony, the petitioner had a condition of hematoma and some low back condition. Dr. Lami did not have any dispute as to the petitioner having right-sided radiculopathy in 2010. Dr. Lami reported that at the time of his previous deposition, he received a written job description and a video description.

Dr. Lami stated that his opinion was within a reasonable degree of medical and surgical certainty, and that throughout the deposition he would give all of his opinions within that standard.

Dr. Lami's medical report was entered into evidence at that time.

Dr. Zindrick also opined that the back pain could be coming from repetitive bouncing, doing repetitive bending, twisting, unhooking, and unloading the trucks. Dr. Lami reported that he did not agree with Dr. Zindrick's position. Dr. Lami found it interesting that Dr. Zindrick opined the petitioner had an acute injury, but in case it was not acute, he opined it would be repetitive.

Dr. Lami described asymptomatic disc herniations as somebody who does not have nerve pain going down his leg. So the disc herniation pushes on the nerve, which can cause pain going to the leg. That, he stated, would be symptomatic disc herniation. He also stated that an asymptomatic herniation could become symptomatic from different traumas including sneezing or twisting. However, it was possible that no particular trauma existed at all. If the symptoms came from a traumatic event, Dr. Lami opined, it would be reasonable for the symptoms to appear within days of the trauma. However, it would be unreasonable to say that the symptoms arrived within six months or a year down the line. From Dr. Lami's examination of the MRI report, it was his opinion that the problems the petitioner was having were degenerative rather than traumatic. However he did not personally review the MRI, so he was only able to give his opinion based on the review of the MRI report. He was only able to see the description by the radiologist. Based on that description, Dr. Lami opined it appeared to be a degenerative protrusion.

Written Job Analysis

Dr. Lami was given a copy of a written job analysis from Genex. He described the job summary as the driver taking a load from the origin site and delivering it to the destination, which was listed as St. Louis, switching the trailers with another driver, and bringing a new trailer back to the original location. The job usually lasted eleven hours per day, depending on traffic, five days a week. Based on that job description, Dr. Lami opined that there was nothing repetitive in nature that would cause the petitioner's symptoms. Rather, the petitioner was sitting in a cab, driving the truck. This was not, in Dr. Lami's opinion and most medical doctors' opinion, a repetitive action.

Dr. Zindrick described the petitioner's job as repetitive lifting, bending, twisting, unhooking and loading of trucks, and bouncing around in the cab of a truck in an altered sitting position. It was Dr. Zindrick's opinion that all those things could contribute to aggravation or worsening of the petitioner's back condition. Dr. Lami disagreed with that opinion. He believed that a factory line worker, who would be loading/unloading thirty times per minute, would have a repetitive motion. However, the petitioner was not engaging in any repetitive action here. He was driving most of the day, and was hooking and unhooking twice a day. In terms of discomfort from gluteal hematoma, Dr. Lami believed that was an unfounded opinion. Hematomas are very common and resolved, and the petitioner was asymptomatic. Because a hematoma is just a bleeding underneath the skin, which absorbs and goes away, there should not be any altered sitting position or discomfort from a hematoma. Further, the petitioner's hematoma had resolved by the time he was initially released from care in May of 2008.

Video Job Analysis

Dr. Lami had an opportunity to review the video job analysis. While watching the video, Dr. Lami noted that the driver backs up the truck and connects the electric cables to the trailer from the truck. This occurs at each changing, which would be twice a day. The driver uses the crank to lower the trailer, and he rotates his arm in cranking. Next, the driver opens the hood to inspect the engine and closes the hood. Then, the driver uses the crank in the reverse direction, the legs

are lowered to the ground and he is standing slightly bent, in this case he uses both arms while the cables are disconnected. Once the cables are tucked away, the driver drives the truck away, disconnecting the trailer. During all of these actions the driver was mostly standing. Dr. Lami noted that the driver did, at one point, flex his lower back to thirty, forty degrees to lift it up, but again, he was mostly standing. Once the driver arrives at his destination, he connects the trailers and reconnects the cables. At that time, he goes under the trailer, inspects the lower part, and uses the crank again. Dr. Lami noted that even though the petitioner had to engage in a cranking motion twice a day, there was nothing about that task that could have aggravated a preexisting back condition.

Regarding Dr. Zindrick's Report

Dr. Lami was asked about Dr. Michael Zindrick causation opinions. On direct examination, the following exchange took place:

Q: Doctor, I want to show you page 54 of the deposition from Dr. Zindrick that you previously reviewed. Would you please look at the answer portion of that page and read that into the record?

A: Dr. Zindrick said, "Well, the symptoms can change, and clearly he did not have right leg radiculopathy when he first saw me. He did have back pain. He had ongoing back pain that ultimately evolved into right leg discomfort or right leg pain and discomfort with a right-legged disc herniation. Now, traumas can result in weakening of the disc fibers, the annulus, and over time it can evolve into a full-blown disc herniation."

"So, between, as I mentioned earlier, the combination of the fall resulting in an ongoing chronic bachache, then this gentleman returns to his job of vibratory exposure, sitting abnormally, repetitive bending, twisting, lifting, loading and unloading trucks, hooking and unhooking trailers."

"A combination of those factors could very easily, and very consistent with medical knowledge of how disc herniations occur, result in the progressive disc herniation six months down the line and the onset of leg symptoms; and as time goes on, it's gotten worse."

Q: Now doctor, we've just discussed that you reviewed the written Job Analysis and the video Job Analysis for the Petitioner's job. Taking those into consideration, do you agree or disagree with Dr. Zindrick's opinion?

A: I don't agree, and I don't see how he can give this opinion based on reasonable medical and surgical certainty.

Q: Could you explain why you don't agree with that?

A: Because having degenerative changes in the general population is very common, and the degenerative changes can weaken the fibers of the disc. In addition, his previous MRI after his

injury showed diffuse spondylitic changes. Although there was a right-sided disc herniation at L4-L5, there was also left-sided (sic) disc herniation at L5-S1.

How can you tell me, based on a reasonable degree of medical certainty, that the fibers were weakened by a particular event, which didn't result in radiculopathy, not caused by degenerative changes, which are more consistent with natural history and the way he presented to providers?

So, the fact that the patient had no symptoms coming from the disc, no one can say, based on a reasonable degree of medical certainty, that anything was from that disc months or a year later. (R's Ex 4, pp. 19-21)

In conclusion, Dr. Lami opined that the petitioner's low back condition was not related to any injury or activities of employment, and that it was due to his personal health and degenerative changes.

Cross-Examination

Dr. Lami reported that the only examination he had of the petitioner was on November 12, 2010. His October 12, 2011 addendum was solely based on some additional medical records that he reviewed regarding the petitioner, the written job analysis with which he was provided, the videotape job analysis, and his review of Dr. Zindrick's deposition transcript.

Dr. Lami noted that during his original deposition, he did not disagree with Dr. Zindrick's diagnosis or his treatment options. Dr. Lami noted that at the time he saw the petitioner, he only knew that the petitioner was a truck driver. He was not aware at that time that the petitioner had to engage in hooking or unhooking of the truck as a part of his job description. Dr. Lami did not learn of these requirements until he saw the video following his evaluation of the petitioner.

Dr. Lami was asked to review the video job analysis once again. This time, his testimony was focused on the driver's cranking. Dr. Lami indicated that he did not know how much force was needed to operate the crank, since the video did not show any numbers. Therefore, the amount of force needed to move the crank could vary based on certain conditions including different weather conditions, the weight of the specific load or the different positions of the trailer. Even so, from the video, Dr. Lami opined that the force appeared to be not very significant either with one hand or two. He believed it was within the petitioner's capability. Dr. Lami reported that in terms of the other activities the driver was performing in the video, it was difficult to know how much force was being used since the video does not indicate any weight measurements. However, he agreed that the driver in the video appeared to be using some resistance, and force. Dr. Lami was hesitant to say that it was "possible" for the repetitive cranking the petitioner had to do had a cumulative effect on his back condition.

Dr. Lami agreed that the driver in the video had to move a three thousand pound dolly by lifting the front end of the dolly in order to connect it to the trailer, and then lifting it again to disconnect it. While doing this, the driver used both hands and arms and was bent over. When asked whether it was possible that the petitioner's lumbar condition resulted from the repetitive

action of working with the dolly over a period of two and a half years, having to maneuver, lift, push, pull, and place that dolly at least one hundred times, Dr. Lami opined that while anything was possible, he did not believe that lifting one hundred times in the period between May, 2008 and September, 2010 could cause the petitioner's back issues. Dr. Lami agreed that it was possible that his personal definition of repetitive activity was different from that of Dr. Zindrick's as well as any other doctor. However, he emphasized that he was giving his opinion based on a reasonable degree of medical and surgical certainty.

Dr. Lami was asked to review the job analysis. He noted that under the heading "pre-trip inspection", a driver was instructed to pull the hood forward to open by using his legs as leverage. He was to place his foot on a bumper of the truck and pull the hook back. He was to check the levels of fluid and push the hood shut when finished. In order to shut the hood, the driver was to use his leg and arms as leverage to prevent the hood from slamming thus. Under the "arriving to origin location" heading, a driver was advised that he may need to pick up the dolly in order to physically connect the dolly to the trailer. In order to do this, the driver was to use two hands, physically move the dolly (the dolly is on wheels) to the trailer, and connect the wires. Based on that description, Dr. Lami agreed that part of the petitioner's job was to physically move and connect the three thousand pound dolly.

Dr. Lami also opined that the hematoma that the petitioner had sustained on February 29, 2008 had resolved by the time Dr. Zindrick last saw him on May 30, 2008 (Yet, the May 30, 2008 Progress Note indicates that the petitioner experienced tenderness, tingling and numbness over the left gluteal region on that date).

Re-Direct Examination

Dr. Lami reported that as of the present date, December 9, 2011, he did not have any information or reason to dispute Dr. Zindrick's treatment of the petitioner. Further, he did not have any reason or basis to dispute his diagnosis of the petitioner's condition. However, Dr. Lami did not agree with Dr. Zindrick's opinion as to the cause of the petitioner's low back condition.

Dr. Lami was asked to review the "crank section" of the physical demand/ tools and equipment section of the job analysis. Based on his review, he stated that it took approximately three to fourteen pounds of force in order to move the crank. That three-to-fourteen pound range accounted for the variables that Mr. Januszkiewicz spoke about during his cross-examination. Further, Dr. Lami noted that the hood weighed about twenty-four pounds as described in the job description. Finally, Dr. Lami noted that although the dolly itself weighed three thousand pounds, Dr. Lami had never met anybody who could lift three thousand pounds, and he had never given anybody a three thousand pound lifting restriction when they went back to work. In other words, he reported that while the dolly itself weighed three thousand pounds, the driver is not actually lifting three thousand pounds. The dolly is on wheels.

Dr. Lami reported that he is a diplomat of the American Board of Orthopaedic Surgeons, and that he keeps up with his research and literature related to his practice.

Re-Cross Examination by Mr. Januszkiewicz

During re-cross examination, the following exchange took place:

Q: Doctor, again, it sounds like you're saying it's impossible that the repetitive activities in Mr. Wisniewski's case would have aggravated or exacerbated or accelerated his preexisting condition; correct?

A: Very close to it, yes.

Q: It's impossible from a medical standpoint, based on the question just asked you by counsel?

A: Correct. (P's Ex 4, pp. 55-56)

Dr. Lami agreed that the petitioner did not have to pick up the dolly itself and merely engaged in pushing and pulling the dolly that was on wheels.

CONCLUSIONS OF LAW:

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

F. IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The petitioner testified that following his February 29, 2008 accident, he was released to return to regular-duty work by Dr. Zindrick on May 5, 2008. He returned to work at that time and performed his regular work duties. He next saw Dr. Zindrick on May 30, 2008. X-rays of his back showed some minor degenerative changes. He complained of increasing pain into his lower back and tailbone area since his return to work. Dr. Zindrick offered the following impression: "Diskogenic back pain aggravated with return to work, still soft tissue complaints associated with a hematoma and resolution of the contusion to his gluteus and buttock area."

Although Dr. Zindrick's "impression" was diskogenic back pain, he did not conduct a straight leg raising test or order a lumbosacral MRI. Moreover, the petitioner was able to toe-walk and heel-walk.

The petitioner testified that at some point after his back started bothering him, his dispatcher took care of him and had spotters perform the hooking and unhooking of trailers.

The petitioner next saw Dr. Zindrick on September 10, 2010, which was more than 27 months later. At that time, the petitioner followed up with Dr. Zindrick for complaints of increased pain in his lower back. The petitioner described a worsening of his lower back pain and within six months of his original injury, pain that radiated down his right leg and has progressively worsened. He told Dr. Zindrick that his symptoms were worse with sitting too long, bouncing in his truck, and walking greater than 10 feet after sitting. He further related that while he was recovering from his gluteal injury, he had to change his sitting position. He put more weight on his right side, and this was associated with increased back pain. He also associated his progressively-worsening back pain with the significant lifting he performed when hooking and unhooking dollies, opening the truck hood and driving extended distances. X-rays of his back showed significant degenerative changes in his lumbar spine. Dr. Zindrick's offered the following impression: "Back pain with radiculopathy." Dr. Zindrick ordered an MRI of the lumbar spine and prescribed a trial of Medrol Dosepak followed by Relafen with Norco for pain. Dr. Zindrick opined that the petitioner was unable to return to work. He opined that the petitioner's current complaints and symptoms were related to his previous work-related injury.

In this case, 11 WC 17794, the petitioner alleges that on September 10, 2010, he sustained an injury that arose out of and in the course of his employment by the respondent and that his current condition of ill-being of his lumbar spine is causally related to this accidental injury. The petitioner alleges that he suffered a repetitive trauma with a manifestation date of September 10, 2010.

During his first deposition, Dr. Zindrick testified, on direct examination, as follows:

Q: And you testified it was your understanding he had returned to his regular work activities; correct?

A: That's correct.

Q: Doctor, do you have an opinion within a reasonable degree of medical and surgical certainty whether Mr. Wisniewski's work activities after May 30th, 2008, and when he returned to you - - I'm sorry, his work activities after May of 2008 when he returned to work as a truck driver, and between that period and when he returned to you in September of 2010, do you have an opinion as to whether or not the work activities might or could have caused, aggravated, accelerated, in whole or in part, the condition of Mr. Wisniewski's low back and for which he sought treatment with you?

A: Yes.

Q: And what is your opinion?

A: I think that's certainly more likely than not the case, in that in his history as he described it is clear on that that he did repetitive lifting, bending, twisting, unhooking and loading of trucks, in addition spent time bouncing around in the cab of the truck in an altered sitting position often times due to his prior gluteal discomfort. All of those things would contribute to aggravation or worsening of a back condition. (P's Ex 6, pp. 30-31)

The Arbitrator notes that the petitioner testified that he "never had to touch any freight or anything like that", and that "[e]verything was sealed", i.e., the truck was sealed.

Before Dr. Zindrick offered his opinions during his second deposition (P's Ex 7), petitioner's counsel asked him to review the job analysis video (R's Ex 5), the Genex job analysis (R's Ex 1) and the specifications of the HT dolly (P's Ex 12). Dr. Zindrick then testified, with the understanding that the petitioner drove approximately 11 hours a day, that the vibration associated with driving coupled with the abnormal position when sitting (during the hematoma recovery), can aggravate or accelerate the petitioner's back condition. Furthermore, Dr. Zindrick testified that assuming the arbitrator determines that the Genex job analysis and job analysis video are accurate representations of petitioner's duties, he continues to hold the same opinions that he held during the first deposition.

On cross-examination of Dr. Zindrick, the following exchange took place:

Q: Just to clarify, you mentioned earlier the activities you saw on the video in the context of the petitioner's workday (sic), you would not qualify that as repetitive. Correct?

A: It wouldn't be what I would call a repetitive activity such as somebody who did that day in and day out, those activities, many times or hundreds of times a day, no. I wouldn't call it repetitive.

Dr. Lami agreed with Dr. Zindrick that there was nothing repetitive about the work that the petitioner performed since he returned to work on May 5, 2008.

In terms of aggravating his back by his work activities, Dr. Lami opined that the degenerative disc disease was progressing and that the petitioner simply noticed pain while engaged in activity. It was for that reason that he felt the petitioner was unable to work since if he did so, he would notice too much pain to be able to perform his work duties.

On redirect examination of Dr. Zindrick, the following exchange took place:

Q: And, Doctor, you have previously testified about the interrelationship of the original - -And this is in response to your question on cross that I know is beyond my direct but I have to inquire. You have previously testified about the relationship between A, the original trauma that this gentleman sustained when he fell down the stairs and B, the work he performed upon his return to work, in particular during that six months. Can you briefly describe what role the work that he performed in the ensuing six months upon his return to work had when superimposed on the earlier trauma?

A: Well, again when he first fell he complained of some back pain as well. Most of the pain was in his buttock and we repaired or drained the buttock hematoma. He has a dead space; he has fibrous tissue. He has a large area that's now going to be scarred and painful. And now he returns to work and is going about his normal routine and sitting on this surgical area for as we have gone over today down and back from St. Louis on a daily basis. That would be uncomfortable. And alterations in the sitting posture can - - will definitely load the spine differently and can make previously asymptomatic conditions symptomatic or minimally symptomatic conditions worse. And I would challenge any one of us to sit, you know, off of one buttock for a five-and-a-half-hour period intermittently on a drive to St. Louis and back every day and not have a back ache (sic), especially with underlying degenerative disc disease. It just doesn't make sense.

Clearly, Dr. Zindrick viewed the petitioner's driving, especially during the time he was recovering from the gluteal hematoma, as the "repetitive" activity that could or might have aggravated the petitioner's underlying degenerative disc disease and led to the L4-L5 herniation.

Dr. Lami opined that the activity of driving a truck would not constitute, or result in, repetitive trauma.

The Arbitrator places great weight on the fact that other than the history he gave to Dr. Zindrick 2-1/4 years later and thereafter, the petitioner has not provided any documentary evidence that his back pain began to worsen during the 6-month period after the accident, or that his radicular,

right leg pain began at that time. The petitioner treated with Dr. Brenner every 2-3 months during 27-month period . . . and yet, he did not offer Dr. Brenner's records into evidence.

The Arbitrator draws the reasonable inference that Dr. Brenner's records do not support the petitioner's workers' compensation claim.

Furthermore, a review of the Adventist LaGrange Memorial Hospital reveals that although the petitioner treated for other conditions during this 27-month period, there is no mention of low back pain or radicular right leg pain in such records.

Accordingly, the Arbitrator concludes that the petitioner failed to prove that he suffered an accidental injury as a result of repetitive trauma that manifested itself on September 10, 2010, and the petitioner failed to prove that his current condition of ill-being is causally related to the alleged accident.

Please see Robert D. Williams v. Indus. Comm'n, 244 Ill.App. 3d 204, 614 N.E.2d 177 (1st Dist. 1993).

Therefore, compensation is hereby denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RIGOBERTO RODRIGUEZ,

Petitioner,

14IWCC0353

vs. NO: 08 WC 04096

CARLANDER DRYWALL CONTRACTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was a Drywall Hanger for Respondent. A sheet of drywall weighed 140 pounds. He lifts them alone, unless he is placing drywall on the ceiling, in which case he has help. He worked 40 hours per week.

2. On May 26, 2006 Petitioner was placing drywall in a garage. After thinking he had securely screwed it into the wall, Petitioner bent down to pick something up. While trying to stand up, the drywall fell down on top of Petitioner. He felt a pinch in his low back, but ignored it. After lunch he was unable to stand up after having sat down to eat.

14IWCC0353

He required assistance in standing.

3. Petitioner treated at Lansing Chiropractic on June 14, 2006. His treatment consisted of traction, chiropractic manipulations and an ultrasound. On July 6, 2006 he was sent for a lumbar MRI. An orthopedic surgeon named Dr. Khan examined him on July 29, 2006 and recommended an EMG and returned Petitioner to work with medication, a brace and light duty restrictions. Petitioner underwent the EMG August 9th, and was then referred by Lansing to Dr. Earman on August 25th. Dr. Earman prescribed therapy and medication. On September 29, 2006 Dr. Earman administered an injection in Petitioner's low back. In October 2006 Dr. Earman returned Petitioner to full duty.

4. On December 21, 2006 Petitioner presented to Dr. Earman with complaints of increased low back pain. Petitioner was referred to Dr. Carabene, who recommended a discogram on December 21, 2006, which Petitioner underwent January 30, 2007. Petitioner then underwent a CAT scan. On February 7th Dr. Earman recommended surgery. On April 25, 2007 Dr. Heim recommended a two-level fusion. After reviewing another MRI on July 18, 2007, Dr. Heim scheduled Petitioner for surgery, which occurred July 26, 2007. Upon follow up, Dr. Heim prescribed medication and x-rays and told Petitioner to wear a back brace for 6 weeks. On September 19th Petitioner was told to discontinue wearing the brace and was started on a different medication and physical therapy.

5. Approximately 5 weeks later Petitioner began work hardening. After completing it he underwent an FCE. On December 11, 2007 Dr. Heim recommended Petitioner return to work for 6 weeks within the restrictions of the FCE. After a January 23, 2008 CAT scan Petitioner was returned to light duty.

6. Petitioner visited Dr. Earman February 8, 2008, who also released him to light duty with physical therapy and medication. At this point, Respondent had no light duty available, however. Petitioner continued treating with Dr. Earman through February 6, 2009. At that point he was referred to Dr. Huddleson for pain management on February 16, 2009. He has not seen him since as Respondent did not authorize further treatment.

7. On January 18, 2010 Dr. Earman issued restrictions of no repetitive bending and lifting ladders and overhead activity, with weight restrictions of 20 pounds.

8. On February 21, 2011 Petitioner saw Dr. Huddleston and complained of low back pain. He was prescribed Percocet and Oxycontin. One month later the prescriptions were renewed.

9. In April 2011 Petitioner was recommended for a spinal cord stimulator, which was never approved by Respondent.

10. On June 21, 2011 Petitioner was hired at P.F. Chang's as a part-time dishwasher for

$9.50/hr. The job required standing, bending, turning, twisting. Petitioner stated that he told P.F. Chang's of all work restrictions prior to being hired. Once he began working for P.F. Chang's, Petitioner began to notice increased low back pain radiating to his legs. He was terminated in the beginning of July, as he was unable to perform his duties.

11. Jackie Ormsby, a vocational rehab counselor, interviewed Petitioner with assistance from an interpreter. Ms. Ormsby opined that the P.F. Chang's Dishwasher position was above his work restrictions. It required him to stand 5-6 hours. An August 2012 Functional Capacity Evaluation revealed that Petitioner could only perform light to medium physical demand level work. He was able to work 8 hours, but stand for only 4, in 35 minute increments.

12. In June and July of 2011 the union pay scale for residential Drywallers such as Petitioner was $33.47/hr. On October 1, 2011 the scale was $31.37/hr., through September 30, 2012. On October 1, 2012 the scale rose to $32.12/hr.

The Commission affirms the Arbitrator's rulings on causal connection and nature and extent.

The Commission, however, modifies the Arbitrator's ruling on the wage differential. The Arbitrator used the yearly union rate of pay for a Drywaller and the $9.50 per hour rate of pay at P.F. Chang's to calculate Petitioner's wage differential. The Operating Partner at P.F. Chang's stated that a dishwasher could work up to 40 hours per week. The Culinary Partner at P.F. Chang's stated that an evening dishwasher would work 30-38 hours per week. The Arbitrator used the 40 hours per week alluded to by the Operating Partner in calculating wage differential. The Commission views the evidence slightly differently. With no valid evidence pointing to a specific amount of weekly hours worked in order to calculate the wage differential, the Commission takes the average of the two Partners' statements, which is 35 hours per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner a wage differential based on two-thirds of the difference between Petitioner's potential rate of pay as a Drywaller and the $332.50 per week Petitioner was earning while employed with P.F. Chang's. The $332.50 is based on Petitioner earning 9.50/hr. at P.F. Chang's while working 35 hours per week. The differential amount is still subject to the wage differential dates provided in the Arbitrator's Decision (which adhere to the fluctuating Drywaller pay scale mentioned in paragraph 12 above).

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 $32,200.00. 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: MAY 0 5 2014
O: 3/6/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RODRIGUEZ, RIGOBERTO
Employee/Petitioner

Case# **08WC004096**

14IWCC0353

CARLANDER DRYWALL CONTRACTORS
Employer/Respondent

On 5/29/2013, 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:

1836 RAYMOND M SIMARD PC
221 N LASALLE ST
SUITE 1410
CHICAGO, IL 60601

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0353

Rigoberto Rodriguez
Employee/Petitioner

Case # 08 WC 4096

v.
Carlander Drywall Contractors
Employer/Respondent

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Falcioni, Arbitrator of the Commission, in the city of New Lenox, on 5/14/13. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

J. [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 [x] 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 5-26-06, 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. See attached Memorandum Arbitration Decision.

In the year preceding the injury, Petitioner earned $65,686.92; the average weekly wage was $1,263.21.

On the date of accident, Petitioner was 34 years of age, married, with 3 children under 18.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $23,339.69 for maintenance, and $59,563.91 for other benefits, for a total credit of $82,903.60.

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

ORDER

The Arbitrator finds the prescriptions of $515.390 are not reasonable and necessary. See Memorandum Arbitration Decision.

The respondent shall pay petitioner maintenance benefits of $842.14 per week for 27-5/7th weeks, commencing on December 15, 2010 through June 26, 2011 as provided in Section 8(a0 of the Act. See Memorandum Arbitration Decision.

The respondent shall pay petitioner permanent partial disability benefits of $636.53 a week from June 27, 2011 through September 30, 2011 representing 13-5/7th weeks because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

The respondent shall pay permanent partial disability benefits of $583.20 a week from October 1, 2011 through September 30, 2012 representing 52 weeks because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

The respondent shall pay petitioner permanent partial disability benefits commencing on October 1, 2012 of $603.20 a week for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8(d)1 of the Act.

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

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

Nhal E Johnson
Signature of arbitrator

May 27, 2013
Date

ICArb

MAY 29 2013

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rigoberto Rodriguez,	)	
	)	
Petitioner,	)	
	)	
vs.	)	08 WC 4096
	)	
Carlander Drywall Contractors Inc.,	)	
	)	
Respondent.	)	

MEMORANDUM ARBITRATION DECISION

FINDINGS OF FACT

This case was previously tried on November 19, 2009, November 15, 2010 and December 14, 2010 pursuant to Section 19(b). An Arbitration decision was filed on January 11, 2011 finding a causal relation between the accident of May 26, 2006 and the petitioner's current condition of ill-being. Maintenance benefits were awarded at $842.14 per week for 21-6/7th weeks from September 14, 2009 through November 19, 2009 (9-4/7th weeks) and September 20, 2010 through December 14, 2010 (12-2/7th weeks). In addition there were awards for medical expenses, attorney fees and additional compensation as provided in Sections 19(k) and 19(l). The Commission affirmed the decision on February 16, 2012, 12 I.W.C.C. 0171.

The present hearing involved multiple witnesses who testified by deposition and the testimony of the petitioner. A summary of the witness testimony follows.

The petitioner testified vocational rehab started again in February 2011 with Med Voc. It had stopped since September of 2010. The petitioner met with Diamond Warren. She provided him job leads. He submitted employer contact sheets to Ms. Warren. These covered the period from February 2011 through July 2011 (P. Ex. 1; R. Ex. 5).

The petitioner estimated he provided resumes and applications to approximately 60 employers. He estimated he gave only resumes to 30 employers and only job applications to 25 employers. He did not always leave a job application. Not all employers were accepting them. He testified he always tried to leave an employment application. On the employer contact sheets he made notes as to whether he left a resume, application or both.

A job lead was provided by Diamond Warren for P.F. Chang's on June 21, 2011. This was for a dishwasher job paying $9.50/hr. that was part-time. There was no schedule of the hours he would work a week. A paper was put on the wall advising who would be working the following

day. He testified he worked 3 days the first week and one day the second week. He stated the job required that he stand, turn and bend because the dishwasher machine was big. He had to move the plates and to do this, he had to twist and bend. He twisted continuously. He worked evenings. He noted increased pain near the surgical area and above it that radiated into his legs from working. As a result, he would sit down. He was terminated because he could not do his job.

A letter was sent in July 2011 advising that MedVoc was stopping vocational rehabilitation. He testified he was willing to work with MedVoc at that time. He has not heard from MedVoc since July 2011. He admitted he has not looked for any employment since July 2011 stating that because of his restrictions, he does not know what he could do and he does not know where he could look.

At the time of his accident on May 26, 2006, he was a member of the union doing residential carpentry work. The parties agreed to the union pay scale wages for the applicable periods of time. The parties stipulated that as of July 2011, the hourly rate was $33.37. From October 1, 2011 through September 30, 2012, the hourly rate was $31.37. From October 1, 2012 to September 30, 2013, the hourly rate is $32.12. He was a member of the union 24 years. A regular schedule was 40 hours, 5 days a week. He claimed work was always available.

He testified that he had various appointments with Dr. Huddleston and would tell him what he noticed about himself. On February 21, 2011, Dr. Huddleston prescribed Percocet and OxyContin. On March 21, 2011, Dr. Huddleston continued those medications and added Ambien to sleep. On April 14, 2011, the petitioner described the side effects from OxyContin (dizziness). Dr. Huddleston put him on Morphine and recommended a trial spinal cord stimulator at either Rush or Northwestern. On June 30, 2011, Dr. Huddleston again recommended the spinal cord stimulator and this was not approved. On July 18, 2011, Dr. Huddleston renewed the prescriptions and added new work restrictions.

At the request of the petitioner's attorney, the petitioner went to Dr. Huddleston to get a note for an FCE. That was done on August 21, 2012. He saw Dr. Huddleston on September 10, 2012. He was released to work based on the FCE. He continued with Morphine and was now on a Fentanyl patch. On September 26, 2012, a vocational assessment was performed by Jackie Ormsby at the request of his attorney. He saw Dr. Huddleston on January 8, 2013. Dr. Huddleston conducted an examination and prescribed medications.

On February 28, 2013, he told Dr. Huddleston he was having more pain in his back and the area of the surgery, above it and into his legs, particularly his right leg down to his knee.

He has 6 years of education that took place in Mexico. He testified to experiencing an increase in pain with walking, sitting and standing. Morphine and Fentanyl help a little. He identified Exhibit #9 as prescription bills which he paid. He has not been reimbursed for them.

He has not seen Dr. Earman, his orthopedic physician since September 16, 2010.

At the office visit on February 21, 2011, Dr. Huddleston's notes states he was not recommending injections. These had been previously awarded by the Arbitrator and were part of the Decision. Dr. Huddleston instead prescribed medications. The petitioner could not explain the reason for the change. He admitted that on July 18, 2011 that this was the first time Dr. Huddleston issued work restrictions. The reasons for the restrictions were the petitioner's complaints of pain. He admitted that from December 7, 2007 until the FCE his attorney arranged, none of his doctors ordered an FCE. He told Dr. Huddleston on January 18, 2013 that his pain was controlled by medications. He claimed that he told Dr. Huddleston about the automobile accident in March of 2012.

On vocational issues, he admitted he is 41 years old. He had job interviews during the most recent VR sessions. These were at Advanced Auto Home Cleaning Centers of America, Motel 6 and Pro Clean in addition to Chang's. He admitted Ms. Warren provided certain job leads. He admitted he had to conduct job search on his own and make 10 contacts a week. He admitted that he was advised to do volunteer work at St. Joseph's Church at a soup kitchen and refused on advice of his attorney.

He interviewed with Peter at Chang's., They discussed a dishwashing job. He admitted telling them he had a 40 pound lifting restriction. He claimed he told him he had other restrictions. He admitted he was offered a job at $9.50/hr. He admitted there was no significant lifting. He admitted it could go from part-time to full time. He started on June 27, 2011. He testified to leaving work early the second day he worked at Chang's and that his employer told him to leave early. He left early because he was in pain.

He admitted an exam with Dr. Candido on September 6, 2011. Dr. Candido took photos of his back. The interview was conducted in Spanish.

He claimed the FCE of August 21, 2012 was reviewed by Dr. Huddleston who said he was okay to work. He has not conducted any type of job search. He testified Ms. Ormsby did not did not provide him any job leads. He testified he can drive and has no restrictions on his license. He was involved in an auto accident in March 2012 and his vehicle was totaled. He identified 2 photographs of the car. (R. Ex. 26, 27). He continues to receive weekly payments.

He applied for a pension from his union on September 30, 2011. He was denied Social Security benefits in November 2008. On the pension application he listed his retirement date as November 1, 2011. He had to apply for a disability pension because he was not age qualified for a retirement pension. On the application he marked a box stating he did not plan to continue working after his pension begins. He receives a pension of $1,213.00 a month. He admitted he was denied Social Security Disability. (R. Ex. 24)

Julie Bose testified by depositions taken on November 11, 2011 (R. Ex. 10), January 25, 2012 (R. Ex. 11) and March 12, 2013 (R. Ex. 13). She prepared reports between April 5, 2011 and July 28, 2011 (R. Ex. 1). Ms. Bose has been a certified vocational rehabilitation counselor since 1983 (R. Ex. 10 p. 4, R. Ex. 2). Vocational rehabilitation services with MedVoc started again in February 2011. She prepared her reports, (R. Ex. 1) based on information provided by Diamond Warren MedVoc's job placement specialist who worked with the petitioner. (R. Ex. 10 p. 6-8).

MedVoc's role was to provide vocational services and retraining; however, English as secondary language classes were not available at the time. (R. Ex. 10 p. 9) In part, the petitioner's was required to conduct an independent job search contacting a minimum of ten prospective employers per week, five in person documenting that search and providing it to MedVoc weekly. (R. Ex. 10 p 10) Several times he did not meet the five in person contacts and did not fill out applications with each employer that indicated he could complete an application. (R. Ex. 10 p. 10-11)

Ms. Bose targeted positions that did not involve extensive written communication in English and those that could accommodate the petitioner's 40 pound lifting restriction. Examples were maintenance positions, porter positions, auto parts counterman positions and different office cleaning positions. (R. Ex. 10 p. 11-12) MedVoc prepared a resume for Mr. Rodriguez (R. Ex. 4) with his assistance. (R. Ex. 10 p. 20)

As part of her responsibilities Ms. Warren reviewed the petitioner's job seeking skills, spent time going over how to present himself at interviews and assisted in submitting applications on line. (R. Ex. 10 p. 13-14) The petitioner had job interviews in March 2011 and April 2011 at Home Cleaning Center and Advanced Auto. (R. Ex. 10 p. 140-16) Ms. Bose issued a report dated April 5, 2011 in which she noted they were waiting for a call back from the two interviews and recommended continued vocational services. She further recommended the petitioner complete more job applications. (R,. Ex. 1, and 10 p. 16-17)

Ms. Bose recommended volunteer work because it would help fill a gap in the employment history, show prospective employers initiative, develop relationships and contacts and help for the petitioner's work stamina. A position at a soup kitchen was recommended but the petitioner declined on the advice of his attorney. (R. Ex. 10 p. 17-18, R. Ex. 1 4/5/11) An interview was arranged with Motel 6 for a maintenance position on May 12, 2011 . Although the petitioner interviewed well the employer hired another person. (R. Ex. 10 p. 20-21; R. Ex. 1 5/7/11)

Ms. Bose noted that during the month of April 2011 the petitioner needed to be more aggressive in his job search. She observed that during the week of April 8, 2011 he submitted one application. The week of April 15, 2011 he completed three. The week of April 22, 2011 he completed one application. The week of April 29, 2011 he completed two. (R. Ex. 10 p. 21; R. x. 1 5/7/11) She also noted that many of his employer contacts were by telephone instead of in person. She noted that when an employer told him to come in and complete an application he was not doing that. (R. Ex. 10 p.21-22)

The decision was made to target dishwashing positions because there were within his restrictions and unskilled. (R Ex. 10 p. 23-24) Ms. Warren identified such a position at a P. F. Chang's restaurant. The petitioner interviewed for the position and accepted it. He reported it was part time to start and depending on the success of the worker had the potential for full time. Ms. Bose testified it started at $9.25/hour. The petitioner's employment lasted only two weeks. He left early his second day complaining of pain. He went home early twice in the first week. He told Ms. Warren he was terminated because he could not keep up with other workers. (R. Ex. 10 p. 26-28)

Ms. Bose described problems during this time period with the petitioner's job search in addition to the situation with P. F. Chang's. Following up on job leads resulted in the discovery that phone numbers the petitioner listed were disconnected, contact persons identified were not employed and issues on failing to submit an application. Because of these problems and the termination of employment at Chang's she recommended suspension of vocational rehabilitation for a lack of cooperation. (R. Ex. 10 p. 30-31)

Ms. Bose held the opinion that the position at P. F. Chang's was suitable employment which would allow the petitioner to gradually work up his work tolerance since it had been so long since he had worked. She did not think the petitioner made a reasonable effort to perform the job. MedVoc had advised him not to leave work early. In her opinion his complaints of pain and inability to keep up were in his control and led to his dismissal. (R. Ex. 10 p. 31-32) Ms. Bose also testified the petitioner has the ability to seek employment on his own based on the training he has received with MedVoc. She had no documentation of any standing restrictions issued by the petitioner's doctors. She did not think it would be reasonable to provide further vocational services. (R. Ex. 10 p. 32-34; R. Ex. 1 7/28/11)

On cross examination Ms. Bose she conducted the initial vocational assessment and has seen the petitioner on a few occasions since. She agreed Ms. Warren has done the job placement. (R. Ex. 10 p. 34-35) She believed the most recent FCE she reviewed was conducted in 2007 and she may have reviewed it in 2010. (R. Ex. 10 p. 39) She testified it was after the second day at Chang's the petitioner reported to Ms. Warren that he went home early because of pain with prolonged standing. She had a general idea of the bending, lifting and stooping requirements based on her experience as a vocational counselor and the dishwasher dictionary of occupational title description. She was also aware the petitioner explained his work restrictions and the employer agreed to accommodate them. (R. Ex. 10 p. 46-47) She was asked to review the WCS work conditioning report of February 20, 2008. (R. Ex. 21) She found no note indicating they measured the petitioner's standing tolerance.

Diamond Warren testified by deposition on January 27, 2012. (R. Ex. 13) She is a job placement specialist who worked with the petitioner from the start of vocational services with MedVoc back in 2010. She assists clients in finding work within physical restrictions, assists them with interviewing, provides job leads and updates files for supervision with the case manager. She has been with MedVoc since April 2009. (R. Ex. 3 and R. Ex. 13 p. 6-7)

She met with the petitioner on February 24, 2011 and reiterated the job placement protocol describing MedVoc's responsibilities and what his responsibilities were. Mr. Rodriguez was familiar with this from the previous times MedVoc worked with him. Ms. Bose was the case manager. (R. Ex. 13 p.7-9) The strategy was to target maintenance positions, light office cleaning positions, counterparts and clerk positions and customer service positions in Spanish speaking areas. (R. Ex. 13 p. 10) She assisted him in preparing job applications, guidance on interviews and how to explain his work restrictions. Her understanding was that he had a 40 pound lifting restriction. (R. Ex. 13 op. 11)

She recalled he had about five interviews during this time period with Advanced Auto Parts, Home Cleaning Centers, P. F. Chang's, Pro Clean and Motel 6. The details of the interviews are

contained in R. Ex. 1. (R. Ex. 13 p. 13) MedVoc added dishwashing positions because they believed it would be within his restrictions and would open up his chances of finding employment. (R. Ex. 13 p. 14)

She identified R. Ex. 5 as the petitioner's job search results and R. Ex. 6 as her follow up with the employer contacts described in R. Ex. 5. She would call the employers listed and record the information she received in the file and pass it on to Ms. Bose.. (R. Ex. 13 p. 15-16)

She provided the petitioner a lead for a dishwasher position at P. F. Chang's that she found online. She phoned the restaurant to explain the petitioner's situation and lifting restriction, spoke to Bob, and was told they could accommodate. She informed Mr. Rodriguez and arranged for him to apply. This was in June 2011. She went with him to submit the application, reviewed it and found it was completed appropriately. (R. Ex. 13 17-19)

Later the petitioner told her he interviewed at Chang's with Peter and was offered the position. The petitioner told her he explained his work restrictions to the employer and the employer told him that should not be a problem because there is not that much lifting involved. He also told her the job would start part time but could progress to full time. She believes he told her it paid $9.25/hour and would start on June 27, 2011. (R. Ex. 13 p. 20-21

She phoned him the day after he started to see how his first day went and he told her he worked six hours. He was on his way to work and would call her later. He called again that day and told her he left early due to back pain with standing. He was supposed to work six hours. She asked if he had a break to try to figure out ways for him to work the entire dsy. He told her he did have a break and that he stood during the break. She suggested he sit. (R. Ex. 13 p. 22-23)

She continued providing job leads and attended an interview at Pro Clean for an office cleaning position. It was a short interview and he presented well. He had a second interview which she did not attend. He told her after the second interview they would follow up with him. (R. Ex. 13 p. 25-26)

He phoned her to tell her he was terminated by the manager, Joe, at Chang's because he was not keeping up with the other workers. She told him that leaving early twice did not leave a good impression. She later spoke with Joe who told her Mr. Rodriguez was not keeping up and missed two days or left early for two days. Following this Ms. Bose made the decision to end vocational services. (R. Ex. 13 p. 26-28)

Ms. Warren discovered inconsistencies in information the petitioner provided in his employer contact sheets (R. Ex. 5) and her follow up (R. Ex. 6) She prepared a list which documented the consistencies and inconsistencies from February 2011 through July 2011. (R. Ex. 7) She testified to these in her deposition. There were instances where contacts the petitioner identified were not employed at a City Auto Parts, a Subway, Mr. Gyros and Ice Cream, and Pet Smart. She noted that at Crete Garden the petitioner not only listed an incorrect contact (Steve) but also claimed they were not hiring. She testified she spoke to Don the manager who told her there was no employee named Steve and they are always accepting applications. The petitioner did not submit an application. Similar inconsistencies were discovered with T. J. Maxx as to contact

information and hiring. The contact name was wrong and she was told they were accepting applications. Employers listed as Al Warren Oil and Pierre's Flowers had disconnected phone numbers. He also listed a person at Shelly's Deli who did not work there. (R. Ex. 13, p. 29-36) She also discovered he indicated a Pep Boys told him to apply online and he did not and that he also could have applied online with Sears and did not. (R. Ex. 13 p. 37-38) Prior to the job at Chang's he never talked to her about any limitations with standing. (R. 13 p. 37)

On cross examination she testified she is not a certified vocational counselor. She provided the job contacts or leads. He may have made a mistake on the number for Pierre's Flowers but she was not sure and could not recall if she Googled the number. Follow ups she made with City Auto Parts, Mr. Gyros and Pet Smart determined they were not hiring. She also agreed that certain other employers were not hiring. (R. Ex. 13 p. 39-48)

Joseph Caruso testified by deposition on January 5, 2012 (R. Ex. 14) He is the operating partner at the P. F. Chang's where the petitioner was hired. Respondent's exhibit 8 is the petitioner's personnel file. (Exhibit was formerly marked #6)

A dishwasher rinses dirty plates, places them in a rack and feeds the rack into a machine. A dishwasher on the other side unloads the rack and puts the dishes on a shelf. Some load or unload all night. The ones who unload go to the cook line to pick up bus pans and bring them back into the dish pit (area where the dishes are washed). (Tr. p. 7-8)

During the week there are two dishwashers. One may start at 4:00 p.m. and the other at 5:00 p.m. Three work the weekends. The first dishwasher arrives at 9:00 a.m. and work until 2:00 p.m. or 3:00 p.m. (Tr. p. 8-9)

The dish area has a table where the servers place dirty dishes. One of the dishwashers takes the dishes, puts them in a rack, rinses them and slides them into the dishwasher which automatically grabs the rack and does the rest. A shift varies from six to eight hours depending on the night. (Tr. p. 10-11) He testified there are no breaks but there is a family meal where everybody takes a few minutes to eat. If there are three dishwashers one will eat depending on the volume of the night. Breaks depend on the volume of business (Tr. p. 12)

The dishes that are washed are removed and placed on a shelf based on size and shape. He estimated that four to six dishes weighed five pounds at most. The dishes do not have to be dried. (Tr. p. 13-14) Bending is not required to load. You have to reach down. The rack is not lifted. A body turn is used to load or unload. He said you could call it a twist but you could do whatever is comfortable. (Tr. p. 15-16) The third dishwasher will get dirty bus pans and help the servers with the clean dishes. A full bus pan weighs about eight to ten pounds. (Tr. p. 16-18) The third dishwasher also does prep work for food portions. (Tr. p. 18-19)

He recalls the petitioner sitting in a dining room chair during a work shift and asked if he were hurt. The petitioner told him his back bothered him or something to that effect. Mr. Caruso asked if he injured his back at the restaurant and was told no. Mr. Caruso asked if he needed to go home and was told yes. Mr. Caruso is pretty sure the petitioner went home. (Tr. p. 19-21)

After a second similar episode, Mr. Caruso spoke with Mr. Hogrefe, the chef who told him Mr. Rodriguez had back surgery. A meeting took place in an office with Mr. Rodriguez where he explained he was injured at another job and that his back bothered him and he had to sit down. He did not mention any doctor order that restricted standing. Mr. Caruso told him he could not sit down and later in the conversation told him that if he could not do the job he could not have him at the restaurant. He believes this was when the employment was terminated. Mr. Rodriguez told him he had to sit down at times because of his back. Mr. Caruso told him they could not stop everything on a Saturday night so that he could sit for 20 minutes and that once he started taking a break everyone would and that is not how the restaurant operated. (Tr. p. 21-25)

On cross examination Mr. Caruso testified there is no written job description. They have five or six dishwashers that cover all seven days and work 35 to 40 hours depending on volume. The daytime dishwasher's hours are pretty set at 30-33 hours. The nighttime dishwashers are rotated. Normally, a dishwasher works five days a week. (Tr. p. 26-27) Mr. Rodriguez was let go do to lack of productivity and inability to work at the same pace as the other workers. (Tr. p. 27) The pace is quick and you are moving. (Tr. p. 28) He testified there is not always a break on a six hour shift but added: "if you find some downtime...but there is nothing about a break." (Tr. p. 29) There are about four shelves where the dishes are put after washing which are from six inches from the ground and then every 12 to 15 inches. (Tr. 29-30)

Peter Hogrefe testified by deposition on January 5, 2012. (R. Ex. 15) He is the culinary partner at Chang's who oversees the kitchen and all of its duties. Based on his review of R. Ex. 8 he interviewed the petitioner in June 2011. He could somewhat recall the interview. (Tr. 4-6)

The dishes are washed in an automated machine. The dishwashers load it or unload it, restock clean dishes, silverware and anything else that goes through the machine. They also help portion food. (Tr. p. 7)

At the interview Mr. Rodriguez told him he was not able to lift anything more than 40 pounds. Mr. Hogrefe testified the dishwashers did not have to lift over 40 pounds. He told Mr. Rodriguez he did not think that would be a problem. Mr. Rodriguez did not mention any other medical or physical restrictions in the interview including standing, bending and twisting. (Tr. p. 8-9) Mr. Hogrefe could not recall if he offered the position during the interview or later. The starting pay was between $9.00 and $10.00 an hour. (Tr. 10-12)

Shifts for the dishwashers vary depending on the shift. Mr. Hogrefe approves the schedules. He believed he hired Mr. Rodriguez for evenings and his hours would have started between 3:00 p.m. and 5:00 p.m. and work until after the restaurant closed. The restaurant closes Sunday through Thursday at 10:00 p.m. Friday and Saturday it closes at 11:00 p.m. The dishwashers usually leave a half hour after closing. (Tr. 12-13

In general there are two dishwashers during week nights and three on the week ends. The duties vary depending on when they start. (Tr. p. 14-15) One employee will load dish racks picking up plates, putting them in racks and sliding the rack into the machine. The rack has two bars and is nice and easy. You only have to catch the very first maybe two inches of the rack into the beginning part of the machine and the conveyor takes over. (Tr. p. 15-16)

The second dishwasher will unload the cleaned dishes and stack them on a shelf on the side wall. The shelf is within arm's reach. There are four shelves ranging from a foot off the ground to six feet high. (Tr. p. 17) The third dishwasher picks up dishes from the cook line, brings them to the dish area and passes them to the person loading. Someone will take clean dishes back to where they are needed. The bus pans hold utensils and are on the bottom shelf in the dish room. (Tr. p. 18) Dishwashers also move garbage cans and clean up after portioning food and before leaving at night. (Tr. 19-20)

Evening dishwashers in general average 30 to 38 hours a week. (Tr. p. 21) Mr. Rodriguez' application indicated he was available to work any shift. (Tr. p. 22)

He was off the first day Mr. Rodriguez worked. He recalls a sous chef phoning to inform him about back issues. He had a conversation with Mr. Rodriguez who said he would be fine and needed to sit for a little bit. Mr. Hogrefe took him at his word. (Tr. p. 23) After more incidents of constantly sitting down, Mr. Hogrefe tried him out as a wok cook. Mr. Rodriguez did not make it past the first shift and complained his back bothered him from standing in place. (Tr. p. 25-26) Mr. Rodriguez went back on dishwasher duty. Mr. Hogrefe had conversations with the managers about Mr. Rodriguez having to sit down after an hour or two and sit for more than two minutes. (Tr. p. 27) At times he asked Mr. Rodriguez if he needed to go home. He could not recall for sure but believed Mr. Rodriguez went home early twice. (Tr. p. 27-28) Eventually, it was decided there was nothing more they could offer him and they had to part ways. The decision was discussed with Joe Caruso. (Tr. p. 28)

On cross examination Mr. Hogrefe testified about the movements required to put dishes on the shelves involve extending the arms, turning to the side and putting them on a shelf. At times this is done continuously. (Tr. p. 32-33) He repeated that Mr. Rodriguez told him he had a 40 pound lifting restriction which would not be a problem and that Mr. Rodriguez did not say anything about limitations as to standing, bending, or twisting. (Tr. p. 34) Dishwashers are not guaranteed a set number of hours a week. (Tr. p. 36) (Tr. p. 32-33)

Julie Bose's deposition was continued to January 25, 2012. (R. Ex. 11) She identified the employer contact sheets and MedVoc job leads. (R. Ex. 5) and explained the information contained on the employer contact sheets. The potential employer contact sheets were prepared by Mr. Rodriguez. The job leads were from MedVoc. She identified R. Ex. 6 as the review of the submitted contact sheets. Ms. Warren prepared R. Ex. 6. (Tr. p. 64-68) Ms. Bose relies on the information provided by Ms. Warren in order to prepare her vocational reports and opinions. (Tr. p. 70) She described the information Mr. Rodriguez submitted and the results of the follow up with City Auto Parts, Subway, Pierre's Flowers, Progressive Temporaries, T. J. Maxx and Shelly's Deli. (Tr. p. 71-75) The review found inconsistencies with respect to contact persons, phone numbers and whether employers were hiring and/or accepting applications. Respondent's Ex. 7 is a cross reference of exhibits 5 and 6 prepared by Ms. Warren and Ms. Bose. (Tr. p. 75-76) The inconsistent information was a basis for her opinion to discontinue vocational services. (Tr. p. 77) She testified it is important to submit job applications particularly with entry level positions which MedVoc was targeting because the hiring trends change frequently. (Tr. p.77-78)

The respondent scheduled the petitioner for a Section 12 examination with Kenneth Candido, M.D. a pain specialist on September 6, 2011. He testified by deposition on January 10, 2012. (R. Ex. 16) Dr. Candido is certified by the American Board of Anesthesiology and has a sub-specialty certification in pain medicine. (Tr. p. 5, Candido Ex. 1) His report of examination is dated October 6, 2011 (Candido Ex. 2) The report summarizes the records he reviewed, the history he took from the petitioner in Spanish, his findings on examination and opinions.

Dr. Candido determined the findings on examination were minimal with myofascial or muscular pain. He felt the petitioner's description of constant pain at the level of 8 was not corroborated by his examination findings. It was very minimal on exam. There was no radicular pain and no radiculopathy which means pain and sensory loss. All that was identifiable was palpation tenderness about the lumbar spine. (Tr. p. 28)

His diagnoses were status post lumbar spinal fusion, myofascial pain of the lumbar spine, opioid dependence and degenerative disc disease. (Tr. p. 29) Dr. Candido testified the epidural steroid injections were probably acceptable but did not provide any benefit. The use of narcotics (morphine sulfate immediate release and morphine sulfate extended release prescribed by Dr. Huddleston) failed to provide any consistent analgesic benefit. (Tr. p. 31-32)

Dr. Candido testified the petitioner had axial and discogenic pain that was likely related to the described work injury. (Tr. p. 32) He testified the petitioner does not have radiculopathy because he has no sensory or motor loss or changes that he could identify with his physical examination. (Tr. p. 34) He believed the petitioner would benefit from conservative care only including non-opioid analgesics to control symptoms. Non-opioid analgesics would be non-steroidal antiinflammatory medications, or membrane stabilizing medications such as Neurontin or lidocaine and local anesthetics including those provided by a patch preparation. (Tr. p. 35-36)

He did not believe injections such as facet blocks or rhizotomies suggested at one time by Dr. Huddleston wold be helpful because Mr. Rodriguez did not have pain to maneuvers that stress the facet joints such as side bending and lumbar extension. He was able to perform those without symptomatic complaints. (Tr. p. 36-37) He also disagreed with Dr. Huddleston's recommendation for a spinal cord stimulator. He determined there was no foundation for making the suggestion because although the petitioner described radiating leg pain there was no maneuver that Dr. Candido could utilize to corroborate the presence of a radiculopathy. He testified spinal cord stimulation is fairly effective for radiculopathy and radicular pain but not very good for low back pain and the petitioner primarily complains of low back pain. He also was very hesitant to be supportive for the use of a spinal cord stimulator in an individual who failed to derive any symptomatic relief whatsoever from surgery, injections medication or therapy. In his opinion such an individual is likely to fail all modalities directed towards symptomatic improvement or pain control. (Tr. p. 37-38)

Dr. Candido also reviewed various functional capacity evaluations which had the petitioner in the medium work category. He felt the petitioner is not likely to return to heavy work his job entails. He elaborated stating that somebody that is acceptable for the medium level of work is not likely to improve to get to the next level based on his experience with or without interventions or medications. He has not seen that occur. (Tr. p. 38-39)

He felt the prognosis was poor for the petitioner with respect to his medical condition based on his interpretation of the objective findings on examination and his observation of Mr. Rodriguez, his body language and the historical information provided in that Mr. Rodriguez believes he is disabled and not capable of going back to gainful employment. Dr. Candido agreed with Dr. Goldberg that the petitioner was already at maximum medical improvement and capable of returning to work in the medium capacity demand level. He added that the prognosis is poor because he did not think the petitioner had the mind-set to go back and do such work. (Tr. p. 44-45)

On cross examination Dr. Candido agreed the petitioner had limited motion on flexion and extension. Side bending was in the normal range. (Tr. p. 43-44) He believed a restriction of no repetitive bending and twisting would be appropriate. He disagreed that a limitation on standing is common after the fusion the petitioner had stating that it is common in the early phases but not several years after the fact. (Tr,. p. 52-53)

On re-direct Dr. Candido testified the petitioner's subjective reporting of never having pain below 7.5 is atypical and is not commonly found in individuals who have myofascial pain or individuals who have pain of the axial skeleton of a discogenic nature. (Tr. p. 56-57)

Jacky Ormsby testified by deposition on January 29, 2013. (P. Ex. 6) She conducted a vocational assessment of the petitioner on October 10, 2012 at the request of his attorney. (P. Ex. 5) Ms. Orsmby is a certified vocational rehabilitation counselor.

She testified the August 12, 2012 FCE placed the petitioner at a light to medium demand level, work an 8 hour day, stand 4 hours with 35 minute durations, walk for 3-4 hours occasionally with moderate distances. (Tr. p. 9-10) She testified she did not think the petitioner was able to do the dishwasher job at Chang's. (Tr. p. 18) She thought MedVoc's use of the December 2007 FCE was not as valid as to what the petitioner's current medical would be. (Tr. p. 18-19) She testified the petitioner would not be able to perform the job at Chang's because of repetitive twisting and bending. (Tr. p. 19) In her opinion there is no stable labor market for the petitioner because of his education, physical restrictions and his type of work in the past was all physical. (Tr. p. 20) She does not advise any job search because there is no market for the petitioner and that there is really not anything out there he would be able to do. (Tr. p. 22)

On cross examination she testified she did not review any of Dr. Heim's post operative records. (Tr. p. 25-26) She agreed the December 4, 2007 FCE assessed the petitioner for twisting at 30 pounds of rotational activity. (Tr. p. 28-29) She testified the petitioner at age 41 has a work life expectancy of 24 years if he were to retire at age 65 (Tr. p. 34) The August 21, 2012 FCE did not mention how long a break should be taken after standing 35 minutes. (Tr. p. 35-36) She agreed that Dr. Earman did not issue restrictions on standing or twisting at the appointment on January 18, 2010. (Tr. p. 42-43) The petitioner did not provide any data that he conducted a job search after Chang's. (Tr,. p. 44-45, 47) She did not advise him on seeking employment. (Tr. p. 47) According to her report prolonged standing at Chang's was contributing to petitioner's pain. She had no references to problems with twisting, stooping or bending at the job. (Tr. p. 49-50) She did not conduct a transferrable skills analysis or labor market survey. (Tr. p. 52) She agreed

there are minimum wage jobs within a light to medium work category. (Tr. p. 53) She did not provide job leads or contact prospective employers. (Tr. p. 54) She did not research any potential jobs for the petitioner. She agreed he has the ability to look for work. (Tr. p. 55)

Julie Bose testified in rebuttal by deposition on March 12, 2013. (R. Ex. 12) She reviewed Ms. Orsmby's report and deposition, the FCE of August 12, 2013, the Align Network review of the FCE (R. Ex. 19) the depositions of Mr. Hogrefe and Mr. Caruso, Dr. Huddleston's September 10, 2012 record and Dr. Earman's records of January 18, 2010 and September 16, 2010. (Tr. p,. 6-7) This information did not change her opinion that the dishwasher position was suitable employment. (Tr. p. 8-9) She maintained her opinions the petitioner was able to look for work and that it was appropriate to end vocational services. (Tr. p. 9-10) She expressed her disagreement with the opinions of Ms. Orsmby regarding the dishwasher job at Chang's (Tr. p.. 11-12) She did not agree that use of the December 4, 2007 FCE was inappropriate. (Tr. p. 13-14) She disagreed with the opinion there is no stable labor market for petitioner explaining he is marketable, there is work out there for him and he would have been more successful had he given a more aggressive job effort. (Tr. p. 17-18) The fact that he is 41 is also favorable in terms of securing employment. (Tr. p. 18) She did not think he needs a GED to find work. (Tr. p. 19-20) She testified there are light to medium category jobs that would not require training within his capabilities such as porter, light cleaner, call center clerk and customer service clerk. (Tr. p. 20) On cross examination she testified she did not recommend termination of vocational services until after Chang's. She was not able to determine if any of the earlier FCE's assessed the petitioner's standing tolerance. (Tr. p. 26-27)

CONCLUSIONS OF LAW

As to Issue F, Is the petitioner's current condition of ill being causally related to the injury?, the Arbitrator concludes:

The Arbitrator observes the Commission affirmed his earlier determination on this issue in its decision in 12 I.W.C.C. 0171.

The Arbitrator has reviewed the medical records of Dr. Huddleston, (P. Ex. 3) and the testimony and report of Dr. Candido. (R. Ex. 16) Dr. Huddleston's records fail to describe his examination findings. They record the verbal complaints and treatment plan. Dr. Candido's report details his findings on examination. The Arbitrator notes Dr. Candido's conclusion the petitioner has myfascial pain of the lumbar spine and axial and discogenic pain likely related to the described work injury. Based on this, the Arbitrator finds a causal connection between those conditions and the accident.

As to Issue J, were the medical services that were provided to petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?, the Arbitrator concludes:

The only medical bills claimed were for medications prescribed by Dr.Huddleston. (P. Ex. 9) The medications were for Fentanyl, Morphine and Oxycontin. All are narcotic, opioid medications.

Based on Dr. Candido's opinions concerning appropriate medications the Arbitrator finds the prescriptions are not reasonable and necessary. Dr. Candido recommended non-opioid analgesics such as non-steroidal antiinflammatory medications or membrane sustaining medications such as Neurontin, lidocaine and local anesthetics including those provided by a patch preparation.

The Arbitrator also relies on the results of the Utilization Reviews of June 18, 2012 (R. Ex. 17) Morphine sulfate was non-certified for both the MSIR and MSER prescribed by Dr. Huddleston. There is no evidence Dr. Huddleston responded to the U.R. Section 8..7(i)(4) of the Workers' Compensation Act states: "When a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review pursuant to subsection (a) is reasonably required to cure or relieve the effects of his or her injury. The Arbitrator finds the petitioner has failed to meet his burden of proof on this issue.

The Arbitrator finds further support for the denial of the prescriptions from R. Ex. 18 a pharmacy drug review which recommended weaning of the opioid medications in this case.

As to Issue K What temporary benefits are in dispute?, the Arbitrator concludes:

The Arbitrator finds the petitioner was provided vocational rehabilitation services with MedVoc from February 2011 through July 2011. At the previous hearing the Arbitrator awarded temporary benefits be paid through December 14, 2010. Based on the evidence, including the testimony of Ms. Bose and Ms. Warren the Arbitrator finds the petitioner is entitled to maintenance from December 15, 2010 through June 26, 2010 the day before he began employment with P. F. Chang's. The period represents 27-5/7th weeks and is to be paid at the rate of $842.14 per week.

Any further claims for maintenance are denied as the petitioner has admitted to not conducting any form of job search since his termination from P.F. Chang's in July 2011.

As to Issue L What is the nature and extent of the injury?, the Arbitrator concludes:

The petitioner has claimed a permanent and total disability based on the "odd-lot" theory. The Arbitrator finds the evidence fails to support his claim. In *Ceco Corp.v. Industrial Commission,* 95 Ill.2d 278, 286-287/ 447 N.E.2d 842, 845-846, 69 Ill. Dec. 407, 410-411 the Supreme Court summarized the rules for permanent total disability:

"This court has frequently held that an employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. (Citations omitted) The claimant need not, however, be reduced to total physical incapacity before a permanent and total disability award may be granted. (Citation omitted) Rather, a person is totally disabled when he is incapable of performing services except those for which there is no reasonably stable market. (Citations omitted) Conversely, an employee is not entitled to total and permanent disability compensation if he is qualified for and capable of obtaining gainful employment without serious risk to his health or life. (Citations omitted) In determining a claimant's employment potential, his age, training, education and experience should be taken into account." (Citations omitted)

The Court in *Valley Mould & Iron Co. v. Industrial Commission,* 84 Ill.2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981) commented further:

"Under A.M.T. , (referring to the decision in *A.M.T.C. Co. of Illinois v. Industrial Commission,* 77 Ill. 2d 482, 397 N.E. 804, 34 Ill. Dec. 132 (1979) if the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is on the claimant to establish the unavailability of employment to a person in his circumstances. However, once the employee has initially established that he falls in what has been termed the "odd-lot" category, (one who, though not altogether incapacitated for work is so handicapped that he will not be employed regularly in any well-known branch of the labor market (2A. Larson Workers' Compensation sec. 57.51, at 10-164.24 (1980), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant (2 A. Larson, Workmen's Ciompensastion sec. 57.61, at 10-164.97 (1980))."

The Court in *Courier v. Industrial Commission,* 282 Ill. App. 3d 1, 668 N.E.2d 28, 217 Ill. Dec. 843 (1996) elaborated on the burden of proof:

"However, after careful review of the language of *Valley Mould & Iron v. Industrial Commission,* 84 Ill.2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981), quoted in the *Ceco Corp.* decision, we find that the claimant must do more than make a *prima facie* case. In light of *Valley Mould,* the claimant has the burden to initially "establish" that she falls into the odd-lot category, before the burden of proof shifts to the employer to show the availability of work. By using the word "establish," *Valley Mould* requires that the claimant make more than a *prima facie* case. The claimant must prove by a preponderance of the evidence that she falls into the odd-lot category. See *Meadows v. Industrial Commission,* 262 ill. App. 3d 650, 634 N.E.2d 1291, 199 Ill. Dec. 937 (1994) (holding that "claimant has the burden of *proving* that he fits into the 'odd-lot' category of section 8(f) of thee Act: (emphasis added)). Whether the claimant has successfully met his burden is a question of fact for the Commission to determine. (Citation omitted) We believe that the cases which use the term *prima facie* when discussing odd lot, use

that term to mean "initially." See *Meadows,* 262 Ill. App. 3d at 653-54, 634 N.E.2d at 1293-94, 199 Ill. Dec. at 939-40. In other words, those cases hold that the claimant must "initially" establish, by a preponderance of the evidence, that she falls into the odd-lot category, before the burden shifts to the employer to show availability of work. See *Old Ben Coal Co. v. Industrial Commission,* 261 Ill. App. 3d 812, 634 N.E.2d 285, 199 Ill. Dec. 446."

The Arbitrator finds the petitioner has failed to establish by a preponderance of the evidence that he is in the "odd-lot" category.

The Arbitrator notes the following in support of his findings. From July 2011 and up to the present the petitioner made no job search. Instead he applied for a union disability pension on September 30, 2011 advising he was retiring on November 1, 2011 and that he was not planning on working after his pension began. It is also note worthy that he had earlier applied for Social Security Disability and was denied in November 2008. (R. Ex. 24)

In addition the Arbitrator finds the petitioner testimony that he has not looked for a job because he does not know what he can do with his restrictions and does not know where he could look are not credible. Ms. Bose and her reports describe the plan MedVoc utilized to employ the petitioner. She testified he is able to look for work and that had he been more aggressive would have had a successful outcome. His intention to take the disability pension from the union and no longer work strongly demonstrates he has no interest in employment. As mentioned as early as 2008 he sought Social Security Disability. Ms. Bose testified he was not motivated. Ms,. Ormsby agreed that motivation to find employment is significant.

The opinions of Ms. Bose and Ms. Ormsby were at odds with one another. The Arbitrator places greater weight on the opinions of Ms. Bose. Ms. Ormsby was retained for the sole purpose of providing an opinion in support of the PTD claim. Her opinions on the suitability of the job at Chang's, her opinion there is no stable labor market and nothing the petitioner can do are not credible.

An evidentiary issue arose during the deposition of Ms. Warren. The petitioner objected to her testimony for the reason she is not a certified vocational counselor citing the Act. Section 8(a) in relevant part states that "Any vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as ***qualified to render opinions relating to vocational rehabilitation.***" Ms. Warren did not render opinions. She provided job placement services and skills to assist the petitioner. The objection to her testimony is overruled.

The petitioner testified to the number of job contacts made during all periods of vocational rehabilitation going back to the start up with Mr. Luna at Triune. The record establishes Mr. Luna voiced his concerns with the petitioner's efforts stating Mr. Rodriguez should be making more of an effort to seek out new employers and contact these employers for potential positions. Mr. Luna did not think it was appropriate that Mr. Rodriguez took three to four weeks to follow up on a job lead that lead to another person being employed,. (R. Ex. 3 admitted at the 12/14/10 hearing Triune report #6 page four) In his progress report # 5 Mr. Luna commented that Mr. Rodriguez contacted some employers and was asked to come in and fill out applications he did

not follow up and therefore Mr. Luna was not convinced Mr. Rodriguez was strongly committed in looking for work. (R. Ex. 3 admitted at the 12/14/10 hearing report # 5 page 3)

Ms. Bose and Ms. Warren noted the same problems with the petitioner's efforts.. While the petitioner testified in response to his attorney's questions that he more than met his obligations established by MedVoc, the evidence shows that is not true. Ms. Bose and the MedVoc records (R. Ex. 1, 5, 6 and 7) show multiple occasions where employer contacts were not made and employment applications not submitted when it could have been done.

The Arbitrator also adopts Ms. Bose's opinion that the dishwasher position at Chang's was within his restrictions and that he did not make a reasonable attempt to perform the job. The petitioner testified to constant twisting and that he had to stand, turn and bend because the dishwasher was big. Ms. Ormsby on more than one occasion admitted the only problem he related to her was the standing. Both Mr .Caruso and Mr. Hogrefe testified the job did not require twisting and one could make a body turn. The Arbitrator finds the petitioner was not credible in describing the job duties at Chang's. The Arbitrator also finds the petitioner's testimony that he told Mr. Hogrefe he had more restrictions that a 40 pound lifting limitation is not credible. Mr. Hogrefe testified this was the only restriction mentioned. There is no reason for Mr .Hogrefe to not be truthful on this topic. The Arbitrator further notes that the petitioner had three FCE's before the one arranged in August 2012. The first was a baseline at PTSIR on November 6, 2006 which concluded he was at a Medium-Heavy Work Capacity. The second one at PTSIR was on November 27, 2006 which found he was at a Very Heavy Work Level. (R. Ex. 22) The third was at WCS on December 4, 2007 which found he was at a Medium-Heavy work capacity. (R. Ex. 21)

Dr. Heim reviewed the December 4, 2007 FCE on December 7, 2007. He explained to the patient his symptoms were muscular in nature. (R. Ex. 20) The same as what Dr. Candido determined. Dr. Heim released him to medium-heavy work. On January 23, 2008 the petitioner returned to Dr. Heim telling him he worked a few days and was not able to tolerate it particularly because of his tool belt. He repeatedly told Dr. Heim there was no light duty he could perform. Dr. Heim's findings on examination were not significant in that there was no numbness, tingling or weakness. Dr. Heim again told the patient the symptoms were muscular and stressed the importance of keeping up with his exercises. (R. Ex. 20)

Dr. Heim prescribed additional work conditioning which was done in February 2008 at WCS. The sessions were completed on February 20, 2008. The therapist noted Mr .Rodriguez was functioning at the upper limits of the medium classification. (R. Ex. 21) Based on this Dr. Heim issued a permanent restriction on February 26, 2008 to work at a medium demand level. (R. Ex. 20)

The Arbitrator finds MedVocs plan to target positions at a medium classification with a 40 pound lifting limitation was appropriate.

The Arbitrator finds that Dr. Candido's opinion on the petitioner's perception that he is disabled is accurate. It appears this has been the case as far back as when he saw Dr. Heim on January 23, 2008. Statements to the effect that there is no light duty he is able to do, that he has not looked

for work because he does not know what he can do with his restrictions and that he does not know where to look support this. So does his applying for Social Security Disability in 2008 and the union pension shortly after his employment at Chang's terminated. In addition Dr. Candido described the petitioner's pain rating as atypical.

The Arbitrator finds the evidence establishes he is able to work at a medium capacity. While the August 2012 FCE had him at a light-medium capacity there is evidence to suggest the interpretation could be that he tested at a medium capacity. (R. Ex. 19)

In addition Dr. Goldberg felt the petitioner was able to work based on the December 4, 2007 FCE. (R. Ex. 23)

The parties stipulated that once he started at Chang's the respondent paid a wage loss. The Arbitrator finds that a wage loss based on what he would be earning as a residential carpenter and what he would have earned in a successful attempt at work at Chang's is the appropriate award.

According to Mr Caruso the night dishwashers will work up to 40 hours a week. Therefore the Arbitrator uses that as the base for determining the wage loss at an hourly rate of $9.50. The parties stipulated that as of July 2011, the hourly rate was $33.37. From October 1, 2011 through September 30, 2012, the hourly rate was $31.37. As of October 1, 2012 the hourly rate is $32.12 which is the wage the petitioner would be earning as of the date of this hearing.

Accordingly, the Arbitrator awards a wage loss of $636.53 a week from June 27, 2011 through September 30, 2011 representing 134-5/7th weeks. [[1,002.80 - $380.00] x 2/3].

The Arbitrator award a wage loss of $583.20 a week from October 1, 2011 through September 30, 2012 representing 52 weeks. [[$1,25420 - $380.00] x 2/3]

The Arbitrator awards a wage loss of $603.20 a week fom October 1, 2012 for the duration of the disability.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Johnson,

Petitioner,

vs. No. 10WC006809

14IWCC0354

Yellow Roadway Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, the necessity of medical treatment and temporary disability, and being advised of the facts and the 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).

In this case, the Commission conducted two section 19(b) hearings in which Petitioner requested emergency medical treatment. An Arbitrator conducted the first hearing on July 27, 2010, and the Arbitrator found that the accident was compensable, and that the medical treatment was reasonable and necessary, and caused by the accident.

Subsequently, Petitioner requested a second section 19(b) hearing. A different Arbitrator conducted the second section 19(b) hearing which was held on January 18, 2013, almost three years after the first section 19(b) hearing. The second Arbitrator found that the Petitioner's then current-condition was not caused by the accident.

The Commission affirms the Arbitrator's decision, but clarifies that a previous section 19b decision determining causal connection and temporary total disability has no preclusive effect on the same issues in subsequent hearings. In short, each section 19(b) proceeding is a separate proceeding, limited to a determination of temporary total disability up to the date of the hearing, and a second arbitration hearing involves different legal and factual issues than a first arbitration hearing. See *Weyer v. The Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 297, 307, 900 N.E.2d 360, 369 (1st Dist. 2008); and *R.D. Masonry, Inc. v. The Industrial Comm'n*, 215 Ill. 2d 397,408, 830 N.E.2d 584, 591-92 (2005).

The Commission corrects the temporary total disability rate to $603.60.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on January 24, 2013, is hereby clarified and corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all medical bills related to his lumbar spine condition incurred on or before December 3, 2010, under §8(a) and §8.2 of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $603.60 per week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, 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 Petitioner interest under §19(n) of the Act, if any.

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

MAY 12 2014

DATED:
ML/db
o-01/22/14
44

Michael P. Latz

Charles J. DeVriendt

Ruth W. White

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

JOHNSON, KENNETH
Employee/Petitioner

Case# **10WC006809**

14IWCC0354

YELLOW ROADWAY CORPORATION
Employer/Respondent

On 1/24/2013, 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:

0320 LANNON LANNON & BARR LTD
PATRICIA LANNON KUS
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
COLLEEN McMANIGAL
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

14IWCC0354

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

KENNETH JOHNSON
Employee/Petitioner

Case #10 WC 6809

v.

YELLOW ROADWAY CORPORATION
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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on January 18, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

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

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☒ Should penalties or fees be imposed upon the respondent?

FINDINGS

- After a hearing on July 27, 2010, a Section 19(b) decision was filed on September 2, 2010, finding an accident that arose out of and in the course of the petitioner's employment with the respondent, medical benefits of $8,652.00 due the petitioner and a temporary total disability period from February 18, 2010, through July 27, 2010.

- A Decision and Opinion on Review was rendered on January 5, 2012, essentially affirming and adopting the decision of the arbitrator.

- The parties agreed that the respondent paid $21,469.23 in temporary total disability benefits.

- The parties agreed that the respondent paid all the related medical services provided to the petitioner.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $543.24/week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, which is the period of temporary total disability for which compensation is payable. The petitioner's request for temporary total disability benefits after October 24, 2010, is denied.

- The petitioner's request for medical benefits after December 3, 2010, is denied.

- The petitioner's request for penalties and fees is denied.

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

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

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

Robert E. Williams

Robert Williams

1/23/13

Date

JAN 24 2013

FINDINGS OF FACTS:

The petitioner received lumbar transforaminal epidural steroid injections at L4 at the Pain Treatment Centers on August 4 and 20, 2010, with a reported 50% relief for the earlier one and 40% relief for the last one. He saw Dr. Cary Templin on August 13th, who opined that the petitioner had an L4-5 far lateral disc herniation impinging the L4 nerve root with pain over his back and right leg. Physical therapy was started. On September 10th, Dr. Templin noted reluctance regarding performing an L4-5 excision since the petitioner's bilateral, mechanical low back pain was not concordant with a right L4 radiculopathy and he had no significant relief with the last two epidural injections. Right L4/5 and L5/S1 facet joint injections were given to the petitioner on September 23rd. The petitioner reported significant improved leg pain on October 21st but significant low back pain. He wanted to return to work to which the doctor complied. On December 3, 2010, the petitioner reported low back pain, some mild right leg pain but doing well overall.

The petitioner returned to Dr. Templin on January 31, 2012, for low back pain without any radiation. The doctor noted a heel-toe gait, 5/5 motor strength, a negative straight leg raise, flexion 70, extension 10 and minimal tenderness to palpation over his back. Dr. Faris Abushariff opined that a lumbar discogram on March 1st was strongly concordant for the petitioner's daily pain at L5-S1. Dr. Templin recommended a transforaminal interbody fusion from L4-5 through L5-S1 on April 20th. On September 10, 2010, Dr. Templin noted that the petitioner had three injections at the L4 nerve root without any benefit from the last two. On December 17, 2012, Dr. Templin performed an L4-5 and L5-S1 posterior and transforaminal lumbar interbody fusion. On January 17, 2013, Dr. Templin continued the petitioner's off-work status.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that his current condition of ill-being with his lumbar spine is causally related to the work injury on February 17, 2010. The petitioner sustained a temporary aggravation of his pre-existing lumbar spine condition on February 17, 2010.

The petitioner had two lumbar spine injuries in 2006 and received treatment with Dr. Malek. On May 8, 2006, Dr. Malek opined that an MRI on April 28, 2006, showed desiccation at L4-5 and L5-S1, a foraminal disc herniation at L4-5 and an annular tear on the left at L5-S1. An MRI on February 19, 2007, revealed a disc bulge at L3-4, a right paracentral disc protrusion, bulge, endplate spurring, facet arthritis and asymmetric right neural foraminal stenosis at L4-5 and a left paracentral disc protrusion, endplate spurring, facet arthritis and mild left neural foraminal stenosis at L5-S1. Dr. Malek's opinion was that the MRI revealed foraminal disc narrowing, annular tears and protrusions on the right at L4-5 and on the left at L5-S1. He recommended a lumbar fusion from L4 through S1 on April 30, 2007, however, the petitioner wanted to delay surgery to a later date.

An MRI on March 1, 2010, showed facet arthrosis, disc bulging and a right-sided foraminal protrusion at L4-5 with mass effect on the right L4 nerve root and facet arthrosis, disc bulging and mild foraminal degenerative narrowing at L5-S1. Dr. Malek opined on March 10, 2010, that the MRI showed desiccation at L4-5 and L5-S1, a right-sided foraminal disc herniation at L4-5 and an annular tear on the left at L5-S1.

On June 14, 2012, Dr. Ghanayem opined that based on a structural or symptom basis the petitioner's back problem did not change after his injury on February 17, 2010, and that the nature of the surgery currently required is the same required in 2007. He

noted on September 28, 2012, that all the MRI studies were identical and there has been no structural change to the petitioner's lumbar spine.

Moreover, the petitioner stopped using pain medication by April 2010, returned to full-duty work on October 25, 2010, and ceased medical care with Dr. Templin on December 3, 2010. The opinion of Dr. Templin is conjecture. The petitioner's request for temporary total disability benefits after October 24, 2010, and medical benefits after December 3, 2010, is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The respondent shall pay the petitioner temporary total disability benefits of $543.24/week for 35-4/7 weeks, from February 18, 2010, through October 24, 2010, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The petitioner's request for temporary total disability benefits after October 24, 2010, is denied.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Dryden,
Petitioner,

vs. NO: 11WC 16994

14IWCC0355

Centralia Correctional Center,
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, causal connection, medical (incurred and prospective), temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 14, 2013, is hereby affirmed and adopted.

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

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

DATED: MAY 15 2014

Daniel R. Donohoo

Ruth W. White

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CJD/jrc
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DEVRIENDT DISSENT

I respectfully dissent from my fellow Commissioners and would reverse the Arbitrator's decision and find that Petitioner has proven that he sustained accidental injuries arising from the course and scope of his employment with the Respondent.

Petitioner testified and the Duty Roster (Respondent Exhibit 3) supports that he worked the Segregation Unit 1-2 times a week from October of 2010 through January 2011. While working the segregation unit he gets a rubber mallet and raps the bars on the three shower stalls. There are 4 bars that run perpendicular and 2 metal bars that run horizontal per shower stall. He must do this twice a day. (Transcript Pgs. 15-16) He then goes and checks each cell, and ask whether the inmates want a shower or go in the yard. If they want a shower, he opens the chuck hole and hand cuffs both inmates from behind. He uses the Folger key to open the chuckhole. He will then take them to the shower, removes the cuffs and allow them to shower. While they are showering, they lock the padlock on the shower and then unlock when they are finished. They would then reverse the process when the inmates get out of the shower. (Transcript Pgs.19-21)

When Petitioner would feed the inmates in the Segregation Unit, he would have to open the chuckholes on 30 cells and give the inmates trays of food. They would then close the chuckholes and come back in twenty minutes and open the chuckholes, remove the trays and close the chuckholes. (Transcript Pgs. 26-27)

Every day inmates from the Segregation unit may request doctor or dental care and would be placed in waist chains or leg iron before leaving the Segregation unit. (Transcript Pgs.26-27)

When he is not working the Segregation Unit, he is working the various wings of the prison. He has to make sure the cell doors are secured which results in a jarring motion to his wrists. He has to walk the wings every half hour and look in on each cell. When you get to the end of the wing there is a padlock. He has to unlock the padlock, take out the logbook, write on it and padlock it back in. He does that every half hour for all four wings. (Transcript Pgs. 30-36)

When he operates out of the control room, every time an inmate leaves to go to the house, he has to press a button to let them out of the wing. Sometimes he is requested to do a shakedown of a cell. Sometimes they will do a shakedown if they suspect there is something in the cell. These shakedowns consist of going through the inmate's property or anywhere they think he may be hiding something. (Transcript Pgs. 39-41)

Petitioner reviewed Corvel's Job Analysis (Respondent Exhibit 1) and criticized it for not mentioning the cuffing and uncuffing when it comes to wrist movement. It also does not mention the chuckholes or the inventory of property boxes and their effect on wrist movement. It did not mention the Petitioner's constant sliding of the prison doors. (Transcript Pg. 42)

Petitioner also reviewed the Corvel DVD of his job prepared on January 28, 2011, and pointed out that, they did not show the compliance checks or how many times they cuff the

inmates in the Segregation unit. It did not show the bar rapping or anything the writ officers do. It did not show anybody securing doors with a forcible push or pull and it did not show the inventory of the property boxes. Finally, the DVD did not show the weapons training and firing that he has to go through every year. (Transcript Pgs. 55-56)

Dr. Kosit Prieb gave his evidence deposition on January 26, 2012. He is a hand and vascular surgeon and is board certified in general surgery. He testified that turning a key and twisting the wrist could have an effect on carpal tunnel syndrome if done repeatedly. Pulling a door and shutting it to make sure, it is locked if done repetitively can cause or aggravate carpal tunnel syndrome. If Petitioner performed these tasks multiple times during the day and his symptoms get worse than based on a reasonable degree of medical certainty, it can aggravate the development of carpal tunnel syndrome. (Petitioner Exhibit 2 Pgs. 11-13)

Petitioner advised him that he opens 150 doors per day and restrains inmates and his hands get numb doing so. Based on a reasonable degree of medical certainty his job duties were a contributory cause of the aggravation and development of his carpal tunnel syndrome. (Petitioner Exhibit 2 Pg. 14)

In Sisbro, Inc. v Industrial Commission 207 Ill. 2d 193; 797 N.E.2d 665; 278 Ill. Dec. 70 (2003) the Supreme Court of Illinois held that it is axiomatic that employers take their employees as they find them. "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." General Electric Co. v. Industrial Comm'n, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. Caterpillar Tractor Co. v. Industrial Comm'n, 92 Ill. 2d at 36; Williams v. Industrial Comm'n, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981); County of Cook v. Industrial Comm'n, 69 Ill. 2d 10, 18, 12 Ill. Dec. 716, 370 N.E.2d 520 (1977); Town of Cicero v. Industrial Comm'n, 404 Ill. 487, 89 N.E.2d 354 (1949) (It is a well-settled rule that where an employee, in the performance of his duties and as a result thereof, is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Rock Road Construction Co. v. Industrial Comm'n, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

The Petitioner's credible testimony, as well as Dr. Prieb's medical opinions, has sustained the Petitioner burden of proof that the activities he performed for the Respondent was a causative factor in the Petitioner's bi-lateral carpal tunnel syndrome.

The Arbitrator's decision should be reversed.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DRYDEN, BRIAN
Employee/Petitioner

Case# **11WC016994**

14IWCC0355

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

On 3/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% 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:

4535 DENNIS ATTEBERRY
220 W MAIN CROSS
TAYLORVILLE, IL 62568

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

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM PHILLIPS
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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 14 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS 14IWCC0355

)SS.

COUNTY OF JEFFERSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN DRYDEN
Employee/Petitioner

v.

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

Case # 11 WC 16994

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **2/14/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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. [ ] Other ___

FINDINGS

On **3/21/11**, 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 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 **$56,329.00**; the average weekly wage was **$1,083.25**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident.

Claim is denied.

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

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

Signature of Arbitrator

3/1/13
Date

MAR 14 2013

Findings of Fact

Petitioner is a correctional officer at Centralia Correctional Center who reported carpal tunnel symptoms to Dr. Kosit Prieb, on March 21, 2011. Petitioner has been employed by Centralia Correctional Center since 1997; however, he is a reservist who has been deployed frequently throughout that time, most significantly for the 6 years between 2003 and 2009. Petitioner testified that when he mustered out of the military in October 2009, he experienced absolutely no upper extremity complaints. Petitioner testified that he believes his upper extremity complaints developed as a result of this work at Centralia Correctional Center during the five months between October 2009 and March of 2010.

Petitioner worked at a variety of positions on the 7 am to 3 pm shift between October 2009 and March of 2010 including segregation, control room, healthcare, and dayroom. Each of these positions have different duties which involve different upper extremity motions. As a segregation officer, Petitioner manipulated large folger-adams keys weighing approximately one pound, standard sized door keys, small cuff keys, and padlock keys. The majority of his key manipulation in segregation occurs between 8 am and 11:30 am. The segregation unit at Centralia Correctional Center only contains about 30 cells and the duties are divided amongst two correctional officers during the day shift. Petitioner worked in segregation approximately 24 shifts during the period five months he claims to have developed upper extremity complaints. He also worked as a control room officer during which time he would be required to operate a control panel with buttons, switches, and a telephone. He also worked as a dayroom officer during which time he was required to perform wing checks, inspect cells, and check property boxes for contraband. Petitioner continued to work full duty at Centralia Correctional Center with the exception of two brief periods in 2011. His assignment history reveals that he has continued to work in a variety of positions between his onset of symptoms and the present time.

A Job Analysis report for the position of correctional officer at Centralia Correctional Center was prepared by Corvel in January of 2011. (Rx 1) The report indicated that Centralia Correctional Center is a Level 4 medium security facility at which the inmates use their own keys to let themselves in and out of their cells as they go to the yard, gym, school, to meals, the day room, etc. (Id) It further indicates that all the inmates are locked in their cells at approximately 9:30 pm by officers working the 3 pm to 11 pm shift and are not unlocked until approximately 4:30 am by escort officers working the 11 pm to 7 am shift. (Id)

Petitioner initially reported his condition to Dr. Prieb on March 21, 2011. (Px 1) Dr. Prieb's first note indicates that Petitioner experienced numbness and tingling in his upper extremities over the course of the previous year. On March 21, 2011, Petitioner underwent electrodiagnostic testing performed by Dr. Prieb which indicated mildly delayed median sensory latency in the left and right wrist. (Px 1, 3) Dr. Prieb recommended bilateral carpal tunnel decompression on April 14, 2011. (Px 1) Petitioner underwent repeat electrodiagnostic testing on July 22, 2011 which was read as being compatible with right sided carpal tunnel syndrome and right cubital tunnel syndrome. (Px 3) Dr. Preib injected Petitioner's wrists with Kenalog on August 29, 2011 and kept him off of work until September 6, 2011. Petitioner reports that the injections provided only minimal temporary relief. (Px 1) The record does not indicate that Petitioner's has received any medical treatment since October 3, 2011. (Px 1)

The deposition of Dr. Prieb was taken on January 26, 2012. (Px 2) During his deposition, Dr. Prieb confirmed his diagnosis of bilateral carpal tunnel syndrome and bilateral medial epicondylitis. (Id at 9) Dr. Prieb further opined that Petitioner's job duties, as he understood them, had caused his upper extremity conditions. (Id at 25) Dr. Prieb testified that Petitioner first manifested upper extremity tingling in approximately March of 2010. (Id at 32-33) Dr. Prieb was unaware of Petitioner's military service. (Id at 32) He testified that all the information

regarding Petitioner's job duties which he received and utilized in the course of his treatment came directly from Petitioner himself. (Id 29-31) Dr. Prieb further admitted that his causation opinion would be stronger if he had toured Centralia Correctional Center and observed the types of activities which Petitioner performed on a daily basis. (Id at 31)

Dr. Anthony Sudekum is a board certified plastic and reconstructive surgeon with an added qualification in surgery of the hand. (Rx 2 p 5-6) Dr. Sudekum has toured Centralia Correctional Center, Big Muddy Correctional Center, and Menard Correctional Center to perform assessments regarding the potential for repetitive trauma injuries at these facilities. (Id at 22, 91) Dr. Sudekum felt that the duties performed by correctional officers at Centralia Correctional Center and Big Muddy Correctional Center were not causative or aggravating factors for conditions such as carpal tunnel syndrome. (Id at 95-98) Dr. Sudekum spent four hours touring Centralia Correctional Center, during which time he was able to turn keys and perform various other duties of a correctional officer including handcuffing, property box manipulation, bar rapping, and control panel use. (Id at 23-31) He specifically referenced visiting dayrooms, control rooms, and segregation. (Id at 41) Dr. Sudekum has also reviewed the Corvel Job Analysis report and DVD as well as job descriptions provided by correctional officers. (Id at 24)

On December 14, 2011, Dr. Sudekum prepared a Section 12 report regarding Petitioner and, based upon his knowledge and expertise, opined to a reasonable degree of medical certainty that Petitioner's duties as a correctional officer at Centralia Correctional Center did not cause or aggravate his alleged carpal tunnel syndrome. (Rx 2 at 33, 36) Dr. Sudekum did not disagree with Dr. Prieb's diagnosis of bilateral carpal tunnel syndrome and medial epicondylitis, however due to the flaws in the electrodiagnostic testing, he felt that the record lacked sufficient objective evidence to support the diagnosis. (Id at 34-35) Dr. Sudekum opined that Petitioner's age and obesity were comorbid factors for the development of carpal tunnel syndrome. (Id at 37-39)

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

1. Petitioner failed to meet his burden of proof regarding the issue of accident. The Arbitrator notes that the Petitioner's job duties were varied throughout the day and were not sufficiently repetitive to rise to the level of an accident. The Arbitrator also finds the opinions of Dr. Sudekum more persuasive than Dr. Prieb on this issue in that he had a better understanding of the Petitioner's job activities and the physical force required to perform these activities. Even Dr. Prieb admitted that his opinions would be stronger if he had the information obtained by Dr. Sudekum. Petitioner's own testimony was that he believed his carpal tunnel syndrome developed some time between October, 2009 and March, 2010 – which casts further doubt that an accident occurred on the date he alleges. Based on all these factors, the Arbitrator finds the Petitioner did not prove he sustained an accident on March 21, 2011.

2. Based on the Arbitrator's findings regarding accident, all other issues are rendered moot and the Petitioner's claim is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Kaiser,

Petitioner,

vs. NO: 09 WC 38315

14IWCC0356

Elmhurst Memorial Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and prospective medical treatment and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and denies Petitioner's claim for benefits under §19(b) and 8(a) of the Act. The Commission further remands this case to the Arbitrator for further proceedings for a determination of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner, a 34-year-old nurse, filed an Application for Adjustment of Claim alleging injuries to her right knee on April 10, 2009. She sustained an undisputed accidental injury while assisting a patient, catching her right foot underneath a bed and twisting her right knee. Petitioner had a recent history of two prior right knee surgeries, but testified that she was working full duty, had no symptoms, and maintained a physically active lifestyle prior to the date of accident. (T. 10-11) Following the accident, Petitioner underwent three right knee surgeries on an authorized basis. On July 22, 2009, Dr. Romano performed an arthroscopic medial femoral chondroplasty with microfracture. (RX 5) On January 5, 2010, Dr. Cole performed an osteochondral allograft. (PX 3) On June 1, 2010, Dr. Cole performed an arthroscopic medal meniscectomy, right knee synovectomy and suprapatellar pouch release. (PX 3) On September 20, 2010, Dr. Cole released

Petitioner at maximum medical improvement from an orthopedic standpoint but indicated that Petitioner could benefit from pain management treatment. Petitioner was diagnosed with complex regional pain syndrome (CRPS) in her right lower extremity by Dr. Amin and underwent several series of sympathetic blocks with little to no improvement. Most recently, Dr. Amin recommended a six week epidural infusion wherein a catheter is placed in the spinal column and medication is constantly administered to calm the nerves to the right leg. (PX 2) Respondent denied authorization for the epidural infusion, relying on the opinions of Dr. Ingberman.

Dr. Ingberman examined Petitioner pursuant to §12 on three occasions and testified via deposition that she did not agree with the CRPS diagnosis and she opined that Petitioner's current condition of ill-being, chronic pain, is not causally connected to the April 10, 2009 accident. Furthermore, Dr. Ingberman opined that Petitioner is not a candidate for invasive treatments such as the epidural infusions or a spinal cord stimulator. (RX 1)

In a Decision dated July 2, 2013, the Arbitrator found that Petitioner's current condition of ill-being (CRPS) is causally related to the accident. The Arbitrator awarded temporary total disability benefits from February 3, 2013 through May 15, 2013 and the prospective medical treatment recommended by Dr. Amin for CRPS. However, the Arbitrator also ordered Petitioner to undergo psychological testing performed at the direction of Dr. Amin prior to any additional treatment.

The Arbitrator found Dr. Ingberman's opinion that Petitioner does not actually have CRPS and is not a good candidate for further invasive treatments to be "fairly compelling." The Arbitrator noted he personally observed no signs of CRPS (abnormal coloration, hair growth or perspiration) during his examination of Petitioner at Arbitration. Nevertheless, the Arbitrator concluded that Dr. Amin's diagnosis and treatment plan is reliable, reasonable and necessary and related to the accident of April 10, 2009. The Arbitrator found that Dr. Amin's overall treatment plan is "well grounded and credible" and that Petitioner's symptoms of CRPS are documented if subjective. The Arbitrator found that the six-week course of treatment proposed by Dr. Amin is reasonably necessary. Dr. Amin testified that the epidural infusions are part of a recognized course of pain management treatment for patients with CRPS. (PX 2)

Respondent argues on review that the Arbitrator erred in awarding the prospective medical treatment and in awarding any temporary total disability benefits because Petitioner failed to prove the medical treatment is necessary and related to the April 10, 2009 accident. Dr. Amin never specifically provided a causation opinion and the evidence does not prove an unbroken chain of causation between the accident and Petitioner's current condition of ill-being. Dr. Ingberman testified that Petitioner is the type of chronic pain patient who would most likely continue to seek treatment indefinitely without subjective improvement. (RX 1) It is apparent from the testimony of Dr. Amin and Dr. Ingberman that both doctors are cognizant of the probable psychological component of Petitioner's chronic pain condition. A utilization review non-certified the epidural infusions partly on the basis that Petitioner's chronic pain condition

had not been evaluated from a psychological versus physical perspective. (RX 4) Dr. Ingberman testified that she agreed with the decision of the utilization review. (RX 1) The Arbitrator's order for a psychological evaluation prior to the epidural infusion treatment is a compromise between differing medical opinions.

After considering all of the evidence, we find that Petitioner failed to prove that her current condition of ill-being after September 10, 2010 is causally related to the accident of April 10, 2009 and we remand this case to the Arbitrator for further proceedings consistent with this decision. On September 2, 2010, Dr. Cole discharged Petitioner at maximum medical improvement from an orthopedic standpoint. Dr. Cole issued permanent restrictions of limited standing and no lifting greater than ten pounds but added "Please note there could be some "lightening" of these restrictions if and when she attains some clinical improvement through her care with Dr. Amin. I expect and hope that this well be the case. I would love to see her improve in her clinical capacity, as what is going on now is out of my scope of practice and is dealing with greater issues than knee cartilage." (PX 3) Petitioner testified that she could not return to work for Respondent with permanent restrictions, but that within one week she started a new job at Sedgwick CMS performing telephonic case management for workers' compensation claims. (T. 21-22) Petitioner worked full time and did not return to Dr. Amin or seek any medical treatment for one year following her release from Dr. Cole. Petitioner continued working full time for two years until she voluntarily terminated her employment on September 12, 2012. In conclusion, based on Dr. Cole's release followed by a significant gap in treatment and a successful return to work for two years, several inconsistencies in the records with respect to Petitioner's complaints and presentation, and insufficient evidence that after September 10, 2010 Petitioner was still suffering from the effects of the April 10, 2009 accident and was not merely malingering or suffering from a psychological condition, we cannot endorse the recommended invasive treatment for this Petitioner and accordingly we deny Petitioner's claim for benefits under §19(b) and 8(a).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2013 is hereby reversed and the Arbitrator's award of prospective medical benefits and temporary total disability after September 10, 2010 is vacated and this case is remanded to the Arbitrator for further proceedings for a determination 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 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.

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: MAY 15 2014
RWW/plv
o-2/19/14
46

Ruth W. White

Charles J. DeVriendt

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
& 8(A)

KAISER, JENNIFER
Employee/Petitioner

Case# **09WC038315**

14IWCC0356

ELMHURST MEMORIAL HOSPITAL
Employer/Respondent

On 7/2/2013, 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 0.08% 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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

0544 LOSS & PAVONE PC
JOSEPH LOSS
1920 S HIGHLAND AVE SUITE 203
LOMBARD, IL 60148

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B) & 8(A) DECISION

JENNIFER KAISER
Employee/Petitioner

v.

ELMHURST MEMORIAL HOSPITAL
Employer/Respondent

Case # 09 WC 038315

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago** , on **04-15-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 13, 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 $**46,799.37**; the average weekly wage was $**900.00**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **no** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $ **22,628.49** for TTD, $ **2,498.98** for TPD, $**0** for maintenance, and $ **11,610 for PPD advance,** for a total credit of $ **36,737.47.**.

ORDER:

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 600.00 / week for 10.286 weeks, commencing 02-03-13 to 04-15-13.

Causal Connection

Petitioner has proved a causal connection between her current condition of CRPS and her injury on April 13, 2009.

Medical Benefits

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

Respondent shall pay reasonable and necessary medical benefits of **$ 12,705.35** as provided in Section 8(a) of the Act.

The Petitioner is entitled to prospective medical treatment as prescribed Dr. Amin as her condition of ill being has not reached a permanent state. However, the Arbitrator finds that Petitioner should have documented psychological testing performed at his direction prior to the above treatment

THE ATTACHED STATEMENT OF FACTS AND CONCLUSIONS OF LAW ARE INCORPORATED HEREIN.

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

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

Signature of Arbitrator

07.03.13
Date

JUL 2 - 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION OF ILLINOIS

ARBITRATION DECISION

State of Illinois)
)ss
County of DuPage)

14IWCC0356

JENNIFER KAISER
Petitioner

vs. 09 WC 038315

ELMHURST MEMORIAL HOSPITAL
Respondent

STATEMENT OF FACTS

The Petitioner is a 37 year old woman who reported injuring her right knee on April 13, 2009 while working as a cardiovascular nurse at Elmhurst Memorial Hospital. She was moving a patient on a bed and caught her right foot underneath the bed, twisting her leg, and reinjured her knee.

The Petitioner has a history of two previous anterior cruciate ligament repairs to the same knee as well as an ACL reconstruction with a patellar tendon autograft which failed and revision ACL reconstruction with an allograft.

She was initially seen by Dr. Sheehan, an orthopedic surgeon at Elmhurst Clinic on the same day of the accident. X-rays showed mild degenerative changes without acute osseous abnormality. Dr. Sheehan recommended conservative treatment with a diagnosis of a right knee sprain.

An MRI was performed on April 15, 2009 which showed a post ACL repair and no obvious complications or acute changes. She was dispensed with a right knee brace.

The Petitioner then came under the care of Dr. Romano on June 4, 2009. She had

continued complaints of right knee pain and an arthroscopic excision of a plica with possible chondroplasty was recommended.

On July 22, 2009, an arthroscopic medial femoral chondroplasty with microfracture was done by Dr. Romano. She followed with a course of physical therapy and continued complaints of pain, popping, and crepitus which was reported as being due to post operative swelling. She was recommended Celebrex and partial weight bearing for two weeks progressing to full weight bearing.

She saw Dr. Romano again on September 10, 2009 reporting that she was feeling a little bit better and was recommended to continue physical therapy along with a hinge brace and a patella knee sleeve.

She sought the treatment of Dr. Troy Karlsson on October 5, 2009. Dr. Karlsson did not recommend surgery. The Petitioner sought a second opinion with Dr. Bush-Joseph at Rush University Medical Center.

On October 27, 2009, Dr. Bush-Joseph, referred her to Dr. Brian Cole for a surgical consultation with possible cartilage restoration. On November 30, 2009, Dr. Cole diagnosed a right knee medial condyle defect and recommended osteochondral allograft which was performed on January 5, 2010. The Petitioner was nonweightbearing for the four weeks she was on crutches. The Petitioner was released to sedentary duty work and was prescribed physical therapy.

On March 18, 2010, Dr. Cole reported that she was still experiencing pain in the medial aspect of the knee after five minutes of weightbearing. He recommended more physical therapy. The Petitioner was working a desk job for the Respondent.

On April 22, 2010, she reported popping and clicking in the right knee. Dr. Cole recommended a follow up MRI. A follow up MRI showed a small focal bone marrow edema and small effusion anterior to the graft. Dr. Cole recommended an arthroscopic procedure for suspected plica and possible foreign body with anticipated return to work one week after surgery.

On June 1, 2010, Dr. Cole performed the second surgery of the right knee. The plica and a small meniscal tear were excised. Dr. Cole noted at that time that she had residual mild ACL laxity. He recommended additional strengthening and physical therapy.

Petitioner saw Dr. Cole's physician assistant, Mr. Pilz, and told him she had gone fishing on June 7, 2010 and was climbing up a hill. (Pt's Ex. 3). Art Petitioner's request, Pilz wrote specific restrictions of sedentary level with limited standing and walking.

On July 8, 2010, Dr. Cole noted complaints of continued pain with activities, especially in the antrolateral aspect of the patella, but no pain with sitting or resting. She reported hypersensitivity at the lateral aspect of the knee, complaining she began to feel this one week

after surgery but didn't mention it until six months post operatively. Dr. Cole gave a depo-medrol injection into her knee with a recommendation for additional physical therapy and a patella sleeve to support her ACL.

On July 28, 2010, a physical therapist noted swelling in her knee and it was painful to touch due to a possible meniscal tear. Later, she plateaued in therapy and was discharged from it on August 12, 2010. Nevertheless, Petitioner reported persistent pain and hypersensitivity in the lateral aspect of the right knee. Dr. Cole started her on Lyrica and referred her to Dr. Sandeep Amin, a pain management specialist at Rush University Medical Center for evaluation and treatment and possible early Complex Regional Pain Syndrome. (CRPS)

Petitioner was working four hours a day as a light duty nurse at that time. Dr. Amin diagnosed her with neuropathic pain, but did not think she had CRPS. This was on August 23, 2010.

An EMG performed on September 1, 2010 was normal.

Petitioner was discharged by Dr. Cole on September 2, 2010. At that time, the Petitioner was at MMI from an orthopedic standpoint and had permanent restrictions of limited standing and no lifting greater than 10 pounds.

On September 2, 2010, she underwent a sympathetic block by Dr. Amin and reported 50% improvement to her pain level.

The Petitioner started a new job working for Sedgwick CMS on October 4, 2010 as a nurse case manager/pharmacy nurse.

Subsequently, there was an 11 month gap in treatment.

Petitioner did not see Dr. Amin again until September 12, 2011, where she reported three months of relief from the lumbar sympathetic nerve block but had burning pain in the right foot for the last three weeks. Dr. Amin noted mild erythema and moderate diffuse allodynia of the right foot. She also had allodynia in the lateral aspect of the right knee. Dr. Amin recommended a series of lumbar sympathetic blocks and diagnosed a flare up of right foot neuropathic pain.

On September 15, 2011, x-rays showed a stable graft and no demonstrable change in temperature or skin color of the Petitioner's right knee and leg. Nevertheless, the record reflects that Petitioner underwent a series of three injections by Dr. Amin in the autumn of 2011. By October 25, 2011, Dr. Amin's diagnosis had changed to "CRPS and neuropathic pain of the right lower extremity."

Again, there was a six month treatment gap.

On April 23, 2012, the Petitioner returned to Dr. Amin with renewed complaints.

On May 2, 2012, Dr. Amin administered another lumbar sympathetic block. She testified that she felt relief for about two weeks.

Since this treatment was not long lasting, Dr. Amin has prescribed a 6-week epidural infusion. An external pump provides narcotic medication to the Petitioner's lumbar spinal via a catheter which is inserted into an epidural space via x-ray guidance. The portable morphine pump is worn for six weeks.

The above treatment has been denied by Respondent and is the crux of the 8(a) portion of this claim.

The Petitioner continues to treat intermittently with Dr. Amin for pain management.

On April 26, 2012, an MRI of the lumbar spine revealed minimal degenerative changes. The record reflects the Petitioner sought no treatment from November 14, 2011 until April 23, 2012.

On June 4, 2012, the Petitioner was seen by Dr. Ingberman, who is Board Certified in Physical Medicine and Rehabilitation and Pain Medicine. When she examined the Petitioner, the doctor saw no evidence of CRPS. However, mild right knee instability was documented, along with chronic right lower extremity pain that was neuropathic in quality. The prognosis for functional recovery was good. Dr. Ingberman recommended completing one more series of sympathetic blocks followed by an interdisciplinary four weeks pain management program, following which she would be at MMI. Dr. Ingberman noted specifically that the Petitioner should not have additional blocks in the future, but that she should continue an independent exercise program. Dr. Ingberman further found that there was no reason why the Petitioner could not continue to work in her sedentary capacity as a pharmacy nurse at Sedgwick CMS. Dr. Ingberman felt that the Petitioner's symptoms on that date were partially related to the injury and also related to underlying present and past psychological issues.

She was seen again by Dr. Ingberman on October 9, 2012, who noted on that date that the Petitioner reported that she used to regularly do desensitization exercises of her foot which had helped her significantly. The Petitioner stated that she had stopped that many months ago. Dr. Ingberman conducted a physical examination on October 9, 2012 and noted "There is no difference in hair growth, color of the skin or perspiration in bilateral lower extremities. The right foot appears to be slightly cooler on palpation compared to the left," which she opined was a normal finding.

Dr. Ingberman stated that she did not recommend any further treatment for the Petitioner. She found the Petitioner was at MMI and should resume her independent exercises and desensitization. She specifically recommended against the treatment proposed by Dr. Amin.

The Petitioner testified at trial that she smokes marijuana on a daily basis.

The Doctor further noted that the Petitioner has been experiencing psoriatic arthritis involving multiple joints for many years. The Petitioner reported that during flare ups of the arthritic pain, she experienced 5 to 8 out of 10 in her joints. She had been under the care of a rheumatologist. Dr. Ingberman found further that the Petitioner should be able to work in a sedentary capacity at that time.

The Petitioner was seen again by Dr. Ingberman on November 28, 2012. The Petitioner expressed her anger at Dr. Ingberman for her recommendation for no additional treatment. Dr. Ingberman once again found that the Petitioner's painful condition did not meet Budapest's criteria for a diagnosis of CRPS. In addition, she found that the Petitioner has significant psychological factors that make any interventional procedures carry a higher risk of failure and complications. She again found no reason that the Petitioner could not continue to work in a sedentary capacity.

ISSUES

F. Is Petitioner's Current Condition of Ill-Being Causally Related To the Injury?

J. Were The Medical Services That Were Provided To Petitioner Reasonable And Necessary? Has Respondent Paid All Appropriate Charges For All Reasonable And Necessary Medical Services?

K. What Temporary Benefits Are In Dispute?

CONCLUSIONS OF LAW

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that the Petitioner's current condition of ill-being, in particular CRPS, is causally related to the accident of April 13, 2009.

In finding the above, the Arbitrator notes the following:

The Arbitrator finds the opinion of Dr. Ingberman to be fairly compelling. To review, she found no objective evidence of CRPS and, in fact, the Petitioner's pain complaints did not meet the standard for the Budapest criteria in diagnosing CRPS. The Budapest criteria were designed for better diagnosis of CRPS by the International Association for the Study of Pain. (R's Ex. 1, Deposition transcript of Dr. Ingberman, page 56.)

In addition, Dr. Ingberman testified that the Petitioner reported doing desensitization exercises for her foot that she learned from a physical therapist but that she had stopped doing them. "She reported that she found that when she was doing the exercises, they were very helpful, but she stopped doing them for whatever, so that is noncompliance on her part and that was against what was recommended." (Ibid. p. 36).

The Arbitrator notes the significant gap in treatment from September 2, 2010 when last seen by Dr. Cole and her returning for treatment with Dr. Amin on August 26, 2011. The Petitioner was working a full-time sedentary job during this approximate 11 month gap in treatment. The Arbitrator further notes an additional five month gap in treatment from November 14, 2011 to April 23, 2012.

Further, Dr. Ingberman testified that the Petitioner's psychological history would make her a poor candidate for prolonged and invasive pain management. (Ibid. p. 34).

Dr. Ingberman testified that the Petitioner "had the personality profile which would cause her to seek treatment and find treaters and she would maybe find temporary relief but then would go on and have another and ask for another treatment and another treatment but that the Petitioner would neglect to do the most basic things that would really help her to improve quality of life and avoid ongoing harmful interventions." (Ibid. p. 35)

The Arbitrator had an opportunity observe the injured knee. The Arbitrator found no evidence of discoloration about the knee, however, there was significant discoloration due to psoriasis. In addition, the Arbitrator found no abnormal hair growth or abnormal perspiration.

The Arbitrator notes that the Petitioner was discharged by Dr. Cole at MMI on September 3, 2010 followed by an 11 month gap in treatment until August 26, 2011, during which Petitioner worked full time.

Despite the above, the Arbitrator finds the Petitioner's current condition of ill-being is causally related to her work injury of April 13, 2009.

If looking at the entire medical record, it appear to the Arbitrator that Dr. Amin's overall treatment plan is well grounded and credible. The symptoms of CRPS are documented, but mostly subjective. Initial treatment for "neuropatic pain" was diagnosed by Dr. Ingberman and approved by Respondent. The Arbitrator notes that a neuropathic pain of unknown etiology is also largely based on subjective complaints.

Dr. Ingberman is concerned about a future scenario where there is perpetual treatment by multiple doctors with astronomical bills and never-ending complaints. However, this case does not appear fit that profile. The Petitioner has not been doctor shopping. The treatment proposed is a six week program and the bills do not seem outrageous. Additionally, the Arbitrator notes there have been no reports of symptom magnification by any treater or physical therapist thus

far. There is some concern about narcotic addiction, but that is true in any chronic pain case. Finally, Dr. Bryan Cole enjoys a reputation as a high quality treater, who referred the Petitioner to Dr. Amin; the Petitioner has not been treating with storefront physicians.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Respondent introduced into evidence the Utilization Review report of Dr. Steven Blum, who is certified by the American Board of Anesthesiology with a Sub-certification in pain medicine. Dr. Blum performed a medical record review and UR at the request of Triune Health Group. (R's Ex.4.) The UR noncertified Dr. Amin's recommendation for a six-week epidural pain pump and noncertified a spinal cord stimulator, Flexor patch, and physical therapy.

In addition, partial certification was given for therapy for dates of July 27, 2009 to August 6, 2009, January 25, 2010 to February 1, 2010, and June 15, 2010 to July 29, 2010. All other physical therapy visits were noncertified.

The noncertification was based on the fact that the epidural/pain pump is an implantable drug delivery system and is recommended only as an end stage treatment alternative for selected patients for specific conditions. Dr. Blum reviewed the treating records and found that the Petitioner was not a good candidate for the epidural pain pump or spinal cord stimulator (SCS). He opined that psychological evaluation should be obtained and the evaluation should state that the pain is not primarily psychological in origin and that benefit would occur with implantation despite any psychiatric co-morbidity. Dr. Blum was not subject to cross-examination.

Dr. Blum found there was no psychological evaluation report which indicates that the Patient's claim is not primarily psychological in origin and further opined that ODG recommends psychological screening prior to all SCS implantations. There is no indication that Petitioner had obtained documented psychological clearance before proceeding with the SCS trial. Dr. Ingberman, noted Petitioner's psychological issues.

The Petitioner testified that she has been dealing with anger issues and anxiety issues since childhood. She stated that she was molested as a child, and has had professional help in this area. This was pointed out by Dr. Ingberman in her deposition testimony. (R's Ex. 1, pp 34,35).

Petitioner's treater, Dr. Amin, testified on cross-examination that the Petitioner was seen by a pain psychologist but he did not recall any conversation specifically with the psychologist. His treating notes did not contain any comment or notes from the psychologist nor could he remember any specific date, time, or substance of any conversation with this purported visit with a psychologist. He did state that pre-existing psychological conditions can be aggravated by

chronic pain. (Pt's Ex. 2, Amin Dep., pp 51,52, 53.)

As a result of the above, the Arbitrator finds Petitioner entitled to a psychological evaluation prior to the treatment prescribed by Dr. Amin.

Additionally, the outstanding medical bills in the amount of $12,705.35 are awarded. (PX #1).

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The parties stipulated that the Petitioner was paid Temporary Total Disability (TTD) benefits from July 22, 2009 to December 15, 2009; December 27, 2009 to February 6, 2010; June 1, 2010 to July 10, 2010; and August 30, 2010 to October 3, 2010. This is a total 70 3/7 weeks.

The parties also stipulated that Respondent paid TPD benefits from December 13, 2009 to December 26, 2009, February 7, 2010 to March 22, 2010; April 18, 2010 to June 12, 2010, July 25, 2010 to August 7, 2010. This is a total of 19 5/7 weeks.

Petitioner testified that during the period of time she was paid TPD benefits, she was performing a light duty job for the Respondent, Elmhurst Memorial Hospital. During this period of time, Respondent provided vocational rehabilitation services, but before the actual start of a job search after a vocational assessment, Petitioner found a job on her own with Sedgwick CMS, a workers' compensation administrative provider and third party administrator. She accepted a position as a pharmacy nurse and began work on October 4, 2010. (R's Ex. 2, p.3). This was a sedentary desk job. Petitioner's starting salary with Sedgwick amounted to approximately $21,000.00 more than she had been earning for the Respondent. (R's Ex. 2, pp 11, 23.)

As part of the hiring process, Petitioner was required to fill out a list of previous employers. When asked her reason for leaving her current employer, she responded, "Looking to expand my nursing qualifications. Would like a desk job at this time." (R. Ex 2, p. 26)

Petitioner continued to work in the sedentary capacity until September 12, 2012. On that date, Petitioner terminated her employment with Sedgwick CMS over certain performance issues including violating the dress code. (R's. Ex 2, pp 3, 44). The records reflect that the Petitioner, while discussing remedial action with her supervisor, jumped up and said, "I Quit", and left the employer immediately. She did not finish out the day, but left before 12 noon. (R's Ex. 2, p 44, p. 3.)

The Respondent presented witness Sonya Rose, vocational counselor, who testified that with Petitioner's skills, there were over 200 job openings available which were sedentary and required only desk work. There was no testimony that Petitioner attempted to find sedentary work on her own.

The Arbitrator finds that the Petitioner was capable of performing a sedentary duty position and voluntarily took herself out of the workforce.

For the forgoing reasons, the Arbitrator finds the Petitioner is not entitled to TTD benefits from September 12, 2012 until February 2, 2013.

However, Dr. Amin took the Petitioner off work completely on February 3, 2013, so she was not at MMI from a chronic pain standpoint. The Petitioner is entitled to TTD benefits from February 3, 2013 to April 15, 2013, the date of the 19(b) hearing in Chicago.

07-03-13

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHEILAH GRIFFITH, WIDOW, OF DAVID GRIFFITH
& TABITHA GRIFFITH, INCAPACITATED CHILD,

Petitioners,

vs. NO: 08 WC 56898

14IWCC0357

PEADODY COAL, *ET.AL.*,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, last exposure date, notice, causation, occupational disease, incapacity of the child, and maximum survivor benefit, 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 Arbitrator found that the Decedent's occupational disease contributed to his death. He also found that Decedent's adult child was incapacitated. The Commission agrees with those findings and adopts and affirms those aspects of the Decision of the Arbitrator. In addition, in his order, the Arbitrator awarded Decedent's widow, Sheila Griffith $520 a week until $250,000 has been paid or 20 years, whichever is greater.

Section 8(b)4.2 of the Act provides in its entirety: "Any provision to the contrary notwithstanding, the total compensation payable under Section 7 shall not exceed the greater of $500,000 or 25 years." Unlike the maximum permanent partial disability provisions regarding injuries to specific body parts, the maximum death benefit provision does not specify that it applies to injuries accrued on or after a certain date. If it did, the date of accident would apply and the lower maximum would be in effect in this case. However, because the death benefit maximum provision does not specify the accident or injury date as the operative date, the operative date is the date of death. The higher limit went into effect in 2006 and Decedent died in 2008. Therefore, the higher rate applies and the Commission modifies the decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay death benefits, commencing March 11, 2008 of $520.00 per week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, Sheila Griffith shall be paid $260.00 in weekly benefits on her own behalf. Sheila Griffith's benefits shall continue until $500,000 has been paid or 25 years, whichever is greater. Tabitha Griffith shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child for the duration of her incapacity.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay compensation that has accrued from March 11, 2008 through the date of this order, and shall pay the remainder of the awarded benefits of the awarded weekly benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that if the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $8,000.00 for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing the second July 15th after the entry of this award, Petitioners 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 pay to Petitioner interest under §19(n) of the Act, if any.

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

DATED: MAY 15 2014

Ruth W. White

Ruth W. White

Daniel R. Donohoo

Daniel R. Donohoo

Charles J. DeVriendt

Charles J. DeVriendt

RWW/dw
O-4/22/14
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRIFFITH, SHEILAH WIDOW OF GRIFFITH, DAVID, GRIFFITH, TABITHA DEPENDENT INCAPACITATED CHILD
Employee/Petitioner

Case# **08WC056898**

14IWCC0357

PEABODY COAL CO ET AL
Employer/Respondent

On 7/25/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

2742 HAZLETT & SHORT PC
KEVIN M HAZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

- [ ] 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
FATAL

14IWCC0357

Sheila Griffith, Widow of David Griffith, Tabitha Griffith, Dependent Incapacitated Child

Employee/Petitioner

v.

Peabody Coal Co., et al.

Employer/Respondent

Case # 08 WC 56898

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 Gerald Granada**, Arbitrator of the Commission, in the city of **Collinsville** on **March 25, 2013**. The issue of dependency of Tabitha Griffith was heard on **June 20, 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 Decedent's employment by Respondent?

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

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

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

G. [ ] What were Decedent's earnings?

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

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

J. [x] Who was dependent on Decedent at the time of death?

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

L. [ ] What compensation for permanent disability, if any, is due?

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

N. [ ] Is Respondent due any credit?

O. [x] Other **causation, death benefits, arising out of and in the course of, disease**

FINDINGS

On the date of accident (last exposure), **September 21, 1996**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of the accident/diseases ***was*** given to Respondent.

Decedent's death ***is*** causally related to the accident/diseases.

In the year preceding the injury, Decedent earned **$40,560.00**; the average weekly wage was **$780.00.**

On the date of death, Decedent was **60** years of age, ***married,*** with **1** dependent child.

The Arbitrator finds that Decedent died on **March 11, 2008** leaving **two** survivors, as provided in Section 7(a) of the Act, including **his spouse, Sheila Griffith and his daughter Tabitha Griffith**.

ORDER

Respondent shall pay death benefits, commencing **March 11, 2008**, of **$520.00**/week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, ***Sheila Griffith*** shall be paid $260.00 in weekly benefits on her own behalf . Sheila Griffith's benefits shall continue, until ***$250,000 has been paid or 20 years ,*** whichever is greater. ***Tabitha Griffith*** shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child, for the duration of her incapacity.

Respondent shall pay compensation that has accrued from March 11, 2008 through **the date of this order**, and shall pay the remainder of the awarded weekly payments.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall pay ***$8,000.00*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund*** , as provided in Section 8(g) of the Act.

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

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

Signature of Arbitrator

7/23/13
Date

JUL 25 2013

FINDINGS OF FACT

On April 4, 2003 the Illinois Industrial Commission (now known as the Illinois Workers Compensation Commission) affirmed and adopted an award for David Griffith finding him totally and permanently disabled as a result of coal workers' pneumoconiosis (CWP), and chronic obstructive pulmonary disease (COPD), including emphysema and chronic bronchitis. The Commission found that Mr. Griffith coal mined for 24 years, last working for the Respondent Peabody Coal Company on September 21, 1996. Drs. Partridge and Houser testified for Mr. Griffith, and Dr. Tuteur testified for Respondent. (Arb. EX 3). The Appellate Court affirmed the Commission's decision. (Arb EX 4). Mr. Griffith died on May 11, 2008, and his death certificate listed lung cancer with metastasis as the immediate cause of death. (PX 3). This matter was tried again with the primary issue being whether the Petitioner's death was causally connected to those conditions, which the Commission previously found causally connected to his employment and from which the Petitioner was permanently and totally disabled.

Sheilah Griffith testified on March 25, 2013. There is no dispute that she was married to the Petitioner, David Griffith through the date of his death on May 11, 2008. She described decedent's oxygen use in the year prior to his death. She also detailed his respiratory struggles, including his breathlessness. During his final days decedent turned blue at times requiring his oxygen to be adjusted. He declined each day until he was unable to go on. He died quietly at home.

After the initial hearing on this matter it was discovered that Petitioner, Sheila Griffith's daughter, might be an incapacitated child entitled to benefits as a dependent. By agreement of the parties, proofs were reopened to consider that issue and the matter was heard on June 20, 2013. At this hearing, Petitioner Sheila Griffith testified that her daughter, Tabitha Griffith, was born with spina bifida and has no sphincter requiring Sheila to carry clothes with her whenever Tabitha leaves the house. Tabitha is unable to leave the home without her mother's assistance and care. Tabitha completed three grades of school and has never worked in any capacity. Dr. Elliot Partridge has been her lifelong physician. Petitioner introduced Dr. Partridge's letter stating "Tabitha is disabled and will continue to be disabled. Tabitha is cared for by her mother Sheila Griffin (sic)." (PX 2, 6-20-13 hearing). Sheila Griffith also testified that Tabitha is receiving Social Security disability benefits, and Petitioner introduced a letter from the Social Security Administration granting SSI benefits based on her disabilty. (PX 1, 6-20-13 hearing). Sheila Griffith testified that since Janauary of 1997 these benefits have continued without review. Sheila Griffith is the recipient of the checks for Tabitha's benefit. Tabitha Griffith testified that she has problems leaving the home because she is unable to control her body from the waist down, making it difficult to walk, and requiring the use of a catheter and the assitance of her mother.

Dr. Houser, a treating pulmonologist, testified via evidence deposition that decedent was referred to his office by his primary care physician, Dr. Partridge on April 16, 1999. Dr. Houser then treated him on numerous occasions. Initially decedent had shortness of breath walking one block and had a chronic cough with about a tablespoon of sputum every 24 hours. He coughed up blood on 2-3 occasions over a six month period. He used an aerosol machine at home and antibiotics and Prednisone for acute exacerbations. Decedent was on Theophylline, Atrovent, Proventil and Azmacort for his breathing. (PX 1, p. 9-10). Dr. Houser discussed decedent's treatment over the years. He was treated by cardiologist Dr. Millsaps since 1996 and later by oncologists, Drs. Domingo and Concepcion. (p. 10). Decedent's pulmonary function testing (PFTs) improved to a mild obstruction, which Dr. Houser attributed to periodic use of antibiotics and Prednisone for chronic bronchitis. His condition changed substantially on March 22, 2007 after his cancer diagnosis. He was not a good surgical candidate due to lung and heart disease, weight loss, and chest and back pain, which usually indicates far advanced disease and chest wall involvement. (p. 13-16).

Dr. Houser felt decedent's lung disease would aggravate his heart disease. (PX 1, p. 17-19). Dr. Houser provided postoperative mortality from surgery is impossible to determine in a person with CWP, COPD, lung cancer, and severe CAD. In this he disagreed with Respondent's IME, Dr. Renn. (p. 20-21). Dr. Houser explained that COPD is a chronic systemic inflammatory syndrome, and COPD patients have an increased incidence of other comorbid conditions, such as cardiac conditions. (PX 1, p. 22-25). Decedent's lung cancer would have caused a multi-organ or multifactorial terminal event, and his lung disease would have played a causative role. Dr. Houser concluded that decedent's COPD, emphysema, CWP, and coronary disease were substantial factors contributing to death. (p. 25-27).

Dr. Elliot O. Partridge also testified via evidence deposition. He began treating decedent around 1984. He stated decedent's pulmonary problems gradually deteriorated. (PX 2, p. 7-8). He last saw decedent on April 22, 2008 after he was discharged from the hospital to have hospice care and comfort at home. Decedent had pneumonia which had some resolution by the time of his discharge. He was sent home on antibiotics. Dr. Partridge said that decedent's CWP and COPD made him more susceptible to pneumonia and made recovery from pneumonia more difficult. They diminished his respiratory reserve and caused hypoxemia. (p. 10-12). When organs are deprived of oxygen they deteriorate. Decedent was on several breathing medications. Based on his knowledge as decedent's treater, Dr. Partridge felt the major factor in death was multifactorial respiratory collapse, with CWP, COPD, emphysema, and lung cancer being causative factors. Decedent's overall body burden killed him. (p. 13-15). Dr. Partridge felt death was hastened by decedent's total body burden including heart trouble, COPD, and emphysema. (p. 37).

Pulmonologist, Dr. Joseph Renn, reviewed various medical records and testified on behalf of the Respondent. (RX 1, Resp. Depo. EX 2, p. 1). Dr. Renn has not treated patients since January of 2003, retiring from active practice at that time. (RX 1, p. 23). He is a "forensic medical examiner." (p. 4). Dr. Renn tied the decedent's death to multiple factors including the cancer, heart attacks, further damage to an already damaged heart, and pneumonia. (RX 1, p. 10). He stated Decedent's heart failure was not related to coal dust because it was left sided. Coal mine dust would produce right sided heart failure. (p. 11-12). Dr. Renn disagreed with decedent's treaters. He disagreed with Dr. Partridge, and concluded that death was much more likely due to a heart attack and intractable heart failure. He disagreed with Dr. Houser that decedent's lung disease played a role in death. He disagreed with decedent's oncologist Dr. Domingo that decedent was a poor surgical candidate because of his cardiac and respiratory conditions. (p. 13; Depo. Ex. 2, p. 7). Dr. Renn stated that decedent's respirations had improved up to the time his cancer was found. However, decedent was inoperable because the lung mass had spread to the chest wall and was too far gone. (p. 14). Dr. Renn stated that none of decedent's pulmonary disease affected his gas exchange from August 17, 1999 to February 16, 2008. PFTs from April 16, 1999 through March 23, 2007 showed improvement. He felt "there just could have been no contribution whatsoever" from his CWP, COPD, and emphysema to the respiratory collapse implied by Dr. Partridge. (p. 15-16). However, Dr. Renn agreed coexisting heart and lung problems increase the risk for sudden cardiac events and make recovery from them more difficult. (p. 24-25). He agreed that the chronic lung disease puts one at a higher risk to develop and then recover from pneumonia. (p. 39).

Dr. Domingo's records documented decedent's radiation therapy for lung cancer and eventually brain cancer. (PX 11). Dr. Domingo kept in contact with Dr. Partridge regarding his treatment. On December 13, 2007 decedent had completed palliative radiation for his brain tumor. (p. 17). On November 28, 2007 Dr. Domingo stated "Considering his known severe COPD and cardiac disease he is a high risk of surgery hence his referral back to us for consideration of palliative brain irradiation." (p. 18). Dr. Domingo also stated decedent's lung cancer was inoperable because of his COPD and cardiac disease. (p. 20-22). On April 9, 2007 given the poorly differentiated tumor and comorbid conditions which resulted in his poor prognosis, the treatment was to improve his quality of life and obtain tumor control. (p. 24). At that time Decedent's lungs had coarse distant breath sounds due to COPD. (p. 22).

Ohio Valley Heart records were also admitted into evidence. They reflect treatment of decedent's cardiomyopathy and associated heart issues. These records note the Petitioner's January 30, 1997 pulmonary testing showed air trapping, hyperinflation, mild hypoxemia, and a mild obstructive defect that improved with bronchodilators. (p. 33). September 11, 1996 testing showed mild obstruction, but a lung age of 85 years. (p. 57). Cardiomyopathy and chronic lung disease were noted on April 23, 1997. Decedent was dyspneic with minimal exertion and had scattered wheezes and rhonchi bilaterally. (p. 2). On May 1, 2001 exertional dyspnea continued; he was still being seen by Dr. Houser for his CWP. (p. 6).

Treating Oncologist, Dr. Concepcion's, records reflect decedent's chemotherapy, and declining health with cancer metastasis to the brain. Chronic bronchitis, black lung, and COPD appear throughout the records. Globally diminished breath sounds are noted on several entries, with crackles also noted. On October 23, 2007 it was noted that he has been started on home oxygen at bedtime and nebulizers. (p. 60). His baseline symptoms have improved on nebulizers and oxygen. (p. 62). He was advised to use round the clock oxygen. (p. 63).

Records from Ferrell Hospital contain entries regarding decedent's April of 2008 admissions for rib fractures, pneumonia and chest pain. On April 9, 2008 decedent had fallen after getting up to go to the bathroom. There was no chest pain or seizure prior to falling. He had been getting very weak with chemotherapy. He had a chronic harsh cough and intermittent hemoptysis. On April 15, 2008 it was noted decedent's pneumonia had improved, but he developed chest pain and transferred to acute care and had an acute inferolateral infarct. He was more lethargic and had continued bibasilar rales. On April 17, 2008 Dr. Moore increased oxygen to 3 liters per nasal cannula with humidified oxygen. (PX 14, p. 3-4). A chronic harsh cough was noted on April 19, 2008 with diaphoretic skin and slightly diminished lung sounds. Decedent was a DNR. By the April 22, 2008 he and his family agreed on home care with VNA Hospice. (p. 10). Dr. Moore's consultation of April 16, 2008 noted decedent's chest had diminished breath sounds throughout with expiratory wheezing. (PX 14, p. 11). Decedent's angina post infarct was concerning, but given decedent's metastatic disease and continued deterioration he would avoid getting too aggressive with treatment. He decided to push medications and hope things settled down. Another infarct was possible, but decedent's chance of surviving it would be good. (p. 12). Other testing was included in these records. (p. 16-22, 25-34).

VNA Hospice Records detail decedent's declining condition at home. In addition to his respiratory symptoms and eventual respiratory cessation, his problems included an inability to eat, seizures with leg paralysis, and a reduced heart rate. On April 22, 2008 decedent was very weak and dyspneic with minimal exertion. He was oxygen dependent, bedbound, and lethargic. (PX 16, p. 23). From April 23, 2008 until May 7, 2008 decedent's lung sounds were diminished and oxygen saturations varied, from 84% to 93% on 2 liters of oxygen. The records from this provider indicate Petitioner passed away on May 11, 2008.

CONCLUSIONS OF LAW

1. For purposes of this claim, both Sheila Griffith and her daughter Tabitha Griffith are the appropriate Petitioners in this case. The Arbitrator finds that Tabitha Griffith is a dependent child who is physically incapacitated under Section 7(a) of the Act. The application for adjustment of claim is hereby amended sua sponte to conform to the proofs and add Tabitha as a party based on the findings herein.

2. Petitioners filed their claim on December 31, 2008 thereby providing notice. *Crane Company v. Industrial Commission*, 32 Ill. 2d 348, 205 N.E. 2d 425, 427 (1965). Respondent has failed to show it was substantially prejudiced by the timing of this notice as required by the Act. 820 ILCS 310/6(c). All parties had medical records material available for expert opinions. In addition, the Act requires notice of the disabling disease, not death, which Respondent had by virtue of the prior disability claim. 820 ILCS 310/6(c).

14IWCC0357

3. Petitioners sustained their burden of proof regarding the issue of whether an occupational disease existed that arose out of the decendent's employment with Respondent. In this case, there was a prior final decision by the Commission and affirmed through the Illinois Appellate Court finding the decedent was totally disabled by occupationally related chronic bronchitis, COPD and CWP during his lifetime. Under Section 19(j), the prior final decision regarding decedent's disability claim, "shall be taken as final adjudication of any of the issues which are the same in both proceedings." 820 ILCS 310/19(j).

4. Petitioners sustained their burden of proof regarding the issue of causation. The Arbitrator finds persuasive the opinions of decedent's two treating physicians, as well as those of the multiple consulting physicians on this issue. "Death is compensable under the Act so long as the decedent's employment was a causative factor. His employment need not be the sole cause or even the primary cause; it is sufficient if it is a cause." *Freeman United Coal Mining Co. v. IWCC*, 386 Ill. App. 3d 779, 901 N.E. 2d 906, 912 (4th Dist. 2008). So long as it was a factor in hastening death, compensation is appropriate. *Freeman United Coal Mining Co. v. Industrial Commission*, 308 Ill. App. 3d 578, 720 N.E. 2d 309, 315 (5th Dist. 1999). In *Proctor Community Hospital v. Industrial Commission*, 41 Ill. 2d 537, 244 N.E. 2d 155, 158, (1969), the Supreme Court stated that even though the ultimate outcome of the worker's heart condition likely would have been his death at some future time, and possibly under non-employment related circumstances, it would not invalidate an award where the occupation hastened death. In the present case, there was abundant evidence that decedent's work-related lung diseases weakened him further and contributed to and/or hastened his death as concluded by primary care physician Dr. Partridge and treating pulmonologist Dr. Houser. Although the Respondent did provide a viable defense via the expert opinions of Dr. Renn, those opinions are not persuasive in light of the prior Commission decision in this matter as well as the overwhelming medical evidence from Petitioner's treating physicians.

5. Respondent shall pay death benefits, commencing **March 11, 2008**, of **$520.00**/week because the injury caused the employee's death, as provided in Section 7 of the Act. The distribution to the dependents is as follows: The surviving spouse, ***Sheila Griffith*** shall be paid $260.00 in weekly benefits on her own behalf . Sheila Griffith's benefits shall continue, until ***$250,000 has been paid or 20 years*** , whichever is greater. ***Tabitha Griffith*** shall be paid $260.00 in weekly benefits, as a physically incapacitated dependent child, for the duration of her incapacity.

6. Respondent shall pay ***$8,000.00*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

14IWCC0358

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Geneda Bauman,

Petitioner,

vs. NO: 08WC 56041

Renaissance Care Center,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 28, 2013, is hereby affirmed and adopted.

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 the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 15 2014

Ruth W. White

Charles J. DeVriendt

Daniel R. Donohoo

RWW:bjg
0-4/22/2014
046

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BAUMAN, GENEDA
Employee/Petitioner

Case# **08WC056041**

RENAISSANCE CARE CENTER
Employer/Respondent

14IWCC0358

On 10/28/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
TODD A STRONG
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2337 INMAN & FITZGIBBONS
G STEVEN MURDOCK
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- [ ] 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

GENEDA BAUMAN,
Employee/Petitioner

v.

RENAISSANCE CARE CENTER,
Employer/Respondent

Case # **08** WC **56041**

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, 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] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other ___

FINDINGS

On **November 10, 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 **$34,954.00**; the average weekly wage was **$672.19**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$36,604.58** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$12,105.00** for other benefits, for a total credit of **$48,709.58**.

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 **$448.35**/week for **202** weeks commencing **November 11, 2008** through **September 25, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of **$448.35**/week for life, commencing **September 26, 2012** as provided in Section 8(f) of the Act.

Respondent shall pay to Petitioner reasonable and necessary medical services of **$282,817.08,** subject to the provisions of the medical fee schedule, pursuant to Section 8(a) and 8.2 of the Act.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

October 18, 2013
Date

OCT 28 2013

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

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

Petitioner testified she is currently 56 years of age, earned a high school diploma and received LPN certificate from Spoon River College. Petitioner has been employed as an LPN since 1978, primarily in nursing homes providing medical services to elderly patients, along with others suffering physical and mental disabilities. Petitioner testified she has received awards for nurse of the year as well as Humanitarian of the Year during her career.

Petitioner further testified that on November 10, 2008, she was an LPN for Respondent. Respondent runs a facility that provides residential life care services for the elderly as well as the mentally and physically disabled. Petitioner had been so employed by Respondent for approximately 8 years prior to that date.

Petitioner further testified she was in charge of CNA's working for Respondent and was responsible for direct contact with physicians of the patients at that facility, should there be any change in their medical conditions.

On November 10, 2010, Petitioner was working in the pediatric wing of Respondent's facility. This wing housed 33 child patients, only four of which were ambulatory. Petitioner testified this work called for constant twisting, bending and kneeling to replace tubes and feeding bags. Petitioner testified there was a minor resident who was 12 years old and weighed 68 pound. This minor had a propensity of climbing on others, including staff members. Petitioner testified she and other employees were aware of his behavior, and would attempt to redirect him if he tried to climb on anyone. Petitioner testified that while she had her back to this minor on that date, he ran to her and jumped on her back and pulled her hair, pulling her neck back while she twisted to try to grab the minor to stop him from pulling on her hair and head. At that time, she experienced a popping sensation in her neck.

Petitioner testified this incident was reported immediately to Ms. Jennifer Spencer, her supervisor, after the minor patient was brought under control.

The next day, Petitioner sought treatment with Dr. Phillips, her personal physician. Petitioner testified that Ms. Spencer, her supervisor, directed her to follow up with Dr. Phillips, who is also affiliated with Respondent's nursing home. When she first saw Dr. Phillips, Petitioner complained of headaches, a scalp abrasion, neck pain, low back pain and left sided weakness. Dr. Phillips took Petitioner off of work and prescribed conservative care.

On December 12, 2008, Petitioner was seen at the emergency room of Graham Hospital, where she reported a work injury of hair being pulled by a client. Petitioner complained of right sided cervical pain, right shoulder pain with pain radiating down the arm to the hand. Petitioner was advised to see her primary physician. Petitioner also visited that same emergency room on February 25, 2008, November 22, 2009, March 11, 2010, July 22, 2010, March 30, 2012 and May 24, 2012, primarily for complaints of pain.

Petitioner also had multiple emergency room visits at Methodist Medical Center for the same symptoms. Petitioner also had multiple emergency room visits at OSF St. Francis Medical Center for the same symptoms.

Petitioner also sought treatment with Dr. Yibling Li on December 17, 2008. Dr. Phillips referred Petitioner to Dr. Li. Dr. Li prescribed an MRI of the head and brain. The MRI of the brain was performed on January 14, 2009, and the findings were unremarkable. Dr. Li diagnosed discogenic neck pain with a disc herniation at L4-L5 and a sprain at the S1 joint.

Petitioner also sought treatment with Dr. Hoffman on February 26, 2009. Petitioner began treating with Dr. Hoffman on her own. Dr. Hoffman prescribed a cervical MRI. This was performed on December 3, 2008. This revealed cervical disc herniation at C4-C5. Dr. Hoffman prescribed a lumbar MRI. This MRI was performed on February 28, 2009, and revealed and revealed a lumbar disc protrusion at L5-S1 with multi-level lumbar degenerative disc disease. Dr. Hoffman diagnosed a cervical strain, lumbar strain with herniated disc at L5-S1 with radiculopathy to the left leg. On March 8, 2010, Dr. Hoffman prescribed an ultrasound.

Petitioner also saw Dr. Trudeau on March 10, 2009. This referral was made by Dr. Hoffman. Dr. Trudeau performed an EMG/NCV study that revealed a left S1 radiculopathy, left C7 radiculopathy, and a right C6 radiculopathy, which he described as severe in nature.

Petitioner was also referred to see Dr. Blair Rhode for her right shoulder complaints. This referral was by Dr. Hoffman. Dr. Rhode, an orthopedic surgeon, saw her on April 2, 2009 and diagnosed neck pain, low back pain, cervical radiculopathy, and spondylolisthesis, which he felt was related to this accidental injury. Dr. Rhode referred Petitioner to see Dr. Kube, an orthopedic surgeon specializing in spines. Petitioner saw Dr. Kube on April 2009, and diagnosed degenerative disc disease and hyperextension injury causing a bruise or irritation to the nerve root. Dr. Kube felt this condition was aggravated by the accidental injury.

Petitioner was referred to see Dr. Bond, an ophthalmologist. Petitioner first saw Dr. Bond on April 20, 2009. Dr. Bond noted complaints of "black spots" in her vision and Dr. Bond recommended treatment by a neurologist.

Petitioner was also referred to see Dr. Mulconery, an orthopedic surgeon. This referral was made by Dr. Demaceo Howard. Dr. Mulconery saw Petitioner on November 20, 2009 and diagnosed a cervical work related injury, axial neck pain, and prescribed continuing neurologic care. Dr. Mulconery suggested that Petitioner return to Dr. Lee, a neurologist.

Dr. Hoffman then referred her to Dr. Russo for a neurologic consult. Petitioner first saw Dr. Russo on December 15, 2009. Dr. Russo diagnosed cervical and lumbar degenerative disc disease, prescribed physical limitations and physical therapy.

Petitioner underwent a cervical myelogram on February 7, 2011. Dr. MacGregor, a neurosurgeon, prescribed this test. Petitioner was referred to see Dr. MacGregor by Dr. Lee. The myelogram revealed multiple level cervical radiculopathy.

On February 11, 2011, Petitioner sought the service of the Illinois Department of Rehabilitation Services. An assistant, MR. Stewart Nyi, was assigned to assist her and reviewed her home environment. He made certain suggestions for home safety, including techniques and guidance so that she could continue to live in her own home alone. The Department also provided assistance in the form of a housekeeper to perform daily chores in the house.

Petitioner then returned to see Dr. MacGregor, a neurosurgeon, on February 17, 2011. Dr. MacGregor prescribed fusion surgery to the spine. On April 1, 2011, Petitioner underwent surgery with Dr. MacGregor in the form of an anterior cervical decompression and two level fusion at C4-C5 and C5-C6.

Petitioner remains under the care of Dr. Lee. Dr. Lee testified by evidence deposition that the cervical pathology which necessitated fusion surgery, and the separate and distinct injury to the brain stem to be analogous to a concussion, accounting for the multiple constellation of complaints. On August 23, 2011, Petitioner under a maxillofacial CT scan to rule out a maxillofacial component to the injury. This CT scan was prescribed Dr. Lee, and revealed a brain stem injury with multiple cervical surgeries.

On September 12, 2012, Petitioner underwent a cervical spine MRI. This was prescribed by Dr. MacGregor, and revealed post-operative nerve root compression.

With the above blizzard of medical treatment, Petitioner introduced into evidence opinions of her many treating physicians as to the issue of nature and extent of her disability. Dr. Lee felt she was permanently and totally disabled from work in his May 15, 2000 note. Dr. MacGregor felt Petitioner was permanently and totally disabled from work in her note dated May 9, 2012. Dr. Rennick, her current primary care physician, felt that she is permanently and totally disabled from work in his note dated April 13, 2012.

Dr. MacGregor testified by evidence deposition that the basis for her prescription for cervical fusion surgery was cervical instability. She noted Petitioner had been undergoing muscle wasting and atrophic changes in her hands. Dr. MacGregor also reviewed the examination findings of Dr. Graf, and contested same during her testimony.

Dr. Lee testified by evidence deposition that he diagnosed degenerative changes in the cervical spine, left sided weakness and pain, a herniated disc, and spinal cord irritation secondary to a traumatic injury. Dr. Lee also diagnosed right C6 radiculopathy and left C7 radiculopathy, and observed muscle wasting and atrophy to her left arm and hand. Dr. Lee noted decreased range of motion to the left arm, neck and left side, along with left sided weakness. Dr. Lee felt that Petitioner could only walk short distances and should use a cane. Dr. Lee felt these conditions were causally related to the accidental injury of November 10, 2008. Dr. Lee further felt the brain stem injury could account for the multiple constellation of symptoms.

A vocational rehabilitation expert, Mr. Bob Hammond, was of the opinion that Petitioner is totally and permanently disabled from work in his report dated September 25, 2012.

Mr. Jim Ragains, a vocational expert, also consulted with Petitioner. This consultation took place at the request of Respondent. Mr. Ragains indicated that he had no vocational recommendations to offer, and felt that if the "finder of fact" finds the treating physician opinions as to permanent and total disability to be correct, then the opinions he tendered regarding employability would be "moot."

As indicated above, Petitioner has been treated by multiple physicians following this accidental injury, who have performed a battery of tests, prescribed physical therapy and performed surgery. Most of them have rendered opinions that the conditions of ill-being as described above, are causally related to the accidental injury of November 10, 2008.

Respondent arranged for Petitioner to be examined by two physicians. Dr. Graf examined her on June 2, 2011, and felt she was capable of returning to work as an LPN. Dr. Levin examined her on August 30, 2012, and also felt she was capable of returning to work as an LPN. Dr. Levin felt that Petitioner was malingering or fabricating her symptoms. Dr. Levin is the only physician to reach that conclusion.

Dr. Levin testified by evidence deposition that there was "absolutely no evidence of neurologic abnormality" of Petitioner. Dr. Levin was unable to offer an opinion as to why the EMG/NCV study performed by Dr. Trudeau was positive for radiculopathy, and admitted to not reviewing the multiple MRI films, the myelogram films or the CT scan films when rendering her opinion. Dr. Levin also admitted to not reviewing the operative report and it was her understanding Petitioner underwent a cervical decompression only, and not a fusion.

The Arbitrator finds the opinions and findings of the treating physicians in this matter to be far more credible than the opinions of Dr. Graf and Dr. Levin under these circumstances.

Petitioner during the hearing testified to currently experiencing weakness to her left side, left leg and left arm. She uses a cane to ambulate and takes multiple prescribed medications including Permarin, Norco, Tizanidine, Protonix, Baclofen, Oxaprozin, Pro-Air inhaler, Xopenox, Gabapentin, Oxycodone, Alprazolam, Prochlorperazine, Fluticasone, along with aspirin, other over the counter medications and vitamens.

Petitioner testified that she did not have any medical treatment to her neck or cervical spine prior to November 10, 2008. Petitioner testified she experienced a lower back strain for which she consulted a physician in 2006. Petitioner lost no time from work from that episode. Petitioner further testified she never had a workers' compensation claim prior to this matter, or any other type of personal injury claim. The medical evidence introduced into evidence supports this testimony.

Based upon the above, the Arbitrator finds that the above conditions of ill-being are causally related to the accidental injury of November 10, 2008.

Based further upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner's condition of ill-being became permanent in nature, rendering her totally and permanently disabled from any gainful employment, commencing September 26, 2012.

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

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

Advanced Rehabilitation and Sports Medicine	$ 4,229.00
Canton Radiology Services	$ 505.00
Central Illinois Radiological Services	$ 5,168.55
Clinical Radiologists	$ 715.50
Comprehensive Emergency Solutions	$ 450.00
Fulton County Emergency Medical Associates	$ 893.50
Graham Hospital	$51,964.85
Graham Medical Group	$ 2,243.00
Heartcare Midwest	$ 180.00
Dr. Daniel Hoffman	$ 3,270.00
Illinois Neurological Institute	$ 924.00
Illinois Workers' Pharmacy	$12,978.72
Methodist Medical Center	$49,516.70
Memorial Medical Center	$58,599.95
Midwest Emergency Department Specialists	$ 664.00
Midwest Urological Group	$ 202.00
Orland Park Orthopedics	$ 1,207.92
OSF Healthcare	$29,343.60
Pathology Associates of Central Illinois	$ 229.40
Peoria Open MRI	$ 1,425.00
Peoria Tazwell Pathology Group	$ 317.60
Prairie Spine & Pain Institute	$ 808.00
Springfield Clinic	$50,789.67
Dr. Edward Trudeau	$ 4,080.00
Out of Pocket Expenses by Petitioner	$ 2,211.12

These charges total $282,817.08.

See findings of this Arbitrator in "F" and "L" above.

14IWCC0358

Based upon said findings, the Arbitrator finds that the above medical charges represent reasonable and necessary medical care and services designed to cure or relieve the condition of ill-being caused by this accidental injury. Respondent is found to be liable to Petitioner for all of the above charges so listed.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "F" and "L" above.

Petitioner claims that as a result of this accidental injury she became temporarily and totally disabled from work commencing November 10, 2008 through January 15, 2013, and is entitled to receive temporary total disability benefits from Respondent for this period of time. Respondent disputes all periods of temporary total disability.

Mr. Bob Hammond, a vocational expert, consulted with Petitioner and authored a report dated September 25, 2012. Mr. Hammond reviewed certain medical records and interviewed Petitioner. Following this consultation, Mr. Hammond was of the opinion that Petitioner was permanently and totally disabled from work.

Mr. Jim Ragains, a vocational expert, also consulted with Petitioner. This consultation took place at the request of Respondent. Mr. Ragains indicated that he had no vocational recommendations to offer, and felt that if the "finder of fact" finds the treating physician opinions as to permanent and total disability to be correct, then the opinions he tendered regarding employability would be "moot."

Based upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner reached maximum medical and vocational improvement on September 25, 2012. Based further upon the above, the Arbitrator finds that as a result of this accidental injury, Petitioner became temporarily and totally disabled from work commencing November 11, 2008 through September 25, 2012, and is entitled to receive temporary total disability benefits from Respondent for this period of time.

M. Should penalties or fees be imposed upon Respondent?

This Arbitrator admittedly has spent months reviewing the voluminous testimony, medical records, medical opinions, vocational opinions and medical charges incurred in this matter. It has been an extremely time consuming effort, and the Arbitrator respects the extraordinary efforts of the parties in attempting to prove and defend the voluminous evidence presented.

Petitioner requests penalties and attorneys fees in this matter.

Although the Arbitrator found the opinions of Dr. Graf and Dr. Levin to be less than credible than the opinions of the treating physicians, the fact of the matter remains concerning the medical care in this case, which often was driven by emergency room visits for pain treatment, resulting in multiple treating physicians with multiple ideas and efforts to treat the conditions found.

In addition, vocational expert Mr. Jim Ragains indicated his assessment in this matter.

Under these circumstances, all claims for penalties and attorneys fees in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ 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

Loretta Bandy,
Petitioner,

vs.

Continental Tire of the Americas Inc.,
Respondent.

14IWCC0359

NO: 12 WC 44165

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 nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2013 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $16,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
KWL/vf
O-5/6/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0359

BANDY, LORETTA
Employee/Petitioner

Case# **12WC044165**

CONTINENTAL TIRE OF THE AMERICAS INC
Employer/Respondent

On 11/13/2013, 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 0.09% 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:

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

0299 KEEFE & DePAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0359

Loretta Bandy
Employee/Petitioner

Case # 12 WC 044165

v.

Consolidated cases: ___

Continental Tire of The Americas, Inc.
Employer/Respondent

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Granada**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **10/02/13**. By stipulation, the parties agree:

On the date of accident, **06/27/12**, 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 $**35,275.24**, and the average weekly wage was $**678.37**.

At the time of injury, Petitioner was **46** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $**7,326.36** for other benefits, for a total credit of $**7,326.36**.

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 **$407.02**/week for a further period of **41** weeks, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **20% loss of use of the left hand**.

Respondent shall pay Petitioner compensation that has accrued from **01/28/13** through **07/04/13**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

11/4/13
Date

NOV 13 2013

FINDINGS OF FACT

Petitioner was working for Respondent on June 27, 2012, when she was attempting to move a stuck tire and felt a pop and crack in her left wrist and hand. She testified that she had no prior problems or injuries to this part of her body. Petitioner is right hand dominant.

After a course of conservative treatment Petitioner underwent surgery with Dr. David Brown on September 27, 2012, for an arthroscopic procedure to address the TFCC and a left wrist synovectomy. Dr. Brown released her to light duty on October 8, 2012, and recommended physical therapy. Ultimately she was released to full duty and placed at maximum medical improvement on January 28, 2013. Dr. Brown indicated at that time she had occasional swelling at the end of a work shift, but overall was doing well. He instructed her to return to him if she had additional problems. She testified that she sought no additional medical treatment after this appointment.

On April 30, 2013, Petitioner was evaluated by Dr. James Williams at the request of Respondent. Dr. Williams drafted a report and testified in this matter at bar. Petitioner complained to Dr. Williams of stiffness, cramping, and swelling of the wrist with tingling and numbness in the last two fingers of the hand. Dr. Williams reviewed the treatment records of Petitioner as a component of his exam and pointed out that the operative report of Dr. Brown was inconsistent with a diagnosis of a tear of the TFCC as debriding of the synovitis and debriding of fraying of the TFCC was done, with an additional note that probing confirmed there was no tear of the TFCC. Dr. Williams concluded that Petitioner had one of two AMA ratings. The rating for her condition without an actual tear of the TFCC would be 2% of the left upper extremity and with a confirmed tear of the TFCC a rating of 9% of the left upper extremity would be accurate.

At trial Petitioner stated she recently bid into a lower paying position with Respondent because she felt the position was less physically demanding considering her continued complaints after being released by Dr. Brown. She admitted Dr. Brown opined that she required no restrictions when he last saw her and she sought no medical treatment after the January 28, 2013, visit with Dr. Brown. She testified that it was a voluntary change of jobs and the hourly rate of pay was the same, but she did not qualify for weekend work at the new position which was equal to an extra one dollar an hour. While she also testified she did not get overtime hours in the new position, she admitted she had only worked the new position since August 26, 2013, and that the entire plant was recently on a status similar to a temporary layoff because of reduced production. She admitted she could not accurately judge the possibility of overtime in the future in this new position.

Petitioner testified that she has had an improvement, with reduced swelling and better sleep than when she last saw Dr. Brown. She also stated she had a reduction in popping and cracking in the wrist as well as less cramping. She did state that she felt she had reduced range of motion with extension and did not feel her left hand was as strong as her right hand. She testified she was right-handed. She also testified that she avoided picking up her grandchildren, ages 4, 5, and 7. She made no complaints or mention of numbness or tingling at trial, contrary to her complaints voiced to Dr. Williams.

CONCLUSIONS OF LAW

The only issue in dispute at trial was the Nature and Extent of Petitioner's injuries. The Act sets forth in §8.1b(b) the criteria for determining Permanent Partial Disability for injuries occurring after September 1, 2011.

The first factor is an AMA impairment rating. In this matter the only rating presented at trial was that of Dr. Williams, which found either 2% impairment at the level of the left upper extremity, or 9% impairment at the level of the left upper extremity depending on the interpretation of the surgical procedure done by Dr. Brown. The record reflects that Dr. Williams is the only physician to provide an AMA rating.

The second factor to be determined is Petitioner's occupation. At the time of trial Petitioner was an End Line Inspector. She explained this job as visually inspecting tires and stamping them. This was a less physically demanding job than she performed at the time of the injury. The job change was voluntary as she was released by Dr. Brown to full duty work at his last visit.

The third factor is Petitioner's age at the time of the injury. Petitioner was 46.

The fourth factor to be considered is Petitioner's future earning capacity. Petitioner conceded that she is making the same hourly rate of pay as prior to the accident, with the exception of no weekend work and an uncertainty of overtime in the future. Petitioner admitted she was cleared by Dr. Brown to return to her prior job at the end of Dr. Brown's treatment and further admitted she worked that prior job up until August 26, 2013, when she voluntarily took the new position.

The fifth and last criterion is evidence of disability in the treatment records. The treatment for Petitioner's injury included an arthroscopic procedure to the left wrist. This included Dr. David Brown on performing an arthroscopic procedure to address the TFCC and a left wrist synovectomy. Dr. Williams reviewed the treatment records of Dr. Brown and testified that the operative report of Dr. Brown was inconsistent with a diagnosis of a tear of the TFCC. The operative report notes debriding of the synovitis and debriding of fraying of the TFCC. The operative report goes on to additionally note that probing confirmed there was no tear of the TFCC.

Based upon the undisputed evidence presented at trial and after considering the five factors indicated above, the Arbitrator finds that the Petitioner has suffered 20% Permanent Partial Disability to the left hand in accordance with Sections 8(e)(9) and 8.1 the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

14IWCC0360

Randall Patrick Smith,
Petitioner,

vs. NO: 11 WC 31068

State of IL Dept of Correction Hardin County Work Camp,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed Seotember 11, 2013 is hereby affirmed and adopted.

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

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

DATED: MAY 16 2014
KWL/vf
O-5/6/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0360

SMITH, RANDALL PATRICK Case# **11WC031068**

Employee/Petitioner

SOI DEPT OF CORRECTIONS/HARDIN COUNTY WORK CAMP

Employer/Respondent

On 9/11/2013, 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 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2546 FEIST LAW FIRM LLC
KREIG B TAYLOR
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

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

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
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

SEP 11 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0360

RANDALL PATRICK SMITH
Employee/Petitioner

Case # 11 WC 31068

v.

STATE OF IL, DEPT. OF CORRECTIONS/HARDIN COUNTY WORK CAMP
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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **August 16, 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] 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 **July 8, 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 $**56,658.00**; the average weekly wage was $**1,089.58**.

On the date of accident, Petitioner was **41** years of age, *married* with **0** dependent children.

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

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

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

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

ORDER

Petitioner failed to prove the issue of accident. No benefits awarded.

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.

Gerald A. Granado

Signature of Arbitrator

9/10/13

Date

SEP 1 1 2013

FINDINGS OF FACT

Petitioner is a 41 year old correctional officer who has worked for the Respondent since 1998. On July 8, 2011, Petitioner was working in the mail room. Petitioner testified that he was sitting on an office chair. He described pivoting in the chair and then experiencing a pop in his right knee.

Petitioner completed an Employee's Notice of Injury on July 8, 2011. (RX2) He reported the injury occurred when "I turned while sitting in the chair. My foot was planted in one spot and twisted my knee." (RX2) Petitioner also reported the same mechanism of injury on July 8, 2011 on the State of Illinois Department of Correction Incident report and the Illinois Form 45. (RX6 & RX7)

Petitioner presented to Jennifer Price, PA-C at Primary Care Group on July 8, 2011. Petitioner gave a history of right knee pain which began when he was "sitting in a chair this morning at work in the mail room at approximately 8:30 am and started to turn. His foot stayed planted, but his knee turned. He felt sudden pain." (PX3) His medical history was significant for right ACL repair in 1992. X-rays were ordered for the right knee, which showed no acute bone abnormality, mild osteoarthritis, status post anterior cruciate ligament repair with orthopedic hardware in place and intact. (PX3) Petitioner was diagnosed with a knee sprain and it was reported that swelling had improved but Petitioner was still having some pain and stiffness. After four follow-up appointments, on July 21, 2011, Petitioner was referred to Dr. Richard Morgan.

Petitioner presented to the VA Medical Hospital on August 3, 2011. (PX1) He underwent an MRI scan on August 10, 2011. The impression of the imaging study was of medial meniscus tear, marrow edema medial tibial plateau.

On August 18, 2011 Petitioner completed an intake form for Southern Illinois Orthopedic Center. (PX6) He reported that his chief complaint was severe knee pain and that he injured himself by "[t]urning in swivel chair with right foot planted on floor and poped my knee." (sic) (PX6) On August 25, 2011 Petitioner presented to Dr. Richard Morgan an orthopedic surgeon. Dr. Morgan took a history of "[h]e was injured in the early part of July when he was sitting at a swivel chair. He turned to pivot to reach around to a mail bag and injured his right knee." (PX6) Dr. Morgan's impression was status post ACL with an acute medial meniscal tear. He planned to do a right knee arthroscopy. (PX6)

On September 28, 2011 Petitioner underwent an arthroscopy of right knee with partial medial meniscectomy. (PX6) Following surgery Dr. Morgan ordered physical therapy for Petitioner three times a week for four weeks. Petitioner presented to physical therapy for an initial evaluation on October 6, 2011. He gave a history of "had foot planted and pivoted; heard a 'pop' and felt pain in knee". (PX5) On October 11, 2011, Dr. Morgan noted that Petitioner could return to work on October 17, 2011 with no restrictions. (PX6) On February 2, 2012, Petitioner reported a little ache at the end of the day but did not take pain medication for it. Dr. Morgan discharged the Petitioner from care and reported that he would see him back as needed. (PX7)

Dr. Morgan testified via evidence deposition on October 25, 2012. He testified that he believed the condition of Petitioner's right knee was related to his July 8, 2011 incident at work and acknowledged that his opinion was based solely on the history provided to him by the Petitioner. (PX9, pgs. 10-11) Dr. Morgan also agreed that a bucket handle tear of the meniscus could occur in the normal course of daily activities. (PX9, pg. 11) He did not believe that Petitioner's diagnosis of chondromalacia was related to his work incident. (PX9, pg. 11) He described the symptoms of chondromalacia as usually being anterior knee pain, pain getting up from a chair, and climbing stairs. (PX9, pg. 12) Dr. Morgan testified that the Petitioner did very well after surgery. (PX9, pg. 12)

Petitioner testified at arbitration on August 16, 2013. Petitioner first testified that he was injured on July 8, 2011 while he was sitting in a swivel chair. He further described that while he was reaching to his right, his right knee got caught on a hole in the floor. And as he pivoted in the chair, he popped his right knee. Petitioner also testified this occurred when performing his normal duties in the mail room.

During cross-examination Petitioner was asked why his Employee's Incident report, Report of Injury, medical records with Jennifer Price, PA-C, or medical records from Dr. Morgan did not mention a "hole in the floor". (Tr.20) Petitioner did not explain the discrepancy. He later explained that his right knee got planted on the floor as he turned.

Respondent called John Mott as a witness. John Mott has been employed at Hardin County Work Camp for 13 years as the Superintendent. Mr. Mott testified that Hardin County Work Camp used to be a school and the mail room was used as a kitchen at that time. (Tr.31-32) Mr. Mott further testified the drain shown in Petitioner's Exhibit 12 has been there since Hardin County Work Camp was a school. (Tr.32) Mr. Mott testified the particle board and rug were in place to make the ground level. (Tr.33)

Petitioner testified that he still experiences pain on a regular basis with regards to his right knee. He testified that he is not allowed to do any high impact activities. His medical records do not reflect any restriction or continued complaints of this nature. Petitioner does not currently take any medication for his right knee. He has received good yearly performance evaluations since returning to work and that he has had no complaints from his supervisors.

CONCLUSIONS OF LAW

The Arbitrator finds that the Petition failed to meet his burden of proof regarding the issue of accident. In this case, the Petitioner testified that he injured his knee when he turned or pivoted in his office chair. There was no evidence that there was any increased risk of injury, such as a defect in the chair, that would have caused Petitioner's injury. Although the Petitioner testified regarding his foot getting caught in a hole in the floor, all of the initial records do not support this claim. Petitioner's initial testimony indicated he injured his leg while he was turning or pivoting in a chair, and his later testimony made reference to a hole in the floor. Given the Petitioner's different versions of his mechanism of injury, the Arbitrator is persuaded by the medical records and the accident reports taken soon after the incident, in which there is no mention of any hole in the floor. As such, the Arbitrator finds that the mere act of turning or pivoting in an office chair does not rise to the level of an accident, as such an activity did not expose Petitioner to a greater risk than that to which the general public is exposed.

Accordingly, this claim is denied and all other issues are rendered moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Virdia Spain,

Petitioner,

14IWCC0361

vs. NO: 09 WC 25332

Elgin Mental Health Center,

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, TTD, medical expenses, notice and penalties and fees and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

On April 17, 2013, the Arbitrator caused an arbitration decision to be filed with the Commission, one in which the Arbitrator awarded benefits under the Act after finding that Petitioner sustained a compensable accident on June 20, 2008, that arose out of and in the course of her employment as Security Therapy Aide for Respondent. The compensable accident was found to be post traumatic stress disorder brought about as the result of Petitioner having a patient die in her arms. Respondent took timely appeal of the arbitration decision, conferring upon the Commission jurisdiction to review the arbitration decision. In doing so, the Commission arrives at a conclusion opposite of that of the arbitrator and finds Petitioner failed to prove she sustained a compensable accident relatable to the incident of June 20, 2008.

The Commission does not dispute Petitioner was present at the death of the patient as she testified to but finds no contemporaneous records, either employment or medical, that corroborates her witnessing the death of the patient resulted in manifestation of symptoms of post traumatic stress disorder. Most notably, Petitioner was seen by her primary care physician, Dr. Florentino, on June 26, 2008, six days after the death of the patient, and was diagnosed with

14IWCC0361

acute conjunctivitis. Though Petitioner testified that she informed Dr. Florentino of what she experienced on June 20, 2008, during that visit, nowhere was this account recorded. Dr. Florentino's record of Petitioner's June 26, 2008, is silent with respect to Petitioner having a patient die in her arm. At a later date, Petitioner requested of Dr. Florentino that he amend his June 26, 2008, note to reflect that she was seen because she suffered a trauma, but that request was denied with Dr. Florentino reiterating that she was seen on June 26, 2008, for what was diagnosed as acute conjunctivitis.

The Commission notes, in a letter dated January 23, 2009, Petitioner was denied a credit disability insurance by CUMA Mutual Insurance as the effective date of her policy came within six months of her having received medical advice, a diagnosis or treatment. The letter stated Petitioner's insurance policy became effective on July 30, 2008, but also both that she had received medical advice, a diagnosis or treatment relating to a disabling condition on February 15, 2008, and that the medical indication indicated that the disability began on October 31, 2008. The letter did not make any reference to any event occurring on June 20, 2008, for which Petitioner might have sought medical treatment for. The finding of October 31, 2008, as the onset date of Petitioner's disability, the Commission finds, to be significant as that was the day after Petitioner, herself, claimed was the day her disability began in the July 9, 2009, notice of injury she provided to Respondent.

Petitioner presented to Respondent on July 9, 2009, a notice of injury, one in which she documented her condition as post traumatic stress disorder and its onset date being October 30, 2008. According to Petitioner's claim in the notice of injury, she attributed her condition to being accused of negligent and reckless homicide of a patient, not for witnessing the death of a patient on June 20, 2008. The Commission finds, on October 30, 2008, Petitioner took part in a meeting that included her supervisor, a union representative and the nurse director and, at that meeting, Petitioner was informed that she was being placed on diverted duty while the death of patient was being investigated. It was also at that meeting that Petitioner began to experience chest pains and was subsequently hospitalized at Swedish Memorial Hospital.

In reviewing Petitioner's psychological treatment records, the Commission finds Petitioner, upon a referral from Dr. Floretino, was seen by Dr. Michael Shapiro, a psychiatrist, beginning in January 2009. Dr. Shapiro's notes from that first visit indicate Petitioner suffered her first panic attack on October 30, 2008, the date of the meeting in which she was placed on diverted duty. He also noted a second panic attack occurred the next day, on October 31, 2008, when the police came to her residence. On April 24, 2009, Dr. Shapiro wrote of Petitioner experiencing nightmares about going to jail. On June 16, 2009, Dr. Shapiro recorded that the anniversary of the death of the patient was June 20, 2009, but nothing more. This appears to have been Petitioner's first reference to the events of that day during her treatment with Dr. Shapiro. This occurred on or about Petitioner's seventeenth session with Dr. Shapiro. No record was made on June 16, 2009, of how the events of June 20, 2008, affected Petitioner's psyche.

At the time Petitioner treated with Dr. Shapiro, she was also seen, pursuant to Section 16 of the Act, by Dr. Gerald Hoffman. Dr. Hoffman's records indicate Petitioner complained of being unjustly accused for the death of her charge and recounted recurring dreams she had of being placed in a jail cell and of having the cell door slammed shut. Dr. Hoffman's records, as

with those of Dr. Shapiro, did not reference any indication as to how the death of the patient on June 20, 2008, itself, negatively impacted Petitioner.

The Commission finds it was not until November 20, 2009, that Petitioner first related her post traumatic stress disorder to the June 20, 2008, incident. She did this during her first visit to Dr. Jack Rodriguez, the psychiatrist she treated with subsequent to Dr. Hoffman's retirement. Dr. Rodriguez recorded, and subsequently testified, that Petitioner complained that she began experiencing symptoms of post traumatic stress disorder after having the patient die in her arms and doing so with a contorted face. To the extent Dr. Rodriguez wrote, in his treatment notes, about the professional or legal implications of the patient's death, he only wrote, on November 20, 2009, that Petitioner was held responsible for that death. He was not told of or did not make a record of Petitioner having dreams of going to jail or of having a cell door slammed shut, dreams Petitioner had previously related to both Dr. Shapiro and Dr. Hoffman.

The Commission, as stated above, finds no evidence to support a finding that the events of June 20, 2008, resulted in Petitioner's post traumatic stress disorder. After June 20, 2008, Petitioner was seen by her primary care physician, Dr. Florentino, and two psychologists, Dr. Shapiro and Dr. Hoffman, respectively, and never confined to them any ill-effects to witnessing the patient's death, rather complained of symptoms only after administrative and criminal proceedings against her were commenced in October 2008 and of symptoms directly relatable to those proceedings. The Commission relies on these records rather than the history Petitioner espoused to Dr. Rodriguez and at her arbitration hearing, a history first expressed more than one year after the claimed onset date.

The Commission, finding no compensable accident occurred on June 20, 2008, reverses the arbitration decision of April 17, 2013, and denies any benefit under the Act to Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitration Decision of April 17, 2013, is hereby reversed and compensation denied.

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

DATED: MAY 1 6 2014
KWL/mav
O: 03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES PARRA,

14IWCC0362

Petitioner,

vs. NO: 12 WC 43353

ADMIRAL HEATING & VENTILATING,

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the June 12, 2013 19(b) Decision of Arbitrator Williams finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent on November 14, 2012, and that Petitioner failed to provide timely notice of his claim of injury.

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, notice, causal connection, medical expenses, temporary total disability benefits, prospective medical care, and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator with regard to Petitioner's right elbow injuries sustained on November 14, 2012, but affirms the Arbitrator's finding as to accident and causal connection with regard to Petitioner's alleged low back injury for the reasons specified below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact and Conclusions of Law:

1) Petitioner's two claims, 12 WC 43353 and 13 WC 609, were consolidated for hearing. On June 12, 2013, the Arbitrator found Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on August 17, 2011, the subject of 13 WC 609. The Commission, in a decision to be issued simultaneous with the decision herein, affirms and adopts the Arbitrator's June 12, 2013 decision in 13 WC 609.

2) Petitioner testified he began working as a sheet metal worker for Respondent in 2003, performing installation of heating and A/C equipment. Petitioner testified that on August 17, 2011, while at a job site at a grade school, he sustained a right elbow and low back injury when he threw a 50 pound extension cord up to his foreman, Paul Tobin, who was up in the ceiling. [13 WC 609]. Petitioner testified he felt a pulling or burning in his right arm and elbow and a twisting injury in his lower back. Petitioner testified that prior to August 17, 2011 he had no right arm or low back treatment or injury. Petitioner testified that following his injury on that date he drove directly to Respondent's shop in Hillside and reported his injury to Mike Crnkovich, the general superintendent. Petitioner testified he returned to work for Respondent thereafter and continued working full duty for Respondent throughout the course of 2011, and into 2012. (T13-22).

3) Petitioner's immediate supervisor, Paul Tobin, testified Petitioner was not working with him on August 17, 2011, that Petitioner was actually kicked off the grade school jobsite due to Petitioner's behavior on August 3, 2011. Tobin testified Petitioner never advised him that he had injured himself at work on August 3, and that Petitioner did not return to the jobsite after being kicked off of it on August 3, 2011. (T73-75). Mike Crnkovich, testified Petitioner never reported an August 17, 2011 work-related injury to him on that date or any other date thereafter. Crnkovich testified that in August of 2011 he had a conversation with Petitioner after he was kicked off the grade school jobsite, and that during that conversation Petitioner made no mention of any work-related injury, but instead complained about working conditions, and that Petitioner was then placed on a different job project thereafter, at the Dirksen Federal Building. (T88-92).

4) Petitioner admitted he sought no treatment for his alleged right elbow or low back injuries from August 17, 2011. (T45). Petitioner admitted he saw Dr. Riccardo, his personal physician at Westbrook Internal Medicine, for a comprehensive physical on January 30, 2012. At the time of the January 30, 2012 office visit Dr. Riccardo noted all of Petitioner's systems were negative, no joint pain or swelling, no sciatic symptoms, and no low back spinous process tenderness, normal examination of his extremities, and a normal neurological exam. Dr. Riccardo's assessment was anxiety and alopecia. The office note fails to contain any history of Petitioner's alleged August 17, 2011 work injury or of his alleged right elbow and low back injuries. (RX1).

5) Petitioner testified that on November 14, 2012 he was working on a project for Respondent at Capital One on Golf Road in Rolling Meadows, performing retrofit heating and A/C work, with a co-worker, Robert Muldoon. Petitioner testified that on that date he was moving pallets of material weighing 400 to 500 pounds with a pallet jack, and while attempting to maneuver the materials he felt a pain in his right elbow and lower back. [12 WC 43353]. Petitioner testified he continued working until his supervisor, Mike Chancellor, called his co-worker, Muldoon, on Muldoon's cell phone at 12:45pm. Petitioner testified he spoke to Chancellor on Muldoon's cell phone and advised Chancellor that he had re-aggravated his right elbow and low back while working. Petitioner testified Chancellor advised him to take a few days off and see how he felt afterward. (T23-29).

6) Petitioner testified that on Sunday, November 18, 2012 at approximately 8:00 p.m. he called Chancellor and advised him that his right arm and back were no better with time off work, and that he had wanted to see a doctor regarding same. Petitioner testified that at that point Chancellor advised him that he was laid off. (T30-31). Petitioner testified that he reported back to the Capital One job site on November 19, 2012, and waited there for eight hours until Crnkovich arrived at the job site and gave him his layoff check. (T30-33).

7) On November 21, 2012 Petitioner sought treatment with Dr. Hsu at Westbrook Internal Medicine, at which time he reported he reinjured his back and right elbow on November 14, 2012, and that he had sustained a prior low back and right arm injury in August of 2011 when he threw 100 feet of cable to someone above him. [Companion Case 13 WC 609]. At the time of the November 21, 2012 office visit Petitioner complained of low back pain and right arm pain. Petitioner further reported that he had been taking Aleve four times a day since his prior injury in August of 2011 without resolution of symptoms. Dr. Hsu diagnosed back pain and right elbow pain/strain, referred Petitioner to physical therapy, and advised Petitioner x-rays and an orthopedic referral would be made if he failed to improve. (PX1).

8) On November 29, 2012, Petitioner sought treatment with Dr. Freedberg at Suburban Orthopaedics, at which time Petitioner provided the he pulled his right arm and low back while moving material with a pallet jack. Dr. Freedberg's assessment was a lumbar sprain/strain with left SI joint dysfunction, grade 1 spondylolisthesis at L5-S1, and right elbow lateral epicondylitis with brachialradialis strain. Dr. Freedberg recommended physical therapy and MRI scans of the lumbosacral spine and right elbow, and authorized Petitioner off work. (PX2).

9) On December 3, 2012, Petitioner underwent an MRI study of the lumbar spine, significant for spondylolysis at L5 and right foraminal herniation and diffuse bulge at L2-3, and an MRI study of the right elbow, significant for a radial collateral ligament tear and partial-tear of the common extensor tendon. (PX3).

10) On December 10, 2012 Petitioner was seen in follow up with Dr. Freedberg, at which time he reported constant burning, numbness, and tingling in his elbow, as well as constant

backaches. Dr. Freedberg recommended Petitioner remain off work, continue physical therapy, and consider right elbow surgery. (PX2).

11) On January 9, 2013, Dr. Freedberg performed right elbow surgery, with right elbow debridement of the extensor carpi radialis brevis and decortication of the bone, repair of the extensor mechanism, and imbrication of the posterior anterior capsule and radial collateral ligament. Petitioner's post operative diagnosis was right elbow lateral epicondylitis with mild laxity of the posterolateral corner. (PX4).

12) Petitioner was seen in follow up on January 24, 2013, February 25, 2013, and on April 10, 2013, during which time Petitioner underwent a course of physical therapy, remained off work, and reported improvement in his right elbow symptoms but continuing symptoms in his low back. (PX2).

13) On April 10, 2013 Dr. Freedberg recommended Petitioner remain off work, continue physical therapy for Petitioner's low back and right elbow, and referred him to Dr. Novoseletsky for consultation and possible lumbar injections. (PX2). Petitioner testified he was seen by Dr. Novoseletsky on April 17, 2012, but that he had not undergone any low back injections to date. Petitioner testified he was last seen by Dr. Freedberg on May 8, 2013, that he is still undergoing physical therapy three times a week, and that his elbow is improving. Petitioner testified he has been authorized off work by Dr. Fredeberg since November 29, 2012 through the date of hearing. (T34-39).

Although the Arbitrator found, with regard to Petitioner's right elbow, that Petitioner had failed to meet his burden of proof concerning the issues of accident, notice, causal connection, and temporary total disability, the Commission finds otherwise. The Commission finds that on November 14, 2012 Petitioner sustained an accidental injury arising out of and in the course of his employment with regard to his right elbow, that his current right elbow condition is causally connected to said accident, that Petitioner provided timely notice as required under Section 6(c), and that Petitioner was temporarily totally disabled with regard to his right elbow condition from November 29, 2012 through the date of 19(b) hearing, May 17, 2013.

On January 30, 2012, Petitioner underwent a comprehensive physical with his personal physician, Dr. Riccardo. Petitioner's physical examination was essentially normal, and the assessment made by Dr. Riccardo was limited to anxiety and alopecia. The January 30, 2012 office note contains no complaint with regard to Petitioner's right elbow. The record further contains no evidence of any right elbow medical treatment or any surgery recommendation in the years preceding the date of injury. The Commission finds significant that Petitioner testified, unrebutted, that prior to his November 14, 2012 work injury he received no medical treatment with regard to his right elbow. The Commission is also persuaded by fact Petitioner, a 45 year-old on the date of injury, worked full duty as a sheet metal worker for Respondent from 2003 up

until time of his November 14, 2012 work injury, and that the record is void of any evidence of lost time due to any right elbow complaints.

The Commission also is cognizant that both Dr. Hsu and Dr. Freedberg's office notes indicate they were treating Petitioner for pain in his right elbow due to a work related injury. On November 29, 2012 Dr. Freedberg issued a work duty status form authorizing Petitioner off work due to a work related injury. The Commission also finds significant the December 3, 2012 right elbow MRI findings indicating significant findings of a radial collateral ligament tear and partial-tear of the common extensor tendon. The Commission notes Respondent tendered no medical opinion with regard to the issue of causal connection between Petitioner's current right elbow condition and his November 14, 2012 work-related injury.

For the reasons stated above, the Commission finds Petitioner sustained accidental injuries, with regard to his right elbow, arising out of and in the course of his employment on November 14, 2012, and that his current condition of ill-being is causally related to same.

With regard to the issue of notice, the Commission finds Petitioner provided timely notice of his November 14, 2012 right elbow injury based upon his credible testimony on the issue. Petitioner testified that during the course of Mike Chancellor's November 14, 2012 cell phone call to his co-worker, Muldoon, he participated in the phone call and specifically advised Chancellor that he re-aggravated his right elbow during the course of the day. Petitioner testified Chancellor advised him to take a few days off, after which Petitioner contacted Chancellor on Sunday, November 18, 2012 and advised that his right elbow had not improved and he needed to seek medical treatment for same.

Based upon the finding of causal connection with regard to Petitioner's right elbow condition herein, the supporting medical records, and the off work authorizations, the Commission finds Petitioner was temporarily totally disabled for a period of 24-1/7 weeks, from November 29, 2012 through the date of 19(b) hearing, May 17, 2013, at $1,084.93 per week under Section 8(b).

The Commission affirms and adopts the Arbitrator's finding that Petitioner failed to prove his low back condition of ill-being is causally related to his November 14, 2012 work-related injury. The Commission finds significant Petitioner's testimony that he advised Dr. Freedberg at the time of his initial office visit on November 29, 2012 that he had been having low back pain for well over a year. Petitioner also provided a medical history to Dr. Hsu that in the year prior to November 14, 2012 he suffered from low back complaints requiring him to take four Aleve each day, without resolution of his symptoms.

With regard to Petitioner's request for a prospective medical award for his low back condition, based upon the Commission's finding of no causal connection with respect to same, the issue is moot.

With regard to the issue of penalties and fees based upon non-payment of temporary total disability benefits, the Commissions declines to award same, and finds a real controversy exists as to whether or not Petitioner's current condition of ill- being is causally related to his work accident. The Commission further finds Respondent behavior was not unreasonable nor did Respondent's action result in vexatious delay or intentional underpayment of benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2013 is hereby reversed with regard to Petitioner's right elbow condition of ill-being, for the reasons stated herein, and affirmed and adopted with regard to Petitioner's low back condition of ill-being.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,084.93 per week for a period of 24-1/7 weeks, from November 29, 2012 through May 17, 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 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 $26,300.00. 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: MAY 16 2014
KWL/kmt
O-02/11/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0362

PARRA, JAMES
Employee/Petitioner

Case# **12WC043353**

13WC000609

ADMIRAL HEATING & VENTILATING
Employer/Respondent

On 6/12/2013, 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:

0700 GREGORIO & ASSOC
SEAN C STEC
TWO N LASALLE ST SUITE 1650
CHICAGO, IL 60602

5104 WARMOUTH LAW PC
WILLIAM T WARMOUTH
17 N WABASH AVE SUITE 650
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

14IWCC0362

JAMES PARRA
Employee/Petitioner

Case #12 WC 43353
#13 WC 609

v.

ADMIRAL HEATING & VENTILATING
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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on May 17, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

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

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☐ Prospective medical care?

FINDINGS

- Claim #13 WC 609 is for an August 17, 2011, accident date and claim #12 WC 43353 is for a November 14, 2012 accident date.

- On August 17, 2011, and November 14, 2012, the respondent was operating under and subject to the provisions of the Act.

- On those dates, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injuries, the petitioner earned $84,364.80 and $84,624.80; the average weekly wages were $1,622.40 and $1,627.40.

- At the time of injuries, the petitioner was 44 and 45 years of age, *married* with no children under 18.

ORDER:

- The petitioner's claim for compensation benefits for injuries on August 17, 2011, and November 12, 2012, is denied and the claims are dismissed.

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

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

Robert Williams

6/12/13
Date

JUN 12 2013

FINDINGS OF FACTS:

Claim #13 WC 609 is for an August 17, 2011, accident date. In August 2011, the petitioner, a sheet metal worker, was retrofitting ducts on a heating and cooling system at Sutherland School under the supervision of project foreman, Paul Tobin. On August 3, 2011, Mr. Tobin told the petitioner to leave the job site after some comments were made to him by the petitioner. The petitioner never returned to the Sutherland School project after August 3, 2011. Contrary to the petitioner's testimony, Mr. Tobin's report for August 3rd does not include any statement of a report of an injury by the petitioner, an injury to himself or the throwing of an electric cord. Both Paul Tobin and General Superintendant, Mike Crnkovich, denied that the petitioner reported sustaining a work injury at Sutherland School in August 2011. The petitioner's first medical care after August 2011 was with his primary care doctor, Dr. Nick Riccardo of Westbrook Internal Medicine, on January 30, 2012. He did not report an August 2011 work injury or any work injury and did not complain of right arm, right elbow or lower back symptoms. He continued performing his regular work duties in a full capacity after August 2011.

Claim #12 WC 43353 is for a November 14, 2012, accident date. The respondent laid the petitioner off on November 19, 2012. The petitioner saw Dr. Norris Hsu of Westbrook Internal Medicine on November 21, 2012, and reported a re-injury to his lower back and right arm on November 14, 2012. The doctor noted lumbosacral tenderness, left paraspinal muscles tenderness and spasms, a negative straight leg raise, tenderness over his right lateral epicondyle and forearm muscles, mild tenderness over the lateral upper arm and pain with extension of his right wrist and supination. On November 29, 2012, the petitioner saw Dr. Howard Freedburg at Suburban Orthopaedics

for back and right arm pain and reported work injuries. Dr. Freedburg noted positive tenderness of the petitioner's left SI joint and tenderness in his right elbow. The doctor's diagnosis was a lumbar strain/sprain with left SI joint dysfunction, grade I spondylolisthesis L5-S1 and right elbow lateral epicondylitis with brachialradialis strain. He started the petitioner on medication and therapy. MRIs on December 3, 2012, revealed L5 spondylolsis with grade I spondylolisthesis narrowing of the foramina and a right foraminal herniation and a diffuse disc bulge at L2-L3 of his lumbar spine, and a radial collateral ligament tear and a partial tear of the common extensor tendon of his right arm. On January 9, 2013, Dr. Freedburg performed a debridement of the extensor carpi radialis brevis with decortication of the bone, repair of the extensor mechanism, and imbrications of the posterior anterior capsule and radial collateral ligament at Accredited Ambulatory Care, L.L.C.

On January 24, 2013, the petitioner was started on physical therapy at Suburban Orthopaedics. On April 10, 2013, the petitioner reported to Dr. Freedburg that his elbow was ok but had increased symptoms with his back. Dr. Freeburg recommended lumbar spine injections with Dr. Novoseletsky.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on August 17, 2011, arising out of and in the course of his employment with the respondent. Based on the report of Mr. Tobin, his confrontation with the petitioner occurred on August 3rd and not the 17th and was due to the petitioner's behavior and not an injury. Mr. Crnkovich refuted the petitioner's

testimony that he was given notice of a work injury on August 17, 2011. Moreover, the petitioner did not work at the Sutherland School after being required to leave by Mr. Tobin on August 3, 2011. The petitioner is not credible. The petitioner failed to establish that he injured himself throwing an electric cord to Mr. Tobin on August 17, 2011.

The petitioner failed to prove that he sustained an accident on November 14, 2012, arising out of and in the course of his employment with the respondent. Again, Mike Chancellor refuted the petitioner's testimony that he reported a work injury on November 14, 2012, as was told to take the next day off, instead testified that he told his entire crew to take off due to no work. The petitioner's claim for compensation and benefits for injuries on August 17, 2011, and November 12, 2012, is denied.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The respondent did not receive timely notice of the petitioner's claim of an August 17, 2011, accident. Paul Tobin denied that the petitioner reported or complained of a work injury in August 2011. The petitioner's claim for benefits for an injury on August 17, 2011, is denied.

The respondent did not receive timely notice of the petitioner's claim for a November 14, 2012, accident. Both Mr. Crnkovich and Mr. Chancellor refuted the petitioner's testimony of a report or complaint of a work injury on November 14, 2012. Nor was the filing of the petitioner's Application for Adjustment of Claim #12 WC 43353 on December 18, 2012, timely notice to the respondent since the initial date of accident claimed was August 24, 2012, and the Amended Application for Adjustment of Claim for an accident date on November 14, 2012, wasn't filed until January 8, 2013,

more 45 days later than the claimed accident date. The petitioner's claim for benefits for an injury on November 14, 2012, is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Houston Anglin,

Petitioner,

14IWCC0363

vs. NO: 11 WC 41290

AT & T,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, 8j credit and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2013 is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 1 6 2014
KWL/vf
O-3/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0363

ANGLIN, HOUSTON
Employee/Petitioner

Case# **11WC041290**

AT&T
Employer/Respondent

On 9/4/2013, 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 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1747 STEVEN J SEIDMAN LAW OFFICES
RYAN A MARGULIS
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
THOMAS C FLAHERTY
140 S DEARBORN SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 14IWCC0363

Houston Anglin
Employee/Petitioner

v.

AT&T
Employer/Respondent

Case # 11 WC 041290

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 **Deborah Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 7, 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] Is Petitioner entitled to any prospective medical care?

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

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

N. [x] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, **3/23/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$69,394.00**; the average weekly wage was **$1,334.50**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$23,984.58** for other benefits, for a total credit of **$23,984.58**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $889.67/week for 48 weeks, commencing 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12.

Respondent shall pay the Petitioner the temporary total disability benefits that have accrued to date, and shall pay the remainder of the award, if any, in weekly payments.

The Arbitrator finds the treatment to date reasonable and necessary. By stipulation, the only objection to the bills was as it related to liability. Accordingly, Respondent shall satisfy the following medical bills pursuant to Section 8(a) of the Act directly with the medical providers and shall receive a Section 8(j) credit for those portions of the bills that are satisfied by the group health carrier: Lifestyle Chiropractic ($5,435.00); Illinois Spine & Scoliosis Center ($500.0); Athletico ($6,047.00); Preferred Open MRI ($3,800.00); Pain Treatment Centers of Illinois ($15,568.00); Pain Treatment Surgical Suites ($16,657.60).

Pursuant to Section 8(a), Respondent shall further authorize and satisfy the medical expenses related to the diagnostic medial branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident.

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.

Deborah L. Simpson
Signature of Arbitrator

Sept 4, 2013
Date

ICArbDec19(b)

SEP 4 - 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Houston Anglin,		14IWCC0363
Petitioner,	)	
vs.	)	**No. 11 WC 41290**
A T & T,	)	**formerly consolidated with: 10 WC 39457 and 10 WC 39600**
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on March 23, 2011 the petitioner and the respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. The parties stipulate that the Respondent will satisfy bills listed in paragraph 7 directly with providers pursuant to fee schedule if found liable. They stipulate further that no specific dollar award is requested for the bills and that Respondent shall be given credit pursuant to section 8(j) for those bills satisfied by the group carrier.

At issue in this hearing is as follows: (1) did the petitioner sustain accidental injuries on March 23, 2011 that arose out of and in the course of his employment with the respondent; (2) is the petitioner's current condition of ill-being causally connected to the injury (3) is the respondent liable for the unpaid medical bills to Lifestyle Chiropractic in the amount of $5,435, the Illinois Spine and Scoliosis Center in the amount of $500.00, Athletico in the amount of $6,047.00, Preferred Open MRI in the amount of $3,800.00, Pain Treatment Centers of Illinois in the amount of $15,568.00 and Pain Treatment Surgical Suites in the amount of $16,657.60; (4) did the petitioner gave the respondent notice of the accident which is the subject matter of this hearing within the time limits stated in the Act; (5) is the petitioner entitled to TTD from 3/28/11-7/21/11, 12/22/11-4/16/12 and 4/27/12-8/07/12 representing 48 weeks; and (6) is respondent entitled to credit in the amount of $55,328.73 in nonoccupational indemnity disability benefits or should the credit under section 8(j) be in the amount of $23,984.58?

This case was consolidated with two previously pending worker's compensation claims case numbers 10 WC 39457 and 10 WC 39600. Prior to the hearing the parties moved in writing and orally to sever this case from the other two on the grounds that the petition seeking medical and temporary total disability compensation relates to the last case filed which is case number 11 WC 41290. The motion was allowed and the parties proceeded to hearing on the 19 (b) motion filed in case number 11 WC 41290.

STATEMENT OF FACTS

The Petitioner, Houston Anglin, testified that he was first employed by the Respondent, AT&T, beginning in November of 2000, and had been in its employ consistently through the date of the hearing. The Petitioner is employed as a cable splicer/technician which was described as medium to heavy work involving splicing cables above and below ground, connecting cables to the central office and conducting repairs and installations for commercial and residential customers. His work entailed going in and out of manholes, bending/twisting and lifting between 10 and 100 pounds and climbing up and down ladders.

The Petitioner had previously injured his low back due to a workplace accident which occurred on June 23, 2009. That matter is still pending it is one of the cases that was severed from this case by agreement prior to the hearing beginning. The Petitioner testified that, prior to March 23, 2011, his back was doing fine. He had not had any other problems he was back to work full duty and had not required orthopedic or neurological care for a while. He would see his chiropractor every now and then, but was not under active care from an orthopedist or neurologist. Before the subject occurrence, the Petitioner's last appointment with his chiropractor, Dr. Robert Higginbottom, was on March 15, 2011 where it is noted that he had a "decrease in pain and stiffness" (P. Ex. 1).

On March 23, 2011, the Petitioner and his partner, Kenneth Elstner, were assigned to a job at Ashland Avenue near Chicago Avenue in Chicago, Illinois. Their work was described by the Petitioner as "BAU" or "business as usual", involving installation of a circuit box, working in and out of manhole covers and working with ladders. He said they were going back and forth between manholes on this date as they were looking for where the cable was because it was not where they were told that it was. The Petitioner testified that there was a lot of lifting that day of heavy manhole covers and ladders. As he was performing these work activities, he noticed his lower back burning with a tingling sensation developing in his left buttock and leg. On that day petitioner was working with his supervisor Yves Edmond. The Petitioner testified that he informed Mr. Edmond at the jobsite that his back was bothering him from work. The Petitioner testified that it was a "wait and see" type of injury, meaning that he informed his supervisor of the problem, but would wait and see whether it became significant or worsened and required medical attention.

The Petitioner went back to his chiropractor after work on March 23, 2011. Dr. Higginbottom's therapy notes identify "increasing low back pain" during that visit (P. Ex. 1). The Petitioner continued to work on March 24, 2011 and March 25, 2011, but that the pain continued to worsen. On March 25, 2011, the Petitioner found it physically difficult to perform his job activities. The Petitioner testified that he told Mr. Edmond that his back pain was worsening and he needed to see a doctor. Petitioner returned to Dr. Higginbottom on that date. Dr. Higginbottom noted that his low back pain was increasing and recommended the petitioner be restricted to light duty. (P. Ex. 1)

Yves Edmond testified that he worked for the respondent for twelve years and that he is a manager for U-Verse. In March of 2011 he was the splicing manager. The petitioner was a

member of his crew at that time and that he was the petitioner's direct supervisor. On March 23, 2011, the petitioner and his partner, Kenneth Elstner were working Chicago at a site near Ashland and Chicago Avenues. Mr. Edmond goes to all his sites each day to survey for safety and quality. Mr. Edmond said he was at the job site in his role of supervisor for about 15 minutes that day just before lunch. The work was underground at that site Mr. Elstner was in the hole working underground while the Petitioner was working above ground, handing him his tools, supplies, cables and endplates during the time that he was at the site. The hole where they were working was very small and only one person could fit down there to work. There were two other workers across the street splicing the cable into the X-box. I talked to everyone there, checked to see if the workplace was safe, if they had the cones out to control traffic.

There is a policy in place regarding injuries or accidents on the job. They must be reported immediately to the employee's supervisor, in the case of the petitioner that would be him. I need to be at the scene and to transport the injured worker to the clinic for treatment if they need it and it is not an emergency. Mr. Edmond confirmed that the Petitioner told him at the jobsite that he was hurting, but states that there was no mention that it was from work activity. It is up to the employee to decide if they can continue to work so Mr. Edmond asked petitioner if he could keep on working and petitioner said fine. He testified that he never asked the Petitioner whether it was work related. Mr. Edmond testified that he did not know what the "wait and see policy" was. At the end of the day, they came back to the garage, he saw the petitioner but the petitioner did not say anything about being hurt at that time, if he had Mr. Edmond would have written a report as he is required to do so.

The petitioner and Mr. Edmond had a conversation a few days later at Mr. Edmond's cubical at that time petitioner told him his back was hurting from a previous injury. Since there was no indication it was job related he did not make a report.

Kenneth J. Elstner testified that he is employed by AT & T and that he was so employed on March 23, 2011. On that date, he and other members of his crew were working at a site near Ashland and Chicago Avenues, the first alley south of the intersection, in Chicago. The petitioner was one of the members of the crew, they are both cable splicers. They were getting the area customers ready for U-verse. They were there quite a few days, although he does not recall how many days, the petitioner was there each day also. On March 23, 2011, he and the petitioner were doing the underground work. We worked out of one manhole that day it was very crowded only room for one. I took the cover off of the first manhole. I saw that we needed to be in the other manhole so I got permission then went down there it was also a one person space. Petitioner stayed on top and handed me my tools and the supplies he needed. Mr. Elstner admitted he had no idea what the petitioner was doing above ground when he was not handing him supplies. According to Mr. Elstner the petitioner never told him anything about his back hurting or getting hurt on that day. Mr. Elstner was not the petitioner's supervisor and petitioner was not required to report any injuries to Mr. Elstner. Mr. Elstner agreed that the wait and see policy described by the petitioner does exist.

Although he does not remember what day of the week it was or exactly how long they were at the site, Mr. Elstner is convinced he was the only one going in and out of the manholes that day, he is the one who lifted the cover off the manhole and that no report of injury was made

to him. He admitted that he did not want to be at the hearing testifying, that he had better things to do and was only there because of the subpoena. He also admitted that he does not like working with the petitioner because the petitioner is not motivated.

On March 25, 2011, the medical records reflect that Dr. Higginbottom ordered that the petitioner be restricted to light-duty work beginning on March 28, 2011 (P. Ex. 1). The Respondent was unable to accommodate the restrictions. The Petitioner had an MRI on May 4, 2011 which was interpreted as being relatively normal. (P. Ex. 2) Eventually, the Petitioner was referred to a spine specialist, Dr. Anthony Rinella. Dr. Rinalla first evaluated the Petitioner on May 19, 2011, noting that the petitioner's medical history included a 2009 incident involving the Petitioner's low back but that petitioner had returned to work without problems after that injury. Dr. Rinella's notes identify a March 23, 2011 incident wherein the Petitioner developed low back tenderness radiating into his right leg due to climbing ladders and splicing cables (P. Ex. 2). Dr. Rinella's diagnosis was a lumbar strain with possible radiculopathy. He took the petitioner off of work and prescribed physical therapy (P. Ex. 2).

During a follow-up office visit on June 24, 2011, Dr. Rinella noted that the Petitioner was having mild relief with chiropractic treatment, he prescribed further physical therapy and released the Petitioner to go back to work with a 10-pound lifting restriction (P. Ex 2). The Respondent was not able to accommodate that restriction until April 17, 2012 for a period of approximately 10 days. The Petitioner was off of work again starting on April 27, 2012, and continuing through the date of the hearing, August 7, 2012.

On October 6, 2011, Dr. Rinella referred the Petitioner to a pain management specialist, Dr. Faris Abusharif (P. Ex. 2). Dr. Rinella continued to evaluate the Petitioner as he was undergoing pain management with Dr. Abusharif and physical therapy. Dr. Rinella took the petitioner off work completely on February 17, 2012 (P. Ex. 2). Dr. Abusharif administered a series of three epidural injections, the first one on February 24, 2012; the second one on March 19, 2012 and the third on June 11, 2012 (P. Ex. 4). After the second injection because the petitioner had ongoing radicular symptoms, EMG and Nerve Conduction Velocity (NCV) studies were done on May 10, 2012, revealing objective evidence of left L5 and left S1 radiculopathy (P. Ex. 4).

In a report dated June 5, 2012, Dr. Rinella causally related the diagnosis and treatment that the petitioner was currently receiving to his complaint of injury on March 23, 2011 at his workplace. (P. Ex. 2). As of July 16, 2012, Dr. Abusharif had recommended a diagnostic medial branch block at L5 and S1. The request for authorization was denied.

At the hearing, the Petitioner testified that his low back was very painful and tender. His left leg continued to persist with tingling and numbness and he had pain in the buttocks. The Arbitrator observed the Petitioner's uncomfortable demeanor. He had to shift positions while sitting and standup on occasion during his testimony and the balance of the hearing.

The Respondent offered four reports prepared by Dr. Jesse Butler (R. Ex 1 – R. Ex 4). Dr. Butler evaluated the Petitioner on August 23, 2011 and April 19, 2012, and authored additional reports dated June 20, 2012 and July 12, 2012. Dr. Butler confirmed in his report that the Petitioner sustained a "work related strain" on March 23, 2011. He did not believe that the

petitioner needed additional care or treatment for this injury (R. Ex. 2). Dr. Butler suggested that the Petitioner needed a neurological evaluation. In his July 12, 2012 report, Dr. Butler pointed out that the records of the treating physicians are silent on a workplace exposure for March 23, 2012 (R. Ex. 4).

On the issue of credit toward the TTD period claimed, Respondent offered the testimony of Anne Coyle, a manager at Sedgwick, the Respondent's third-party administrator for disability claims. Ms. Coyle provided a description concerning the various credits, repayments and tax reimbursements that would be owed to the Petitioner. Ms. Coyle testified that she works on the Respondent's account. Her job duties entail assisting in the coordination of workers' compensation and disability benefits and Respondent's E-link. Ms. Coyle testified that E-link is the Respondent's payroll system.

Ms. Coyle testified that Petitioner is currently receiving short term disability benefits and that Respondent funds the disability plan. To qualify for the Respondent's short term disability, Ms. Coyle testified that the employee needed at least six months of service and to be off work. She testified that disability is paid out at a 100% of the employee's pay and then drops to half pay. If Mr. Anglin were to prove a compensable workers' compensation claim, he would then be entitled to Accident Disability (hereinafter "AD") which is a life time benefit and combined workers' compensation benefit. She testified that if he proves a compensable claim, his short disability ("SD") benefits would be converted over to AD benefits. During this process SD would be reimbursed for the full benefits it paid in connection with this claim.

For the time of period March 27, 2011 through July 22, 2011 Petitioner received gross SD benefits totaling $22,320.65. His net benefits for this period totaled $8,360.71. Ms. Coyle testified that the difference between the gross and net pay were the withholdings which included taxes, Medicare, and Social Security. Altogether, the gross payments made by the Respondent toward the Petitioner's short-term disability totaled $55,328.73 whereas the net amount received by the Petitioner totaled $23,984.58. According to Ms. Coyle the Petitioner would be reimbursed for these withholdings if the claim were converted to workers compensation. In connection with that, Respondent would generate a "Repayment of Prior Wages" letter. (R. Ex. 6.) Ms. Coyle testified to and the letter reflects that if there were Federal taxes withheld from the SD payments in prior years (such as in case) the employee would be entitled to a deduction on his personal income taxes in the current year. (R. Ex. 6) If the SD benefits are paid during the same calendar year during the re-classification, Petitioner would be reimbursed those monies that were withheld for Federal taxes. She also testified that the employee would receive back the monies withheld for Social Security and Medicare regardless of the calendar year in which they were paid.

Ms. Coyle stated that after the re-classification if the Petitioner was still short in terms of what he is owed in TTD, he would be made whole by workers' compensation. On cross examination, Ms. Coyle admitted that the reimbursement system she described was dictated by contract and subject to negotiations at the time of contract renewal. She testified she thought Petitioner's labor agreement was recently renewed.

CONCLUSIONS OF LAW

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

The Petitioner testified to performing a variety of work activities on March 23, 2011, including splicing cables, lifting manhole covers and working with ladders. The Respondent offered the testimony of Kenneth Elstner who stated that he was the only one that lifted a manhole cover on March 23, 2011. The Arbitrator does not find Mr. Elstner's testimony on that issue credible. It is difficult to believe that Mr. Elstner can recall the details of one specific day on the job over the course of his career that spanned over 11 years with the Respondent even though he does not remember what day of the week it was, how many days they were on that specific job since it was multiple days or how long before and after that day they were there. When asked to testify as to where he was working one month prior to March 23, 2011, he could not answer. Additionally, Mr. Elstner, by his own admission, did not personally observe the Petitioner's work activities for most of the day on March 23, 2011 his knowledge of what the petitioner was doing while he was underground was limited to when petitioner was giving him the supplies and equipment he needed.

The Arbitrator finds the Petitioner's testimony credible. The treating records document a decrease in symptoms as of March 15, 2011, then demonstrate an increase in symptoms during the visit with Dr. Higginbottom after the March 23, 2011 work day supporting the petitioner's testimony. Dr. Rinella's first office visit of May 19, 2011 provides a detailed history of injury consistent with the Petitioner's testimony (P. Ex. 2). Additionally, the Respondent's own Section 12 examiner, in his April 19, 2012 report, acknowledges that the Petitioner was injured at work on March 23, 2011 (R. Ex 2).

Based on the foregoing, the Arbitrator finds that the Petitioner sustained accidental injuries on March 23, 2011 which arose out of and occurred in the course of his employment by the Respondent.

Was timely notice of the accident was given to the Respondent?

Section 6(c) of the Illinois Workers' Compensation Act states that notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. Section 6(c) (2) states that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *820 ILCS 305/6(c)* (West 2004)

The purpose of the notice provisions is to enable the employer to investigate promptly and to ascertain the facts of the alleged accident. *City of Rockford v. Industrial Commission*, 214 N.E.2d 763 (1966) The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. However, the legislature has

mandated a liberal construction on the issue of notice. *S&H Floor Covering v. The Workers Compensation Commission,* 870 N.E.2d 821 (2007)

The Petitioner testified that he informed his supervisor, Yves Edmond, on March 23, 2011 that his back was hurting from work. Mr. Edmond acknowledged that the Petitioner told him that his back was hurting on March 23, 2011, but denied that he was ever specifically told that it was work-related. He also said that he did not ask the petitioner if it was work related. The respondent did not offer any information or proof that they were prejudiced by what they believe was in adequate notice.

It is undisputed that on two occasions – March 23, 2011 and March 25, 2011 – the Petitioner told Yves Edmond that his back was hurting. Given that the Petitioner was at work and had worked, by Mr. Edmond's own account, for at least a half a day on March 23, 2011 when this complaint was voiced at the jobsite. Given the facts that Mr. Edmond is petitioner's supervisor and there is a policy that when injured you must inform your supervisor that you were hurt, it is reasonable to assume that his back was hurting from the work activity. Why mention to At most, the Respondent could allege defective notice, but it has failed to allege any prejudice from the alleged defective notice.

The Petitioner provided timely proper notice of the accident to the Respondent.

Is the Petitioner's condition of ill-being causally related to the March 23, 2011 accident?

The medical records of Dr. Higginbottom document an increase in low back symptoms following the petitioner's work on March 23, 2011.

Dr. Rinella opined that the Petitioner's ongoing low back and left lower extremity symptomology were causally related to the March 23, 2011 accident. The EMG/NCV studies ordered and conducted after the second injection failed to provide relief from the petitioner's symptoms are objective evidence that document left L5 and left S1 radiculopathy.

Dr. Butler authors a narrative report after his evaluation of the Petitioner on August 23, 2011. That report does not offer an opinion regarding causation of the petitioner's condition. After his evaluation on April 19, 2012, Dr. Butler refers to a work-related injury of March 23, 2011, a sprain that he believes needs no further treatment. In the June 20, 2012 addendum, Dr. Butler acknowledges the EMG/NCV studies which demonstrate L5-S1 radiculopathy, but fails to offer an opinion as to the cause of that objective finding.

For the foregoing reasons, the Arbitrator does not find the conclusions of Dr. Butler reliable. Relying on the pre-accident medical status of the Petitioner, the mechanism of injury, the opinions of Dr. Rinella and the consistent course of medical care with Dr. Higginbottom, Dr. Rinella and Dr. Abusharif the arbitrator concludes that the Petitioner's condition of ill-being as it relates to his low back and left leg are causally related to the March 23, 2011 accident.

Were the medical services that were provided to Petitioner reasonable and necessary?

The Arbitrator finds that the treatment to date rendered to alleviate the Petitioner's low back pain and left leg symptomology, consisting of the initial chiropractic care, orthopedic follow-up visits, a series of three injections, MRI evaluations and EMG/NCV studies, is reasonable and related to the March 23, 2011 accident. Based on the parties' stipulation with respect to bills, the Respondent is ordered to satisfy directly with the medical providers pursuant to the fee schedule the following medical bills from (1) Lifestyle Chiropractic;(2) Illinois Spine & Scoliosis Center; (3) Athletico; (4)Preferred Open MRI; (5) Pain Treatment Centers of Illinois; and (6) Pain Treatment Surgical Suites.

Is the petitioner entitled to prospective medical care and is the respondent responsible for payment for said care?

As of the date of the hearing, the Petitioner had been prescribed a diagnostic medical branch block at L5 & S1 by Dr. Abusharif. The Petitioner had shown improvement with the series of injections but not complete relief and still has significant pain, the Arbitrator finds this treatment recommendation reasonable. Only Dr. Butler offered an opinion refuting the need for further treatment. Based on the foregoing, the Respondent shall authorize and satisfy the medical expenses related to the diagnostic medical branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident.

What temporary benefits are owed to the petitioner?

The evidence established that the Petitioner was either authorized off of work or prescribed work restrictions that the Respondent could not accommodate for three different time periods spanning 48 weeks: 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12. For the reasons stated above the arbitrator the arbitrator finds that the petitioner is entitled to TTD. Accordingly, the Respondent shall pay temporary total disability benefits that have accrued in the amount of $889.67 per week for this 48-week time period.

What is the amount of credit owed the Respondent?

Section 8 (j) of the Act states in relevant part that:

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

An employer should not be entitled to a credit for amounts not paid to the employee, including amounts paid to the government and withheld in taxes. *Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 315 Ill. App. 3d 1197, 1206, 734 N.E.2d 900, 907 (2000).

There is a disagreement between the parties as to the amount of credit the Respondent should be afforded against temporary total disability benefits owed based on the non-occupational disability benefits paid pursuant to Section 8(j) of the Act. The parties agree that the Respondent rendered gross payments of $55,328.72 whereas the Petitioner, after various deductions including taxes, only received a net amount of $23,984.58. At issue is which of these two figures represents the appropriate credit that the Respondent shall be afforded.

The Respondent offered the testimony of Anne Coyle who described the Respondent's benefit system and what would take place if the Arbitrator were to find that the Petitioner sustained a compensable workplace accident. All of these policies were dictated by contract, contracts which can be re-negotiated and changed, thus impacting the potential reimbursements owed to the Petitioner. It is not within the Arbitrator's legal authority to order such reimbursements or adjustments.

The Arbitrator is guided by the holding in *Navistar International Transportation Corporation v. The Industrial Commission*, 315 Ill. App. 3d 1197; 734 N.E.2d 900 (1st Dist. 2000). In that case, similar to this one, the Respondent argued that it was entitled to a credit for the gross amounts paid to the Petitioner before deductions whereas the Petitioner argued the credit should be for the net amounts actually received. Following the plain language of the Workers' Compensation Act, the Court held that the employer should not be entitled to a credit for amounts not actually received by the Petitioner. The credit was only afforded for the net amount received by the Petitioner.

The Respondent, through the testimony of Ms. Coyle, presented a complicated system of reimbursements and credits that were agreed to by the employees and the employer through contract negotiation. The Respondent rendered gross payment which, after deductions, yielded a net amount paid to the Petitioner of $23,984.58. The Commission does not have the legal authority to enforce various internal contract arrangements between the Respondent and its various contracted unions. In applying the *Navistar* case, the Arbitrator finds that the Respondent is entitled to a Section 8(j) credit for non-occupational disability benefits totaling $23,984.58.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner temporary total disability benefits of $889.67/week for 48 weeks, commencing 3/28/11 – 7/21/11, 12/22/11 – 4/16/12 and 4/27/12 – 8/07/12.

Respondent shall pay the Petitioner the temporary total disability benefits that have accrued to date, and shall pay the remainder of the award, if any, in weekly payments.

The Arbitrator finds the treatment to date reasonable and necessary. By stipulation, the only objection to the bills was as it related to liability. Accordingly, Respondent shall satisfy the following medical bills pursuant to Section 8(a) of the Act directly with the medical providers

and shall receive a Section 8(j) credit for those portions of the bills that are satisfied by the group health carrier: Lifestyle Chiropractic ($5,435.00); Illinois Spine & Scoliosis Center ($500.0); Athletico ($6,047.00); Preferred Open MRI ($3,800.00); Pain Treatment Centers of Illinois ($15,568.00); Pain Treatment Surgical Suites ($16,657.60).

Pursuant to Section 8(a), Respondent shall further authorize and satisfy the medical expenses related to the diagnostic medial branch block at L5 & S1 as prescribed by Dr. Abusharif as such services are reasonable, necessary and causally related to the subject accident

Deborah L. Simpson
Signature of Arbitrator

Sept 4, 2012
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rodney Barger,
Petitioner,

vs. NO: 12 WC 25442

T. K. T., Inc.
Respondent.

14IWCC0364

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, temporary total disability, permanent partial disability 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..

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 1, 2013 is hereby affirmed and adopted.

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

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

DATED: MAY 1 6 2014

Ruth W. White

Ruth W. White

o-03/26/14
rww/wj
46

Daniel R. Donohoo

Daniel R. Donohoo

DISSENTING OPINION

I must respectfully dissent as I would have reversed the decision of the Arbitrator and found that Petitioner was credible regarding sustaining an accidental injury to his low back that arose out of and in the course of his employment.

Petitioner testified that he had never driven that particular truck before and when he got into it he noticed that there was a 2x4 under the seat. (T.11-12). Petitioner testified that he did not put the board under the seat himself and has no idea who did. (T.31). He testified that it was very uncomfortable to sit on, there was a lot of bouncing, and his lower back started to hurt but he continued to drive his route. (T.13). Petitioner testified that there were no springs under the seat like a normal seat would have and "the board was right on my tailbone all day." (T.15). Petitioner testified that he could barely walk when he got out of the truck and it was very painful so he filled out an incident report and spoke with either Dave Janson or Shawn Kabat at Respondent on the same day that he took the photograph. (Id.). Petitioner testified that he took the photograph to gather evidence after he finished his route and his back was "sore and hurting." (T.28).

On cross-examination, when Petitioner was shown the May 24, 2012 incident report, he acknowledged that it was a long time ago and he didn't remember which truck numbers were which but that there were actually two incidents. (T.23). Petitioner testified that the first one involved a "rough ride" in Truck 72 on May 24, 2012, which is the subject of the incident report in evidence. Petitioner testified that the second incident was in Truck 84, which had the 2x4 under the seat, about a week later. (T.24). Petitioner testified that he "also wrote up an injury report just like that for that truck." (T.25). Petitioner testified that after the first incident, he was just sore and didn't need medical treatment but after the second one his symptoms increased a lot due to sitting on the 2x4 board. (Id.). Petitioner testified that he made a written report after both of the incidents and they were within a week of each other. (T.30). I would note that neither Dave Janson nor Shawn Kabat testified in this matter and there is no evidence to rebut Petitioner's testimony that there were two incident reports within a week of each other.

Petitioner also testified that when he first saw the board under the seat in Truck 84 he lifted it up and tried to pull it out but "it wouldn't go anywhere." Petitioner testified, "I'm guessing it was screwed down. I tried to move it and it wouldn't move." (T.26-27).

Respondent's witness, Alex Bartolomucci, testified that he looked at the truck "probably when we got the accident report." (T.51). However, it isn't clear to which accident report he is referring. Mr. Bartolomucci never testified that Petitioner only made one incident report.

Regarding how the board got there in the first place, Mr. Bartolomucci testified that "evidently somebody had lifted it up and stuck it in there" but he claimed that there was no permanent attachment of the board to the seat or the frame. (T.41) Mr. Bartolomucci testified that he did not know who put the board in the truck but denied that it was fair to say that it was done by an employee of Respondent because "our yard is open, it's not fenced, so anybody can – a passerby can access any of our trucks." (T.49). Mr. Bartolomucci testified that the seat cushion can be flipped up (T.41) but Petitioner testified that he was not aware that the seat flipped up. (T.56). Mr. Bartolomucci believed that it had not been permanently attached because there are currently no holes in either the cushion or the frame. (T.50). However, he never saw the board under the seat and doesn't know who took the board out. (Id.).

Despite Mr. Bartolomucci's testimony that there was no evidence that the board had been permanently affixed to the seat and the fact that Respondent introduced a service report that doesn't mention anything about a board being under the seat cushion of Truck 84 on May 29, 2012, it was nevertheless unrebutted that the seat in the truck that Petitioner was driving *was defective on the day he drove it*. Petitioner testified that a 2x4 board was under the seat that day, which he was unable to remove, and after driving all day on it he began to experience low back

pain. I find the testimony of Mr. Bartolomucci to be preposterous and incredible that, a 2x4 board under the truck seat would have "very little" effect and "wouldn't have affected the integrity of the air ride system" because it would "be like having a seat in a Cadillac or a car with like lumbar support where you can make adjustments." (T.40). Even though he believed that someone would most likely not even feel the board underneath the seat because of the padding, he also admitted that it would change the elevation of the rear portion of the cushion. (T.51). Furthermore, even though he never saw the board under the seat, he testified that if he had seen it he would have taken it out because it is not supposed to be there. (T.50).

Petitioner testified that the seat cushion was very thin and worn out and he could definitely feel the board as he sat in the seat and rode in the truck. (T.56-57). In response, Mr. Bartolomucci testified that the seat in that truck was no different from any other truck in the fleet but he did not actually testify as to the condition of the seat and the amount of padding it contained. (T.58). Since Mr. Bartolomucci never saw the board and never sat on the seat with the board under it, his opinion is speculative as to how much Petitioner would have felt while driving the truck.

Although the accident date and the truck number were unclear, Petitioner made a motion to conform the Application for Adjustment of Claim to the proofs, which was granted by the Arbitrator. I do not find that the confusion regarding the date of accident to be fatal to Petitioner's claim. Petitioner credibly testified that there were two incident reports within a week of each other and this was not rebutted by Mr. Bartolomucci. I don't find it significant that Respondent's Annual Service Report for Truck 84 does not mention a board under the seat. I would note that it is possible that the Technician, Mike Ring, could have removed it without noting it on the form and that Mr. Ring did not testify at the hearing.

Petitioner credibly testified that had he began to experience back problems while he was driving the truck with the defective seat and was bouncing with his tailbone directly over the 2x4. I would find Dr. Gornet's causal connection opinion to be credible and consistent with the mechanism of injury in this case. The medical evidence shows that Petitioner has a central disc herniation and annular tear at L5-S1. I would find that Petitioner has met his burden of proof regarding accident and would award prospective medical treatment including the CT discogram.

Charles J. DeVriendt

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

BARGER, RODNEY
Employee/Petitioner

Case# **12WC025442**

T K T INC
Employer/Respondent

14IWCC0364

On 5/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

2261 WILLIAMS CAPONI & FOLEY
KIRK A CAPONI
30 E MAIN ST PO BOX 565
BELLEVILLE, IL 62222

0734 HEYL ROYSTER VOELKER & ALLEN
JOE GUYETTE
102 E MAIN ST SUITE 300
URBANA, IL 61801

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)

RODNEY BARGER
Employee/Petitioner

v.

T.K.T., INC.
Employer/Respondent

Case # 12 WC 25442

Consolidated cases:
14IWCC0364

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 **Collinsville**, on **March 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. [x] What was the date of the accident?

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

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

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

N. [ ] Is Respondent due any credit?

O. [ ] Other *

FINDINGS

On the date of accident, May 24, 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 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 $45,499.48; the average weekly wage was $847.99.

On the date of accident, Petitioner was 34 years of age, *married* 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 $8,749.95 for TTD, $693.29 for TPD, $00.00 for maintenance, and $00.00 for other benefits, for a total credit of $9,443.24.

Respondent is entitled to a credit for amounts paid toward the petitioner's medical treatment under Section 8(j) of the Act.

ORDER

The petitioner failed to establish that he sustained an accident that arose out of and in the course of his employment with respondent. No benefits are awarded.

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

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

Signature of Arbitrator

4/26/13
Date

MAY - 1 2013

14IWCC0364

Findings of Fact

Petitioner works as a truck driver for the Respondent. He is claiming a back injury stemming from an alleged accident on May 24, 2012. At around that time period, Petitioner was driving the "Paducah route" which covered up to 500 miles roundtrip over a period of 8 to 12 hours. During his route Petitioner would also make stops to drop off freight at various locations.

Petitioner testified that on May 24, 2012, he was scheduled to drive the Paducah route and noticed a 2 x 4 board under the seat cushion of the truck he would be driving that day. He took a photograph of the driver's seat with the board lodged under the seat cushion (see PX 6). He explained that he could not remove the board. According to Petitioner, there were no springs in the truck seat. He did not tell anyone about the board because he did not think it would make a difference. He testified that as he drove the truck with the board under the seat cushion, he began to feel uncomfortable and eventually experienced low back pain. Despite his back pain, he continued to drive, but had difficulty walking after exiting the truck. He later reported this incident to Dave Jansen.

On June 4, 2012, Petitioner sought chiropractic care at Trenton Chiropractic Clinic. (PX 2) The June 4, 2012 records from that medical provider indicate in the "Subjective" section, a history of the Petitioner complaining of back pain that "...started about 2 weeks ago (May 24, 2012) while driving a tractor trailer at work. It got much worse last week after driving a truck with a 2X4 plank under the seat." (PX 2) The chiropractor diagnosed the following conditions throughout the medical records: subluxation of the lumbar, sacrum, cervical and thoracic areas; lumbar sprain or strain; cervical strain; hip/thigh pain; and muscle spasm. His treatment from this provider included electric stimulation, heat application, myofascial release and manipulation. On July 13, 2012, an MRI was taken of Petitioner's cervical and lumbar spine. The MRI revealed mild disk osteophytes complex at C6-7, and degenerative disk disease with mild broad base diffuse disk protrusion at L5-S1.

Petitioner was subsequently referred by his chiropractor to Dr. Matthew Gornet, who first saw the Petition on September 17, 2012. Dr. Gornet testified that the Petitioner's initial complaints were low back pain going down his left side into his knee and neck pain into both shoulders, and headaches. Dr. Gornet noted in the MRI scans that the Petitioner had an annular tear and small protrusion at C6-7, and a central herniation and annular tear at L5-S1. Dr. Gornet administered injections and indicated that a spinal fusion would be part of the treatment plan. Dr. Gornet testified that assuming Petitioner's history was factually correct, he believed the Petitioner's conditions were causally connected to his employment.

On September 25, 2012, Petitioner underwent an IME with Dr. Kevin Rutz. Dr. Rutz noted the Petitioner provided a history of developing low back pain after driving approximately 500 miles in a semi-truck with a two by four placed under the seat cushion. He further noted Petitioner developed neck pain four or five days later. Dr. Rutz testified that he noted the Petitioner's findings from his MRI and his medical reports, and diagnosed Petitioner with neck and shoulder pain, and low back pain with some radicular features secondary to degenerative disc disease. He did not believe these conditions were work related because he did not see the mechanism of injury – i.e. riding in a vehicle with bad shock absorption - could account for the conditions seen on the MRI. Furthermore, he opined that the Petitioner's complaints of neck and shoulder pain 4 or 5 days following the alleged accident date do not support any causal connection.

Petitioner testified during cross examination that that he initially became sore after driving truck #72 on May 24, 2012. Approximately one week later, he drove truck #84, which had a 2x4 board beneath the back portion of the driver's seat. The petitioner testified that truck #72 had a rough ride, and caused some soreness in his low

back. That soreness resolved within a few days, and he explained that he did not have any low back symptoms when he began driving truck #84. While driving truck #84, he experienced a significant increase in his symptoms, and he attributed those symptoms to driving the truck with the board in the seat. Additionally, Petitioner testified that his May 24, 2012 "Personal Injury Report" mentions back and shoulder complaints and indicates the trucks are rough riding, but does not make any mention of having to sit on a seat having a board placed underneath. (See RX C) He further acknowledged that he had an accident while driving a truck for the Respondent in February 2012. Following that accident, he did not seek any medical treatment, and there was nothing physically that restricted him from being able to do his regular job. He admitted the accident of February 2012 was a "more jarring ride" than what he experienced while driving around with the board beneath his seat.

Alex Bartolomucci testified on behalf of the Respondent. He is the Respondent's Director of Operations. In his position, he oversees the Respondent's trucking terminals, including truck maintenance and repairs. He testified that the Petitioner had an accident in February, 2012 in which the Petitioner drove a truck into a median and hit a guard rail. This resulted in the truck being jack-knifed and totally damaged. Bartolomucci also described the seats of Respondent's trucks as having air ride seats, which means that there is an air cushion in the seat. He described the seat cushions as basically a large air bubble. The seats in the trucks can be lifted to adjust the air cushion. If there was a board underneath a seat cushion, this would only change the seat cushion angle. He denied seeing a board inserted underneath a seat cushion and that no board was found on any prior or subsequent inspection of the truck driven by Petitioner. Bartolomucci explained that if there was a board, it could be removed by simply lifting the seat cushion up or tilting the seat cushion forward.

Petitioner testified on rebuttal that he was not aware that the seat cushions could be lifted or flipped up and that he tried, but could not remove the board under his seat cushion.

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

1. Petitioner failed to prove he sustained an accident on May 24, 2012. This finding is based primarily on the lack of credibility in this claim. Initially, the Arbitrator notes the inconsistencies between the Petitioner's testimony and both his medical records as well as the evidence presented by the Respondent. Petitioner testified that he hurt his back while driving with a board placed under his seat on May 24, 2012. However, the initial medical records show that the Petitioner was complaining of pain on May 24, 2012, and subsequently drove a truck with a board underneath his seat some time after May 24, 2012. The May 24, 2012 accident report does not mention anything involving the Petitioner driving with a board under the driver seat. While the inconsistencies regarding the accident date are not by themselves fatal to the Petitioner's claim, there are other facts that further spread the cloud of doubt in this case. The Arbitrator finds some serious credibility questions raised by the fact that the Petitioner took the time to photograph the seat with a board placed underneath the seat cushion, but did not call anyone to try to either address the reason why the board was there or whether it needed to be removed. Petitioner's explanation that he did not report the board under the seat because it would not make any difference did not stop him from completing an accident report after the fact. The unrebutted testimony of Mr. Bartolomucci casts even further doubt on the credibility of this claim. The fact that the seat cushion, as described by Bartolomucci, is basically filled with air and can be easily lifted up or tilted forward, and that there was no board found under the seat cushion during the pre-accident or post-accident inspections – all further erode the credibility of Petitioner's testimony regarding the significance of the alleged board under his seat. Petitioner's claim that he was injured due to a defective seat was clearly rebutted by the testimony of Mr. Bartolomucci. And assuming arguendo that there was a board lodged under the seat cushion of Petitioner's truck, the evidence shows that the board could have easily been removed by simply lifting the seat cushion up –

14IWCC0364

a fact made evident since the alleged board was not found during the post-accident inspection. In sum, the Petitioner's claim cannot overcome the issue of credibility created by the conflicts between the Petitioner's testimony and the facts presented at trial.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANCISCO ADAN,

Petitioner,

vs. NO: 11 WC 05328

MULLINS FOOD PRODUCTS, INC.,

14IWCC0365

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses and temporary total disability benefits, 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 medical expenses of $103,898.32 per the medical fee schedule. We modify the Arbitrator's award and do not award Petitioner non emergency transportation charges from Marque Medicos. The Commission further modifies the Arbitrator's award to only authorize medical expenses that were certified per the utilization reviews from Dr. Adkins and Dr. Cox.

Petitioner should not be awarded medical expenses in the form of non emergency transportation charges from Marques Medicos. Petitioner received such transportation on

4/11/11, 4/6/11, 4/20/11, 5/18/11, 8/5/11, 8/15/11, 9/6/11, 10/17/11, 1/20/12, 5/11/12, 7/10/12 and 7/24/12. Those transportation charges total $5,837.00. Per the fee schedule those charges would then amount to $3,680.96, per Respondent. Though the Respondent has suggested that the amount due for such transportation services would be reduced pursuant to the fee schedule, the Commission finds said charges to be neither reasonable nor necessary. Petitioner was able to drive an automobile, and drove himself to many of his appointments and while running personal errands. In addition, his wife drove him to appointments.

The Commission believes that the provider, Marque Medicos, is aware of the requisites necessary to qualify said transportation charges for payment and has failed to provide the necessary justification for same.

Since the record is devoid of the elements necessary to justify the payment of the non-emergency charges, as listed above, the Commission denies same. Based upon the record and the findings of the Commission, the Petitioner is not liable for the payment of same.

Further Petitioner is only entitled to medical expenses as authorized in the utilization reviews from Dr. Adkins and Dr. Cox. We agree with Dr. Adkins' and Dr. Cox's findings and reasons and therefore do not authorize medical expenses for the treatment that was non-certified. Dr Adkins did not certify the medial branch blocks on 4/6/11 and 4/20/11. Dr. Cox only certified the first 10 physical therapy visits out of the 26 that Petitioner attended from 2/11/11 to 5/4/11 and continuing.

Dr. Adkins found the medial branch blocks were not medically necessary on May 24, 2011, because Petitioner had lumbar radiculopathy and a positive straight leg test. On June 16, 2011, Dr. Cox certified only the first 10 physical therapy visits based on the ODG-TWC Low Back Procedure Summary, which supports skilled physical therapy to address acute low back complaints for up to 10 visits over five weeks. Moreover, Dr. Cox wrote that there is no evidence of long term benefits from prior skilled physical therapy and it is unclear how providing the same treatment is expected to produce a different or better outcome. After the significant number of physical therapy visits Petitioner has attended, Dr. Cox wrote it is expected he would be able to independently complete a home exercise program. Therefore, we only award the medical expenses for the treatment that was certified in the utilization reviews.

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 $319.00 per week for a period of 84-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses as authorized per the utilization reviews minus the charges for non emergency transportation under §8(a) and §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 16 2014
TJT: kg
O: 3/17/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

ADAN, FRANCISCO F Case# **11WC005328**

Employee/Petitioner

MULLINS FOOD PRODUCTS INC

Employer/Respondent

14IWCC0365

On 3/5/2013, 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 0.12% 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:

2553 McHARGUE, JAMES P LAW OFFICE
MATTHEW C JONES
100 W MONROE SUITE 1605
CHICAGO, IL 60603

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
J G BAMBRICK JR
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Francisco F. Adan
Employee/Petitioner

Case # **11** WC **5328**

v.

Mullins Food Products, 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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 28, 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. [ ] 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. [ ] Is Petitioner entitled to any prospective medical care?

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

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

N. [x] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **January 17, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$20,660.64**; the average weekly wage was **$397.32**.

On the date of accident, Petitioner was **27** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$1,546.65** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,546.65**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$319.00**/week for **84 1/7th** weeks, commencing **January 18, 2011** through **August 28, 2012**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$1,546.65** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$15,877.60** to **Marque Medicos**, **$12,166.42** to **Medicos Pain and Surgical Specialists**, **$491.00** to **Prescription Partners**, **$56,651.61** to **Dr. Robert Erickson**, **$1,224.64** to **Elite Physical Therapy**, **$1,027.29** to **Naperville Medical**, **$14,850.40** to **Metro Anesthesia**, and **$1,609.36** to **Industrial Pharmacy Management**, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Walter Black
Signature of Arbitrator

March 5, 2013
Date

ICArbDec19(b)

MAR 5 - 2013

FACTS

The Petitioner testified that on January 17, 2011 he injured his low back while working for the Respondent. January 17, 2011, was the Petitioner's first day of work as an employee of the Respondent. However he had been consistently working at Mullins for nearly a year, being dispatched there regularly and continuously by a staffing agency, until being hired directly by the Respondent. That day, the Petitioner was working in the weighing station, with his shift being 1:00 p.m. to 11:00 p.m. He was weighing products for the next day, consisting of moving heav barrels off of pallets by himself and then lifting and maneuvering them down to the floor where they could be weighed. The barrels weighed between 300 and 400 pounds.

At approximately 5:30 p.m., the Petitioner was breaking down a large wooden container in which tomato paste had been stored, at which time he attempted to lift one of the sides of the container, while unknowingly catching his foot on the bottom of the container such that when he forcefully lifted the piece upwards, the piece wa trapped beneath his foot causing resistance. The Petitioner testified that he immediately experienced intense low back pain. The Petitioner testified that he had not been experiencing any pain or difficulty with his low back that da prior to his lifting injury and had never suffered any prior accidents or injuries to his low back in the past.

Immediately after the accident, the Petitioner notified his supervisor, "Roberto" and was directed to the company clinic, Advanced Occupational Medicine Specialists, where he was seen by Dr. Gerald Cerniak. The medical records indicate that he was experiencing 10 out of 10 low back pain, with significantly limited lumbar range of motion. (Px. 1, p. 12) He was diagnosed with axial low back pain, low back strain, and paraspinal muscle spasm, noted to have been "all secondary to a lifting incident at work on January 17, 2011." (Id. At 13) He was giv a note to return to work with sedentary duty restrictions, and no lifting, bending, squatting, pushing, or pulling. (Id. The Petitioner presented this note the following day, but was not ever offered a modified position with the Respondent.

The Petitioner followed up with Dr. Khanna at Advanced Occupational Medical Specialists on January 25, 2011, with minimal improvement to his low back condition. He followed up again with Dr. Khanna on February 1, 2011, at which time he was found to have ongoing muscle spasms. (Px. 1, p. 10) An MRI was recommended, and the Petitioner was given work restrictions once again. On the way to the appointment with Dr. Khanna, the Petitioner's car broke down, causing him to push the vehicle off to the side of the road. The Petitioner's symptoms continued to be solely axial in nature with regard to his low back. (Id. At 15) He had some increased pain and tingling in his legs for about a week thereafter.

The Petitioner underwent the recommended MRI of his lumbar spine on February 7, 2011, at Athletic Imaging. The radiologist noted disc desiccation with a disc protrusion extending into the anterior epidural region. (Px. 3, p. 15-16) On February 8, 2011, the Petitioner was seen by Dr. Khanna again, at which time he complained tingling radiating down his legs, intermittently. His straight leg raising returned to normal, bilaterally. (Px. 1, p. 15 Dr. Khanna recommended physical therapy, three times per week for three weeks, and kept the Petitioner on modified duty, though no work was being offered by Respondent. (Id.)

Having failed to improve in his initial 3 weeks of care with the company clinic, and after being told that the would be a delay in authorizing the physical therapy, the Petitioner sought out his own treating physician, and was seen by Dr. Fernando Perez, a chiropractor, at Marque Medicos on February 9, 2011. (Px. 2, p. 31-33) Noting a consistent history and presentation, Dr. Perez commenced physical therapy and recommended that the Petitioner be taken completely off of work. (Id.) Dr. Perez referred the Petitioner to Dr. Andrew Engel, a board certified pain management specialist, who saw him on February 17, 2011. Dr. Engel recommended and provided a series of medications, and recommended ongoing physical therapy. (Px. 3, p. 55-56) Dr. Engel later recommended a

diagnostic medial branch block injection, which was performed on April 6, 2011 at L5 and at S1. (Id., p. 140-141) The Petitioner experienced immediate, though brief, relief of his low back pain, after the injection.

On April 14, 2011, a second medial branch block was recommended by Dr. Engel, and the Petitioner was given a light duty note. He testified that he called the Respondent offering to return with restrictions, and left a voicemail for his supervisor, Terrell Jones. Mr. Jones was present as a representative of the Respondent at trial, but was not called to testify. The Petitioner testified that Mr. Jones left him a voicemail shortly thereafter, stating that could only return upon being released to full duty. Through the date of the hearing, no offer of light duty was ever made to the Petitioner.

On April 20, 2011, the second medial branch block was performed at L5 and atS1, with the same result. (P 3, p. 138-139) In his evidence deposition testimony, Dr. Engel explained that the medial branch block injections a purely diagnostic in nature, as a tool to diagnose and confirm facet-mediated pain. (Engel Dep. Tx. P. 17-19) Dr. Engel testified that the briefly positive responses to the medial branch blocks constituted a positive diagnostic test, and as a result warranted his recommendation of a radiofrequency ablation at L5-S1 as a treatment modality, which was performed on May 18, 2011. (Id., p. 32-33) The Petitioner testified that he experienced moderate improvement after the radiofrequency ablation, both functionally and in terms of pain relief, though he continued to fluctuate in condition with good days and bad. On good days, according to the Petitioner, he continued to have moderate pain, and on bad days the pain was intense. The Petitioner testified that he had between 3 and 4 bad days per week.

A functional capacity evaluation with validity testing was performed on June 20, 2011, the results of which placed the Petitioner at the medium physical demand level, while noting ongoing objective functional deficits and signs of symptom magnification. (Px. 6, p. 3) On June 29, 2011, Dr. Engel noted ongoing low back pain at 4 out of 10 on the visual analog scale, and recommended that the Petitioner see Dr. Robert Erickson, a neurosurgeon, for a consultation. (px. 3, p. 43) Physical therapy was discontinued, with home exercises recommended. (Id.) On or about July 28, 2011and prior to his visit with Dr. Erickson, the Petitioner suffered a temporary exacerbation of his low back pain, after losing his balance while standing on a one foot high stepping stool to change a light bulb. He hopped off of the stool landing on his feet, at which time he experienced a significant increase in low back pain for few days, after which his pain levels lessened, but continued to fluctuate as before.

Dr. Erickson saw the Petitioner on August 5, 2011, at which time he made note of both the January 17, 201 accident at work, as well as the recent incident at home, regarding which he commented specifically that there was no change in the distribution of his pain and no radicular complaints. (Px. 4, p. 5) Dr. Erickson recommended a Medrol Dosepak, and discussed the possibility of surgical intervention at L5-S1 if no improvement were seen. (Id.) On October 26, 2011, a discogram was performed by Dr. Engel at L4-L5 and at L5-S1. (Px. 3, 136-137) The L4-5 level was found to be completely normal, whereas pressurized injection at the L5-S1 level created 8/10 concordant bilateral low back pain. (Id.) Dr. Engel noted a leak at that level as well, which he testified was secondary to an annular tear. (Id.) The discogram was noted to have been positive at L5-S1 for discogenic pain. (Id.)

The Petitioner continued to have follow-up appointments with Dr. Engel and Dr. Erickson, attempting additional physical therapy and ongoing prescription medication management with no relief. On May 11, 2012, he was seen by Dr. Erickson, who recommended instrumented lumbar fusion at L5-S1, due to the Petitioner's lack of improvement with conservative care. (Px. 4, p. 9) Dr. Erickson performed the surgery on July 13, 2012. (Id., p. 10-11) The Petitioner followed up with Dr. Erickson on August 3, 2012, at which time he noted that "the patient has responded beautifully". (Px. 5, p. 1) As of the date of trial, the Petitioner testified to significant improvements functionally after the surgery, with regard to strength and mobility. He testified that he is able to walk more, can move without pain on a frequent basis, and only experiences small brief incidences of pain on occasion. Prior to th

surgery, the Petitioner was unable to sit or stand for prolonged periods, and experienced frequent low back pain of greater intensity. The Petitioner testified that he is happy that he underwent the surgery.

Dr. Engel testified that the Petitioner suffered from both discogenic and facet mediated pain at L5-S1, due t his accident at work on January 17, 2012. Noting ongoing limitation to extension and flexion, Dr. Engel testified th this would be consistent with a facet mediated component, which he testified would not be identifiable via MRI in traumatic, as opposed to degenerative, situation, and testified that this injury was consistent with a lifting event as suffered by the Petitioner. (Engel Dep. Tx., p. 17-19) He explained that the medial branch block and confirmatory medial branch block were the only viable means of diagnosing this condition, and were solely diagnostic in nature. With both injections being positive for immediate pain relief, Dr. Engel diagnosed a facet mediated component, while not ruling out a discogenic factor in the Petitioner's pain, and proceeded with radiofrequency ablation. Dr. Engel noted that his pain was reduced and his physical examination thereafter was not positive for facet mediated pain, though the discogenic component of his condition continued, as diagnosed via discography on October 26, 2011. (Engel Dep. Tx., p. 41-43) Dr. Engel explained the steps taken, in accordance with the medical literature regarding discography, in order to insure a valid result and further explained the significance of the Petitioner's positive, concurrent results at L5-S1. (Id. P. 51-56) He noted that under these conditions, the false positivity rate o a discogram is reduced to nearly zero. (Id. P. 55) Dr. Engel testified that the concordant pain at L5-S1 was consistent with the Grade 4 annular tear seen on the corresponding CT scan, which corresponds with the MRI findings at that level, and supported the diagnosis of ongoing discogenic pain at L5-S1. (Id., p. 61-64)

The evidence deposition testimony of Dr. Richard Kermit Adkins, the Respondent's utilization review physician, was also submitted. Dr. Adkins, a pain management specialist, reviewed the physical therapy performed by Marque Medicos, non-certifying all but 9 sessions. He also non-certified the medial branch blocks performed by Dr. Engel, based on an assertion that they would be inappropriate in the context of radiculopathy. The non-certifications were based on the Official Disability Guidelines. Dr. Adkins testified that he does not use these guidelines at all in his own practice, and in fact utilizes the International Spinal Interventional Society guidelines, o which he acknowledged that Dr. Engel is a member of the Standards Committee. (Adkins Dep. Tx., p. 17-19) This is supported by the curriculum vitae submitted with Dr. Engel's testimony. Dr. Adkins testified that he believes Dr. Engel has a very good reputation and is a very honorable physician. (Id. P. 18) Dr. Adkins acknowledged that he was given the Official Disability Guidelines directly by Genex, as the basis for his review. He testified consistently with Dr. Engel's explanation regarding the purpose and benefits of medial branch blocks, and acknowledges that D Engel and Dr. Singh never noted radiculopathy. (Id., p. 25-28) Dr. Adkins admitted that the radicular symptoms to which he cited could have been referred pain due to facet injury, in which case the medial branch blocks would hav been appropriate. (Id., p. 27)

Two lay witnesses testified for the Respondent at trial, Raul Melasio and Ray Gaytan. They both s filled ou written statements on February 18, 2011. The Petitioner's Application for Adjustment of Claim was filed three day prior, on February 15, 2011. Mr. Melasio testified that Human Resources came to him on the February 18, 2011 to investigate the Petitioner's claim, at which time he filled out his report. Mr. Gaytan, testified that the very same day he walked into HR himself to inquire regarding the Petitioner's claim, prompted by a conversation with Mr. Melasi that day. Both witnesses are currently employed by the Respondent. Mr. Melasio testified that the Petitioner told hi he injured his back at home on January 10, 2011 and was complaining of low back pain the entire week leading up January 17, 2011. Mr. Melasio testified that he offered the Petitioner lighter work but he refused. Mr. Gaytan testified that the Petitioner told him he injured his low back at home in December of 2010, and that he offered to help the Petitioner and switch jobs with him but that the Petitioner refused.

Two Section 12 reports were submitted by the Respondent at trial, authored by Dr. Kern Singh. Dr. Singh opined that the Petitioner suffered a mere lumbar strain, which was not related to his accident at work because the

accident never occurred according to witness statements. Dr. Singh noted decreased disk height at L5-S1, with decreased signal intensity, which he stated were pre-existing in nature, and any treatment would be due to the pre-existing degenerative disc disease.

ACCIDENT

The Arbitrator finds that the Petitioner sustained an accident at work on January 17, 2011, consistent with his testimony at trial and consistent with the histories set forth in the medical records of his treating physicians. The Arbitrator had the opportunity to personally observe the testimony, demeanor, and behavior of the Petitioner, as we as the two lay witnesses for the Respondent. The Arbitrator finds that the Petitioner testified credibly through direc and cross examination. The Arbitrator further finds that both Raul Melasio and Ray Gaytan lacked credibility throughou their testimony.

CAUSATION

The Arbitrator finds that a causal relationship exists between the Petitioner's injury at work on January 17, 2011, and his current condition of ill-being. The Arbitrator bases his decision on the Petitioner's credible testimony the consistent sequence of events, the corroborating medical treatment records, and the persuasive medical opinion of the treating physicians. The Arbitrator is not persuaded by the Respondent's Section 12 reports.

MEDICAL

Having found that the Petitioner's current condition of ill being is causally connected to the Petitioner's wo accident of January 17, 2011, the Arbitrator further finds that the medical treatment provided to the Petitioner was reasonable and necessary. The Arbitrator relies on the persuasive opinions of the Petitioner's treating physicians as well as the credible testimony of the Petitioner. The Arbitrator is not persuaded by the Respondent's utilization review opinions. Therefore, the Arbitrator finds that the Respondent is liable for the claimed medical bills.

TEMPORARY TOTAL DISABILITY

The Respondent's defense on this issue is premised on accident and causation, which have been resolved in favor of the Petitioner. Therefore, the Arbitrator finds that the Respondent is liable for the claimed temporary total disability benefits.

CREDIT

The Respondent has claimed a credit for $1,546.65 for alleged overpaid temporary total disability benefits. The Arbitrator finds that the Respondent is entitled to this credit, which shall be assessed against the award of temporary total disability benefits, but not as any overpayment.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAUL McADON,

Petitioner,

vs. NO: 12 WC 42753

14IWCC0366

MILLENNIUM KNICKERBOCKER HOTEL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment, Section 19(*l*) penalties, and temporary total disability benefits, 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).

As to the issue of temporary total disability benefits, the Commission views the issue slightly different than the Arbitrator and modifies the award of temporary total disability benefits.

14IWCC0366

The Commission has considered the facts of this matter and views them as follows:

Petitioner was injured on November 12, 2012, when he sustained a documented injury to his right shoulder while traversing down a flight of stairs at his place of employment. Subsequent to said accident, Respondent directed Petitioner to the offices of Concentra Medical Center.

Petitioner received medical care at Concentra in Chicago on November 12, 2012. At that time, he was released to return to work with restrictions of: no lifting over 5 pounds, no pushing/pulling over 10 pounds of force and no reaching above the shoulder.

Petitioner returned to Concentra in Chicago and on November 19, 2012, his restrictions were changed. At that time, they were modified to: no lifting over 15 pounds, no pushing/pulling over 20 pounds of force and no reaching above the shoulder.

By his testimony, Petitioner stated that he returned to work for Respondent and performed the full measure of his duties, at least through December 31, 2012. He admitted that his employment with Respondent was terminated effective December 31, 2012, and that he was notified of said termination prior to his date of accident.

After his termination, Petitioner returned to his home in Durham, North Carolina, and began treating with a Concentra Medical Center in Durham. On January 14, 2013, he was seen by Dr. Lawrence Yenni. At that time, they discussed the results of an MRI that was performed on December 10, 2012, at the Durham Diagnostic Imaging. Dr. Yenni commented that Petitioner had findings consistent with a small partial supraspinatus tear. He also commented regarding the possibility of bicipital anchor/labral issue. He ordered an MRI with contrast arthrogram due to Petitioner's increased pain.

On February 14, 2013, Dr. Yenni again saw Petitioner. By his assessment, Petitioner had a tear of the superior labrum both anteriorly and posteriorly. Dr. Yenni stated in part: "He wants to proceed with surgery. We will get him set up at his convenience. It should be noted that he is currently not working, but it is not that he is unwilling to work in the sense that I am not allowing him to work due to limitation of his shoulder. He was released today with restrictions once his questions were answered."

The record demonstrates that Petitioner was working the full measure of his employment from November 12, 2012, until he was discharged effective December 31, 2012. It is also apparent that he was capable of performing his work, full duty, and that he continued to do so.

He was seen by Dr. William Mallon of Triangle Orthopedic Associates in Durham on December 20, 2012. By the note of Dr. Mallon, it was indicated that he would continue the previously imposed restrictions of no lifting greater than 10 pounds and no overhead work. It is readily apparently that this did not preclude Petitioner from pursuing his full duty employment.

14IWCC0366

Petitioner was questioned on cross examination and stated, at page 64 of the record in pertinent part:

Q. Do you agree that, currently, if your job as director of rooms and revenue was available to you, that you could physically do it today?

A. I do.

Q. You agree with that statement?

A. Yeah.

Q. And that's been the case the entire time from the date of the accident until now, correct?

A. Absolutely.

Petitioner argues that under the tenants of Interstate Scaffolding v. IWCC, 236. Ill.2d 132 (2010), he is entitled to either employment or continuing temporary total disability benefits after he sustains an injury, so long as his condition has not reached a state of maximum medical improvement. The Commission disagrees with Petitioner and the Arbitrator and distinguishes this matter from Interstate.

In Interstate the claimant was not capable of performing the full duties of his job. He was placed in a light duty position, which by definition accommodated the claimant's restrictions. That was not the case here.

In this case, Petitioner, though injured, was capable of performing the full duties of his employment. Though one can argue that he had restrictions immediately after his accident, he admitted that even with those restrictions he was capable of full duty work. It is for this reason that the Commission distinguishes this matter from Interstate.

Petitioner notes on page 18 of his Reply Brief that his treating surgeon indicated that his condition has worsened and that Petitioner was then in need of surgery. That statement, as listed above, was made by Dr. Yenni on February 14, 2013.

The Commission finds that Petitioner's condition worsened such that he is in need of surgery and that he is entitled to receive temporary total disability benefits from February 14, 2013, through April 24, 2013, the date of the hearing.

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 $993.59 per week for a period of 14-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $803.74 for medical expenses and prospective medical treatment in the form of right shoulder surgery as recommended by Dr. Yenni under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $3,420.00 pursuant to Section 19(*l*) without further day.

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 $18,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 16 2014
TJT: kg
O: 3/17/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

McADON, PAUL
Employee/Petitioner

Case# **12WC042753**

MILLENNIUM KNICKERBOCKER HOTEL
Employer/Respondent

14IWCC0366

On 6/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

0140 CORTI ALEKSY & CASTANEDA
RICHARD S ALEKSY
180 N LASALLE ST SUITE 2910
CHICAGO, IL 60601

1564 HINSHAW & CULBERTSON LLP
PETER H CARLSON
222 N LASALLE ST SUITE 300
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Paul McAdon
Employee/Petitioner
v.
Millenium Knickerbocker Hotel
Employer/Respondent

Case # **12** WC **42753**

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 **April 24, 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **November 12, 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 $**77,499.76**; the average weekly wage was $**1,490.38**.

On the date of accident, Petitioner was **49** years of age, *married* with **3** dependent children.

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

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

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

Respondent shall pay reasonable and necessary medical services of $**953.74**, as provided in Section 8(a) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**993.59**/week for **16 2/7**^{ths} weeks, commencing **January 1, 2013** through **April 24, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **January 1, 2013** through **April 24, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $**803.74** for medical services, as provided in Section **8(a)** of the Act. Respondent is to pay any unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule or the negotiated rate and shall provide documentation with regard to said fee schedule or negotiated rate calculations to Petitioner. Respondent is to reimburse Petitioner directly for any out-of-pocket medical payments.

Respondent shall authorize and pay for right shoulder surgery as recommended by Dr. Lawrence Yenni.

Respondent shall pay to Petitioner penalties of $ $**3,420.00**, as provided in Section 19(l) of the Act.

Petitioner's claims for penalties as provided in Section 19(k) of the Act and for attorneys fees as provided in Section 16 of the Act are 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.

Milton Black

Signature of Arbitrator

June 7, 2013
Date

ICArbDec19(b)

JUN 10 2013

FACTS

Petitioner testified in his case in chief, as an adverse witness, and as a rebuttal witness. He testified that he was employed pursuant to written contract (PX7) as Director of Rooms and Revenue in Respondent's Chicago hotel. Petitioner testified that he was authorized to work from home in Durham, North Carolina. Petitioner testified that on November 12, 2012, he was injured while performing his duties at the hotel. He testified that three or four days earlier he had a one on one meeting with Respondent's general manager, Jim Gould. Petitioner testified that Jim Gould told him that his services would no longer be required, that his employment would be ending, that the reason was due to working remotely from Durham, that he was doing an effective job, but that the corporate office did not like him working from Durham.

Petitioner testified that on November 12, 2012, there was an important scheduled sales event that was to be attended by 20 guests, including Respondent's president, vice president, several directors of sales, and sales managers. Petitioner testified that the guests were to stay at the hotel and that the general manager wanted everything to be perfect. Petitioner testified that it would be embarrassing if even one room were not up to par.

Petitioner testified that guest rooms were blocked out and spread between the twelfth and the ninth floors. Petitioner's testified that he spent the morning of November 12, 2012 with Rosa Guzman, the chief housekeeper, in a meeting regarding the status of keeping the rooms perfect and determining their vacancy and occupancy. Petitioner testified that checkout time at the hotel was 12 o'clock but that it was not rigidly enforced. Petitioner testified that he met with her in the afternoon around 1 o'clock to get together for the last inspection. He testified that he had a documented room list, with names and numbers, which he also used as a guide where

he could write notes. He testified that the accident occurred about 2:30 or 3 o'clock in the afternoon.

Petitioner testified that they began their inspection on the twelfth floor and worked their way down. He testified that the first room was not close to done and that he set a 3 o'clock check-in target time for all the rooms. He testified that we when he went into the first room, some of the room attendants were still at lunch. He testified that when they were done with the twelfth floor they took the stairway to the eleventh floor and repeated the same activity. He testified that he had documents and was keeping notes. He testified that Rosa Guzman was participating, that they were working as a team, and that they were both under the same pressure. He testified that his pace was close to a jog. He testified that they then took the stairway and repeated the same activity on the tenth floor. He testified that on his way down between the tenth and ninth floor he got too close to and ran into an electrical junction box on the side of the wall. He testified that during the inspection activity he was talking to Rosa Guzman, but he didn't recall if they were actually talking at the time of the accident. He testified that she was utilizing a hand-held radio.

Petitioner testified that the stairwell consisted of two flights with a landing in between. He testified that the stairwell was properly lit and that the stairs were not defective. Petitioner was handed photographs taken by Respondent showing a junction box on a wall before the ninth floor (PX8). While testifying, he took the photos with his left hand. He testified that the stairwell was open for anyone to use including guests, but that although the general public could use the stairs, the stairs were in an obscure location and not readily located, because there were three banks of elevators. He testified that he was uncertain if he knew the electrical boxes were there before the accident. He testified that he had taken the stairwell a handful of times before the accident.

Petitioner testified that Rosa Guzman was behind him, that she had a room list, that he was discussing something with her, and that they were moving quickly. He testified that he slammed into the junction box, was spun around, jumped down two stairs, and came to rest on a landing. He testified that Rosa Guzman did not see the fall, but that when she got to his location in the stairway she looked stunned with her mouth open. He

testified that he wanted to get the two remaining rooms done but that Rosa Guzman said he should report his injury to the human resources department. He testified that he then reported his accident to Lisa Shields who set up his first medical appointment at Concentra in Chicago. Petitioner was given physical restrictions, which Respondent accommodated.

Petitioner testified that his employment ended on December 31, 2012, that he has been unable to work since that date, and that no doctor has released him to full duty. He testified that he injured his right shoulder and his back. He testified that he is right-handed. He testified that he continued his treatment in North Carolina. Petitioner testified that his current treatment is with Triangle Orthopedic Associates and that due to unsuccessful physical therapy one of those physicians, Dr. Lawrence Yenni, has recommended right shoulder surgery.

Petitioner was examined by Dr. Joseph Barker at Respondent's request. Dr. Barker opined that Petitioner's right shoulder injury but not back injury was caused by his work accident, that Petitioner was not at maximum medical improvement, and that Petitioner could consider right shoulder arthroscopy, labral debridement, open long head of biceps tenodesis, and subacromial decompression (RX1).

Rosa Guzman testified in Respondent's case in chief. She testified that she is the hotel housekeeping manager and that she reported to Petitioner, who was her superior. She testified that the time of the accident was about 3 PM. She testified that she and Petitioner were walking together at the top of the stairs, that he then moved ahead of her, that at the specific time of the accident she was behind him and could not see him, that she heard him yell "ouch", that she ran downstairs, that she heard him say "I hurt my shoulder", and that she saw him at the bottom of the stairs. She testified that she saw an electrical box. She testified that the time of the accident there were two rooms left to complete and that the rooms had to be ready by 4 PM. She testified that checkout time was 12 o'clock and that check-in time was at 3 PM. She testified that Petitioner was walking at a normal pace but that he was a tall man and she could never keep up with him. She testified that she inspected

the last two rooms, which were done by 4 PM. She testified that when she was working, it was at a quick pace.

Lisa Shields testified in Respondent's case in chief. She testified that the rooms were to be completed by 4 o'clock. She testified that she took photographs but not of the actual accident scene (PX8). She testified that she is charged with responsibility for and is familiar with the law of Worker's Compensation but that she is not familiar with the case law. She testified that she completed an accident form (PX9). She testified that she had other documents but did not bring them to the hearing. She testified that she did not doubt that Petitioner fell in the stairwell. She testified that there had been a meeting with Petitioner, Rosa Guzman, and herself about the "VIP" inspection. She testified that she was aware that only two rooms were left to be inspected at the time of the accident. She testified that she read the reports from Concentra, that there was nothing inconsistent in them, that she paid the bills, that she filed the reports in Petitioner's file, and that she forwarded them to the insurance company. She testified that it was initially determined that Petitioner's accident was covered under Workers Compensation but that during Respondent's investigation, Respondent reversed its position. She testified that she did not make the final decision but that she participated in the decision-making. She testified that the basis of the changing of mind was the act of what Petitioner was doing, which was simply walking down the stairs. She testified that Respondent's denial was not because Petitioner was a director.

ACCIDENT

This is the central issue. It is undisputed that Petitioner was injured in the course of his employment. What is disputed is whether or not that injury arose out of Petitioner's employment. The focus of this issue is on Petitioner's work activity. The dispositive inquiry is whether or not there was an increased risk.

Petitioner testified credibly throughout each phase of the hearing that it was extremely important to have certain rooms on four floors properly prepared on time for Respondent's corporate leadership. Those rooms were to be ready by a certain time and were supposed to be in perfect condition for the VIP guests. Petitioner testified there was pressure to get the rooms done on time and that he and Rosa Guzman were moving quickly. Rosa Guzman corroborated that when she was working, it was at a quick pace. Petitioner testified that he had

documents and was keeping notes. He testified that during the course of the inspection activities he was talking to Rosa Guzman and that she was utilizing a hand-held radio. Petitioner testified that although the stairwell was open for guests, the stairs were in an obscure location and not readily located, because there were three banks of elevators. It is reasonable to infer that if time were not of the essence, then Petitioner and Rosa Guzman could have leisurely taken the elevators.

Based upon the foregoing, the Arbitrator finds that there was an increased risk to Petitioner as compared to the risk to the general public. Therefore the Arbitrator finds that Petitioner sustained an accidental injury that arose out of and in the course Petitioner's employment by Respondent.

CAUSATION

Petitioner testified credibly that his right shoulder injury and his low back injury were as the result of the claimed accident. Petitioner's testimony is corroborated by the medical records and is consistent with the sequence of events.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident.

PAST MEDICAL SERVICES

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

Therefore, the claimed medical bills shall be awarded.

PROSPECTIVE MEDICAL CARE

Petitioner testified credibly that Dr. Yenni has recommended right shoulder surgery. Dr. Barker's report is in accord.

Therefore, the requested right shoulder surgery should be authorized.

TEMPORARY TOTAL DISABILITY BENEFITS

The focus of this issue is on Petitioner's medical condition. The dispositive inquiry is whether or not the medical condition has stabilized. The focus of this issue is not on the employment relationship.

The nature of Petitioner's injury has resulted in restricted work duties. He has testified credibly that no physician has released him to full duty. The medical records and the medical reports corroborate that he is not at maximum medical improvement. Respondent had accommodated the physician imposed restricted duties through December 31, 2012. Thereafter, Respondent stopped accommodating the work restrictions and did not commence temporary total disability benefits.

Based upon the foregoing, the Arbitrator finds that Petitioner's claimed temporary total disability benefits should be awarded.

PENALTIES AND FEES

Lisa Shields testified the basis of the denial of benefits was the act of what Petitioner was doing, which she described as simply walking down the stairs. No other reason is given.

However, Petitioner and Rosa Guzman were working on a time critical inspection project involving corporate leadership. They were moving quickly from one floor to another and using stairway access to facilitate their pace. The rooms were to be ready and "perfect" within a specified time frame. During the process of hastened inspection through four floors, 20 rooms, and three sets of stairways and while holding documents and keeping notes, Petitioner banged into a protruding electrical junction box on the side of the wall. Petitioner was doing more than the isolated act of simply walking down the stairs. Petitioner's benefits ought to been commenced.

Based upon the foregoing, the Arbitrator finds that Petitioner is entitled to $30.00 per day for the failure to commence temporary total disability benefits without good and just cause pursuant to Section 19 (l) of the

Act.

The Arbitrator does not find that Respondent's misapplication of the law rises to the level of unreasonable, vexatious, or frivolous. Therefore, the Arbitrator denies Petitioner's claims for penalties under Section 19 (k) of the Act and attorneys fees under Section 16 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF La SALLE)

☐ 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

John Marquez,
Petitioner,

vs. NO: 10 WC 02418

14IWCC0367

Steinburg Furniture Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and mileage reimbursement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with additional reasoning, 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 Commission provides additional reasoning in support of the November 13, 2012 Decision of the Arbitrator as follows:

In the prior March 19, 2010 Section 19(b) Arbitration Decision, Arbitrator Giordano found Petitioner did sustain an accident with injury to the lumbar spine in the scope and course of employment on March 28, 2009 and ordered that the issue of prospective medical treatment for the back would be determined at a later date after an examination by a board certified neurosurgeon, to be agreed upon by both parties or by another hearing on the matter. The parties then agreed upon an examination with Dr. Alexander Ghanayem, a board certified spinal surgeon at Loyola. Petitioner traveled from his home in DePue, Illinois to Dr. Ghanayem's offices in Maywood, Illinois and Burr Ridge, Illinois. Dr. Ghanayem gave recommendations for Petitioner's care and Petitioner chose to continue treating with Dr. Ghanayem for his lumbar spine. Petitioner testified that he trusted Dr. Ghanaeym and wished to continue treatment with him. After a failed course of conservative treatment, Dr. Ghanayem recommended and performed bilateral partial medial fasciectomies at L3-4, L4-5 and L5-S1 with posterior lateral fusion at L3-4 and L4-5 using instrumentation and bone autograft.

Petitioner returned home after surgery and underwent physical therapy as recommended by Dr. Ghanayem. On October 21, 2011, the record indicates Petitioner was lifting over twenty pounds during postsurgical therapy that included lumbar stabilization exercises when he experienced pain in his stomach along with nausea and tightness in the area. Petitioner was diagnosed with an umbilical hernia. Dr. Wojcik recommended laparoscopic repair but the surgery was not approved by Respondent. When Petitioner returned to Dr. Ghanayem for follow-up care he advised the doctor of his abdominal pain during physical therapy, and Dr. Ghanayem agreed with Dr. Wojcik's diagnosis of umbilical hernia. Dr. Ghanayem also noted that Petitioner continued to experience back pain and recommended a revision lumbar fusion procedure. Dr. Ghanayem reported that he would like to fix the hernia at the same time as the anterior approach fusion revision procedure. Dr. Ghanayem noted that Respondent's Section 12 examiner, Dr. Bernstein, also recommended a revision fusion but preferred a posterior approach. Dr. Ghanayem explained that the posterior approach favored by Dr. Bernstein would not comply with the standard of care at the time. Dr. Bernstein had opined that the anterior approach recommended by Dr. Ghanayem would also be appropriate.

The Arbitrator found in her November 2012 decision, after careful consideration of the testimony and medical evidence, that Petitioner's umbilical hernia condition was causally related to the work injury of March 28, 2009 as it occurred during the rehabilitation process for the same. Respondent was ordered to authorize the recommended surgery for the umbilical hernia to be performed during the revision fusion surgery, so Petitioner would be exposed to one fewer surgical procedure.

Respondent argues that while Dr. Ghanayem was chosen by agreement of the parties for an evaluation, Petitioner voluntarily chose to continue treating with him after the initial evaluation. Further, Respondent argues that there is no evidence in the record that it agreed to provide mileage reimbursement to Dr. Ghanayem. Petitioner submitted into evidence a series of five letters directed to Respondent's counsel as Petitioner's Exhibit 13. The letters detail Petitioner's understanding that Respondent would reimburse Petitioner $100.00 for travel from his home in DePue, Illinois, near Ottawa, to treat with Dr. Ghanayem outside Chicago, Illinois. There is no evidence in the record of a response by Respondent to any of the correspondence contained in PX13. Petitioner also testified to such an agreement (T. 24). Mileage reimbursement was an issue delineated on the Request for Hearing form submitted into evidence as Arbitrator's Exhibit 1. Respondent was provided the opportunity to object to Petitioner's Exhibit 13, cross-examine Petitioner and provide its own evidence at hearing to refute Petitioner's testimony and documentary evidence regarding travel expenses and any alleged agreements regarding such expenses.

Pursuant to *General Tire & Rubber Company v. Industrial Commission*, 221 Ill.App.3d 641, 582 N.E.2d 744, 164 Ill.Dec. 181 (5th Dist. 1991), the Commission notes that it has the authority to award Petitioner reimbursement for treatment-related travel expenses that are reasonable and necessary under Section 8(a) of the Act. The Commission finds that it was reasonable for Petitioner to continue treatment with Dr. Ghanayem, a board certified physician, whom both Petitioner and Respondent agreed upon to render an opinion regarding Petitioner's prospective care and whom Petitioner trusted. Further, while Respondent questions Petitioner's decision to travel to Chicago for treatment, it apparently found such travel reasonably convenient for an examination by Dr. Ghanayem, as well as its own Section 12 examiners, Dr. Palacci and Dr. Bernstein.

Petitioner has continued to treat with Dr. Ghanayem for his back. Dr. Ghanayem and Dr. Wojcik have both recommended Petitioner undergo surgery for his umbilical hernia. Dr. Ghanayem has recommended Petitioner undergo a revision lumbar fusion with anterior approach and umbilical hernia surgery at the same time. Section 12 examiner Dr. Bernstein has opined the anterior approach as recommended by Dr. Ghanayem is appropriate, and Dr. Ghanayem has explained why the posterior approach is not at this time. Dr. Ghanayem is the only physician in the record ready to perform an anterior approach fusion revision at the same time as repair of the umbilical hernia. Petitioner wishes to proceed with the treatment as recommended by Dr. Ghanayem. The Commission finds this treatment and related travel reasonable and necessary.

The evidence in the record suggests Petitioner believes $100.00 travel reimbursement per trip to and from the Chicago metro area to see Dr. Ghanayem is reasonable. The Commission notes the Petitioner's proposed reimbursement of $100.00 per trip is at or slightly below the State of Illinois mileage reimbursement rate from 2010 to 2012. Petitioner has traveled 21 times to Dr. Ghanayem without reimbursement by Respondent. The Commission finds the Arbitrator's award of $2,100.00 for past travel expenses to be reasonable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2012 is hereby affirmed and adopted with additional reasoning.

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 $10,200.00. 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: MAY 1 6 2014

Daniel R. Donohoo

o-03/19/14
drd/adc
68

Ruth W. White

Charles J. DeVriendt

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

MARQUEZ, JOHN
Employee/Petitioner

Case# **10WC002418**

14IWCC0367

STEINBERG FURNITURE INC
Employer/Respondent

On 11/13/2012, 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 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARWUETTE RD
PERU, IL 61354

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

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

- [ ] 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)

John Marquez,
Employee/Petitioner

v.

Steinberg Furniture, Inc.
Employer/Respondent

Case # **10** WC **02418**

Consolidated cases: **n/a**

14IWCC0367

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa**, 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. [ ] 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. [x] Other **: Mileage Reimbursement**

FINDINGS

On the date of accident, **March 28, 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 **$21,308.94**; the average weekly wage was **$409.78**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **no** 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 **$n/a** for TTD, **$n/a** for TPD, **$n/a** for maintenance, and **$n/a** for other benefits, for a total credit of **$n/a**.

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

ORDER

Pursuant to Section 8(a) of the Act, the Respondent shall authorize umbilical hernia surgery to the Petitioner as recommended by his physicians as the same was caused by his physical therapy activities he was engaged in for the treatment of his work related back injury.

Pursuant to Section 8(a) of the Act, the Respondent shall authorize the Petitioner's lumbar spine surgery through an anterior approach as recommended by his treating physician, Dr. Alexander Ghanayem.

The Respondent shall pay $100.00 each trip for related medical care to and from the Chicago area totalling $2,100.00 for 21 past trips.

Respondent shall pay reasonable and necessary medical services of the Petitioner as it relates to treatment of work related injuries to his back, left knee and umbilical hernia injuries, as provided in Sections 8(a) and 8.2 of the Act and as further set forth herein.

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

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

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

Nerel E. Tolu — October 4, 2012

Signature of Arbitrator — Date

ICArbDec19(b)

NOV 13 2012

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing was held in this matter on September 27, 2012 on 19(b) and 8(a) Petitions. This hearing represents the second time an Arbitrator has been required to render a decision in this matter. On February 25, 2010, the first hearing was held on 19(b) and 8(a) Petitions of John Marquez. Px 7. A decision by Arbitrator James Giordano was issued March 17, 2010 which addressed, among other things, medical bills, temporary disability and prospective medical care regarding a proposed lumbar surgery. Id.

By the time of the initial arbitration decision in this case, the Petitioner had undergone substantial medical care for his March 28, 2009 injuries which included a rib fracture, multiple contusions, internal derangement of the left knee, cervical and lumbar complaints. Id. The Petitioner's work injury of March 28, 2009 occurred when he fell backwards out of a delivery truck, landing on the ground. Id. As noted in the prior decision in this case, the Petitioner suffered multiple injuries from his fall and then underwent tests and care for his left knee and cervical and lumbar spines. Id. He had undergone a left knee arthroscopy with a partial medial meniscectomy and debridement. He obtained treatment with Dr. Robert Mitchell for his left knee and Dr. Steven Delheimer for his spine issues prior to the decision. Id.

The March 17, 2010 decision provided for the payment of the medical bills, then outstanding, past due TTD and prospective medical care to the back. Id. The medical care required would be determined as a result of an examination by a board certified physician agreed upon by the parties. Id. As a result of the arbitration decision in this matter, the

Petitioner was next seen by Dr. Alexander Ghanayem, a board certified physician at Loyola University in Maywood, Illinois. Px 8 & 10.

On June 17, 2010, Dr. Ghanayem examined the Petitioner and reviewed the medical records surrounding his injury. Id. Dr. Ghanayem indicated the Petitioner was a warehouseman and delivery person for the Respondent, a furniture company. Id. He had fell on March 28, 2009 backwards off a delivery truck, injuring his left knee, back and ribs. Id. Dr. Ghanayem felt the Petitioner suffered an extension type of injury in the lumbar spine. Id. He recommended continued conservative care with injections. Id. If there was no improvement, surgical options would be next. Id. Mr. Marquez was provided an off work slip by Dr. Ghanayem and has continued to remain off work through the present hearing of September 27, 2012. Id.

Dr. Mitchell continued to see the Petitioner for his work related left knee injury. Px 2. On October 19, 2010, injections for the knee were provided as the Petitioner continued to complain of pain and discomfort following his first knee surgery of June 12, 2009. Px 2 & 3. At that time a left knee arthroscopy with partial medial meniscectomy and debridement procedure was performed. Id. After an additional left knee MRI on November 23, 2010, his next appointment with Dr. Mitchell was on December 7, 2010. At this appointment, it was recommended the Petitioner undergo a second surgery due to continued complaints of his knee buckling. Id.

His second left knee surgery occurred on January 5, 2011 at Illinois Valley Community Hospital. Id. It consisted of a left knee arthroscopy with partial medial meniscectomy with the removal of loose bodies. Id. The Petitioner reports this surgery was successful in reducing his pain but it did not completely remove all discomfort. On

March 28, 2011, Dr. Mitchell released the Petitioner to return back to work for his knee only. Px 2. He wrote Mr. Marquez remained off of work for his back. Id. This physician further noted the second surgical procedure was related to the injury and the Petitioner may need injections in the future for the left knee injury. Id.

While undergoing his left knee treatment, Dr. Ghanayem visited with the Petitioner on November 10, 2010. Px 2 & 8. At that time, the doctor was concerned about the Petitioner's lack of progress in therapy and with an injection that was provided. Px 8. As a result, he was referred to Dr. Gnatz for a physical medicine and rehabilitation consult. Id.

In January of 2011, Dr. Gnatz first met with the Petitioner. Px 8 & 10. At that time, his chief complaint was low back pain which started following his work injury. He noted the following. "He has also been dealing with knee rehabilitation following his surgery. Id. Mr. Marquez has undergone back rehabilitation without real progress. Id. Along with his back pain, he has also experienced bilateral paresthesia into his lower extremities. Id." After being seen in follow up at Loyola on February 23, 2011 with continued pain and paresthesia, the Petitioner returned again on March 23, 2011. Id. At that time, Dr. Gnatz reported the Petitioner "..continues to have bilateral lower extremity tingling and back pain. Id." It was determined the Petitioner should return to Dr. Ghanayem for a lumbar fusion procedure. Id.

In April 2011, the Petitioner followed with Dr. Ghanayem and obtained an additional MRI. Id. Fusion was planned as the MRI demonstrated a Grade I to II anterolisthesis at L4-5, a mild loss of disc height at L5, disc narrowing at L3-4 and L4-5, among other findings. Id. Dr. Ghanayem reviewed the MRI and felt an L3-4 stenosis was

established by the testing. Id. It was also reported through a MRI of April 14, 2011 that the Petitioner had lumbar congenital spinal stenosis with a superimposed spondylosis most severe at L4-5. Id.

On May 17, 2011, John Marquez underwent lumbar decompression laminectomies with bilateral partial medial fasciectomies at L3-4, L4-5 and L5-S1 with a posterior lateral fusion at L3-4 and L4-5 using instrumentation and a bone autograft. Id. Following surgery, the Petitioner returned to physical therapy at City Center Physical Therapy in Peru, Illinois. Px 4.

While undergoing postsurgical physical therapy on October 21, 2011, the Petitioner reports his physical therapist required him to lift a bar with approximately 25 pounds of weight that was located on the floor. He testified that while lifting the weights from the ground, he experienced a painful sensation in his stomach, accompanied by a tightness in that area, along with nausea. As he continued his physical therapy, the discomfort grew worse. As a result, the same day he visited his family physician, Dr. Damien Grivetti. Px 11. The notes of his doctor explain he developed this pain and discomfort during exercise at physical therapy. Id. Following an examination, Dr. Grivetti reported the Petitioner experienced an umbilical hernia while doing exercises at rehabilitation. Id. He then referred the Petitioner to Dr. Wojcik where he was seen on November 8, 2011. Px 11 & 12.

Dr. Wojcik examined the Petitioner and reported he had a painful lump while performing physical therapy activities. Id. He noted Mr. Marquez developed a symptomatic and chronically incarcerated umbilical hernia. Px 12. Mr. Marquez also reported chronic back pain. Id. Dr. Wojcik attempted to schedule the Petitioner for a

laproscopic repair of his incarcerated umbilical hernia. Id. However, this surgery has not been approved by the Respondent.

On November 17, 2011, Dr. Ghanayem followed with the Petitioner. Px 8 & 10. His notes reflect that while Mr. Marquez was doing physical therapy, he developed abdominal pain. Id. He reported the Petitioner appeared to have an umbilical hernia. Id. He continues to experience back pain as well. Id. He explained the Petitioner appears to have developed a pseudoarthrosis at L3-4. Id. He ordered the Petitioner to follow up for his abdomen issue with Dr. Santaniello, physical therapy was placed on hold and he was told to remain off work. Id. Mr. Marquez was provided with a TENS unit and later underwent x-rays and a CT of the lumbar spine on November 17, 2011. Id. The November 17, 2011 CT scan demonstrated a lucency consistent with loosening along the shafts of both pedicle screws at L3. Id. Following this testing and the care recommended by his doctors for both his lumbar spine and umbilical hernia, the Petitioner reports his care stagnated due to the Respondent not approving care.

On May 2, 2012, Mr. Marquez also was seen at St. Margaret's Hospital for abdominal pain. Px 6. The emergency room records of that visit indicate Mr. Marquez had a sudden onset of umbilical pain due to his hernia. Id. He experienced abdominal pain along with a rectal bleed, internal hemorrhoids and an umbilical mass. Id. Since developing the hernia at therapy, Mr. Marquez testified his hernia pain has undergone multiple flare-ups.

He next followed with Dr. Ghanayem on July 19, 2012. Px 8 & 10. At that time, Dr. Ghanayem noted the Petitioner had continuing ongoing back pain. Id. He wrote there has not been approval to see Dr. Santaniello for the hernia the Petitioner sustained in

physical therapy. Id. Dr. Ghanayem reported he would like to perform the recommended fusion procedure. Id. He also indicated the hernia could be fixed at the same time as the back surgery as it makes sense to handle them at the same time. Id.

In Dr. Ghanayem's most recent note of September 12, 2012, he indicated concern the Respondent was not approving the umbilical hernia repair requested and the surgical procedure recommended for the lumbar spine. Px 8. He indicated the original fusion procedure should be revised from an anterior approach. Id. He notes Respondent's physician, Dr. Bernstein, has recommended a posterior approach. Id. Dr. Ghanayem reports the failure of the Respondent to provide approval for surgery from an anterior approach and to provide an updated CT scan has been medically damaging to the Petitioner and will have an adverse effect on the Petitioner's long-term outcome. Id. He explained the posterior approach favored by Dr. Bernstein would not comply with the standard of care at this time. Id. The screws placed in the prior fusion are loose with the halo created by screw movement now exceeding the diameter of the largest screws available for use in his lumbar spine. Id. Dr. Ghanayem further noted the screws may now be broken and, if so, this would be related to the delay in getting surgery authorized. Id.

The Respondent obtained two medical evaluations relevant to the present circumstances, Dr. Bernstein and Dr. Palacci. Rx 1& 2. Dr. Palacci indicated the Petitioner's umbilical hernia was not related to his employment. Id. He reported some physical therapy maneuvering can predispose one to an umbilical hernia but felt here the hernia was the result of the Petitioner's obesity. Id.

Dr. Bernstein also reports the Petitioner should undergo a fusion revision. Id. However, he recommends a posterior approach due to Petitioner's obesity. Id. Dr. Bernstein also reports Dr. Ghanayem recommends an anterior approach and states this is also an appropriate option. Id. Dr. Bernstein further opined a CT scan of the fusion site is also appropriate to better evaluate Petitioner's pedicles and fusion mass. Id. The CT scan suggested by Dr. Ghanayem and Dr. Bernstein has been denied by the Respondent along with the anterior fusion procedure Dr. Bernstein recommended as an appropriate option. Px 8, Rx 1 & 2.

The Petitioner testified he has great trust in Dr. Ghanayem. He would prefer the surgical procedure as recommended by Dr. Ghanayem and would like to undergo this as soon as possible due to the continuing pain and discomfort he experiences. Relative to the umbilical hernia, he also would like to undergo this procedure as soon as possible as he feels that condition is worsening. He is having significant back pain which is accompanied by numbness through both buttocks and thighs to his toes. The pain and numbness is constant. He reports he has trouble on a daily basis with his ability to stand. He has pain at a 10 out of 10. He experiences very limited sleep due to pain, tossing and turning. He continues to use a cane each day as it provides him with limited relief.

Testimony was also obtained on an additional issue regarding travel expenses. After Dr. Ghanayem made recommendations for continued care, including surgery, a decision was required by the Petitioner on whether he wished to proceed with using his physician, Dr. Delheimer, or switching to Dr. Ghanayem for further care. An agreement was reached by the parties that the Petitioner would continue to follow up with Dr. Ghanayem for this care and treatment. Px 13. Because of the travel expense required to

and from the Chicago area from Spring Valley, Illinois, it was agreed the Petitioner would receive $100.00 per trip as reimbursement for his travel expense. Id. Despite the agreement reached by the parties, the Respondent has not issued reimbursement for 21 trips to and from the Chicago area for medical care and treatment. Id.

The Petitioner has outstanding medical bills as indicated in Px 1. These total $8,013.75. It has been agreed by the parties that the bills relating to the back are not in dispute and will be paid. Arb. Ex. 1. It is also agreed that if the hernia is determined to be related, those bills will also be paid. Id. There is also no dispute regarding the Petitioner's time off of work. It was agreed by the parties the TTD due has been paid to date. Id.

ISSUES

F. Is Petitioner's current condition of ill-being causally related to the injury?
K. Is Petitioner entitled to any prospective medical care?

This case involves a claim where the Petitioner was originally injured on March 28, 2009. Arb. Ex. 1. A hearing was held previously by the Commission on February 25, 2010. Px 7. That decision does not reflect any complaint or issue concerning an umbilical hernia. Id. The first reference to an umbilical hernia does not arise until October 21, 2011. On that day, the Petitioner visited with his family doctor, Dr. Damien Grivetti, and reported he had been doing exercise in physical rehabilitation for his back and felt a sharp pull in his abdomen while performing the same. Px 11. He was referred to Dr. Wojcik for further care. Id. Dr. Wojcik has the same history that the Petitioner experienced a hernia while performing physical therapy activities. Px 12. Hernia surgery was recommended by Dr. Wojcik. Id. Mr. Marquez was then seen by Dr. Alexander Ghanayem for his ongoing back complaints. Px 8. He also reported the Petitioner, while performing physical therapy activities, suffered an umbilical hernia. Id. He recommended surgery to repair the hernia and suggested he be seen by Dr. Santaniello for this to occur. Id. Dr. Ghanayem also felt the umbilical hernia repair and a proposed anterior fusion revision surgery should be performed at the same time. Id.

Although the Respondent obtained a medical evaluation from Dr. Palacci who reported the umbilical hernia was not caused by the physical therapy for the Petitioner's work injury, limited credibility is given to this opinion based upon the histories provided of the Petitioner's physicians, Dr. Grivetti, Dr. Wojcik and Dr. Ghanayem as well as Petitioner's unrebutted testimony. Px 8 & 12.

Following consideration of the testimony and evidence presented, this Arbitrator finds the Petitioner's umbilical hernia condition is causally related to his work injury as it occurred in the rehabilitation process for the same. Further, the Respondent shall authorize the recommended surgery for the repair of the hernia. This surgery is to be performed by Dr. Wojcik independently of the back surgery or to be performed during the fusion revision surgery by another physician so the Petitioner could be exposed to one less surgical procedure.

The Petitioner has been recommended to undergo surgery for his continued back complaints. The parties agree that a fusion revision surgery is reasonable to perform. Px 8 & Rx 1. However, the manner in which surgery is to be performed has been disputed and caused a delay in the care and treatment of the Petitioner's pseudarthrosis which has developed at L3-4. Px 8 & Rx 1. The Respondent's physician, Dr. Avi Bernstein, suggests a posterior approach for the surgery while the Petitioner's physician has recommended an anterior approach. Id. However, Bernstein also stated an anterior revision is also an appropriate option. The reasons provided for an anterior approach are compelling. These are provided in Px 8. A review of Dr. Ghanayem's note of September 12, 2012 provides that if the anterior approach is not taken, the Petitioner's health is in jeopardy. Id.

Following consideration of the testimony and evidence presented, this Arbitrator finds the back surgery as recommended by Dr. Ghanayem shall be authorized by the Respondent for the Petitioner.

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 parties have agreed there remain some outstanding bills related to the undisputed care and treatment rendered to the Petitioner. They have agreed the Respondent will pay all outstanding and future bills related to the Petitioner's spine care. It was further agreed the Respondent shall pay for all past and future care rendered or to be rendered the Petitioner for his umbilical hernia condition should this Arbitrator find this condition and the need for surgery is related to the Petitioner's work injury or care that followed from the same.

As already determined, this Arbitrator has found the Petitioner suffered further injury related to his work accident while performing physical therapy. It was while performing therapy the Petitioner suffered an umbilical hernia which required the care and treatment rendered the Petitioner and which further requires the recommended surgical repair. The bills already incurred for care and those rendered relative to his surgical repair are to be satisfied by the Respondent.

O. Other: Mileage Reimbursement.

As a result of the prior decision in this case, a third medical opinion was sought and obtained from Dr. Alexander Ghanayem. This physician was chosen by agreement of the parties. It was Dr. Ghanayem who recommended surgery. It was agreed between the parties that the Petitioner would follow up with Dr. Ghanayem for his continued care and treatment. Px 13. As a result, the Petitioner underwent surgery with Dr. Ghanayem and this same physician has also directed post-surgical care. Id. An additional surgery is now recommended.

The parties agreed, as indicated in Px 13, that the Respondent would provide a mileage reimbursement of $100.00 per trip to and from the Chicago area for the

Petitioner's continued care. Despite this agreement to provide $100.00 per trip to the Petitioner, no money has been forthcoming from the Respondent. As 21 trips to and from the Chicago area have occurred, the Respondent shall provide $2,100.00 to the Petitioner for his travel expense.

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

Greg Engleking,
Petitioner,

vs. No. 07 WC 30212

Ashland Chemical,
Respondent.

14IWCC0368

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Illinois, Cook County, directing the Commission to re-evaluate several issues related to Section 8(j) credit, the "chain of events" analysis relied upon by the Arbitrator, and the award and calculation of penalties and fees. The Circuit Court specifically instructed and directed the Commission to discuss numerous findings of fact and conclusions of law contained in both the Arbitration and Commission Decisions. The Commission, after considering the issues of Section 8(j) credit, "chain of events" analysis, and penalties and fees, being advised of the facts and law, modifies its October 5, 2012 Decision as stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

This case was initially heard by Arbitrator Douglas Holland, who filed his Decision on December 30, 2011. Both parties appealed the Decision to the Commission, which affirmed and adopted the Arbitrator's Decision on the issues of causal connection, benefit rates, medical expenses, temporary total disability, and penalties and fees. The Commission modified the Arbitrator's award of Section 8(j) credit to Respondent for medical and disability benefits paid by Petitioner's Union Health & Welfare Fund and as accrued sick leave. Respondent appealed the Commission Decision to the Circuit Court, and Judge Robert Lopez Cepero entered his Order on August 6, 2013, instructing the Commission to discuss several issues and provide a written explanation supporting its findings and conclusions. The Commission notes that Judge Cepero did not reverse any finding or award of the Commission or Arbitrator or instruct the Commission to do so. The Commission provides the following additional explanation and discussion pursuant to the Circuit Court's Order:

Petitioner, a tank truck driver, alleged that he injured his left knee on the bumper of his tractor trailer when he fell from the trailer on May 18, 2007. He underwent arthroscopic surgery on his left knee, subsequently developing right knee pain from alleged overuse while favoring his injured left knee. Petitioner received numerous Supartz and cortisone injections and eventual arthroscopic surgery on his right knee with little relief. When Petitioner's bilateral knee complaints persisted, his surgeon recommended bilateral total knee replacements. Although Respondent had been paying Petitioner's medical expenses and temporary total disability related to both knees, it refused to authorize and pay for the recommended surgery. Instead, Respondent obtained a Section 12 evaluation from Dr. Cohen, who opined that Petitioner's bilateral knee condition had initially been causally related to his fall, but his current condition was related to his pre-existing osteoarthritis.

A hearing pursuant to Section 19(b) was held before Arbitrator Holland, who concluded that Petitioner's bilateral knee replacements were caused, at least in part, by his work accident and related arthroscopic procedures. The Arbitrator noted that Respondent's Section 12 examiner causally related Petitioner's bilateral arthroscopic surgeries and injections to his May 18, 2007 work accident and relied in part upon a "chain of events" analysis to conclude that Petitioner's bilateral knee replacements were also causally related to that occurrence. Arbitrator Holland awarded Petitioner medical expenses and disability benefits. Although Petitioner's Union Fund had conditionally paid Petitioner medical and lost time benefits, Petitioner was obligated, pursuant to a subrogation agreement, to refund any payments if his condition were found to be work-related.

Section 8(j) Credit. In the Request for Hearing, Respondent claimed Section 8(j) credit and stipulated that it had paid $55,657.25 in medical expenses through its group health insurance plan, $35,169.46 in temporary total disability benefits, and $18,886.96 in net non-occupational indemnity disability benefits. AX1. Petitioner disputed that Respondent was entitled to Section 8(j) credit for those payments, arguing that Petitioner was bound to reimburse the Fund for all payments by the mandatory subrogation agreement. Arbitrator Holland awarded Respondent credit under Section 8(j) of the Act for the Union Fund's medical and disability payments and also ordered Respondent to pay Petitioner the amount of the Fund's conditional payments. In so ruling, the Arbitrator relied upon *Wellington v. Residential Carpentry*, 06 IWCC 301, for the proposition that, although Respondent is entitled to a Section 8(j) credit for the Fund's payments, it was obligated to pay Petitioner directly the full amount of the benefits paid by the Fund, rather than merely holding Petitioner harmless from the Fund's attempts to obtain reimbursement of those payments.

Both parties appealed to the Commission from the Arbitrator's award of Section 8(j) credit to Respondent and from his order requiring Respondent to pay Petitioner directly for the medical expenses at the fee schedule rate and lost time benefits for the period paid by the Union Fund. The Commission reversed the award of Section 8(j) credit, but affirmed the Arbitrator's award to Petitioner of medical and lost time benefits.

The Commission notes that the right to credit operates as an exception to liability created under the Act and is therefore narrowly construed. The burden is on Respondent to establish its right to Section 8(j) credit.

Arbitrator Holland noted that Petitioner was forced to sign a subrogation agreement as condition precedent for receiving medical and disability benefits from his union's Health & Welfare Fund (PX19). The Arbitrator allowed Respondent credit for these payments under Section 8(j) but ordered Respondent to pay Petitioner the amounts paid by the Health & Welfare Fund to the providers for medical expenses and to Petitioner as disability pay, "in accordance with respondent's obligation under the Act to hold petitioner harmless and petitioner's obligation to reimburse the fund." Arbitrator's Decision, p. 17.

The Illinois Supreme Court has previously addressed the applicability of Section 8(j) credit in cases where the claimant's union fund has made payments for medical expenses or disability. In *Hill Freight Lines, Inc. v. Indust. Comm'n*, 36 Ill. 2d 419, 223 N.E.2d 140 (1967), the Supreme Court rejected the employer's attempt to claim Section 8(j) credit.

> Finally, it is the employer's contention that the commission and circuit court erred in disallowing credit for the benefits received by the employee under a health and welfare program to which employer contributed. . .We need not in this opinion examine the specific provisions of section 8(j) of Workmen's Compensation Act since we do not reach the question of whether this particular union health and welfare plan is that type of plan covered by section 8(j). As we have previously indicated the insurance contract itself is not in evidence and we have but meager information by testimony as to what the plan contains. Although the burden of proving his case is upon the employee, we feel that the burden is upon the employer to establish the fact that it is entitled to credits under section 8(j) of the Workmen's Compensation Act. It was therefore incumbent upon the employer to see that sufficient evidence of the insurance contract itself was introduced in order to determine if it fell within the provisions of section 8(j). The means for the employer to do so were certainly available and since the insurance contract is not in evidence, we will not reverse the determination of the commission on that ground.

36 Ill. 2d at 424. *See also*, *Acosta v. Granite Marble World*, 7 IWCC 1480 (Respondent failed to introduce sufficient documentation establishing entitlement to Section 8(j) credit); *Anaya v. Official Heating & Cooling*, 10 IWCC 1129 (Respondent offered no evidence that they paid any or all of the premiums or to show that the plan would not have paid benefits irrespective of whether the injury were work-related).

The Commission has previously addressed the issue of whether Section 8(j) credit is available where the worker is required to sign a subrogation agreement prior to receiving benefits. In *Swanson v. Illinois Workers' Comp. Comm'n*, 05 IWCC 153, the Commission noted that it is the practice of many employers and insurers to deny claims and then settle with the claimant on a disputed basis with the provision that no part of the settlement represents medical expenses or is for future medical expense. The employer thereby shifts the responsibility to other benefit sources, frequently a union health and welfare fund or group health insurer.

> We are of the opinion that the employer credit provided in Section 8(j) does not contemplate the situation where an employee had to assume the primary obligation to reimburse the fund for benefits paid.
>
> In response to this practice, many union health and welfare funds have either refused to pay any medical or group disability benefits in disputed workers' compensation cases, leaving employees with no access to necessary medical treatment and no income while they are disabled, or have required reimbursement agreements such as that presented herein, in which the right to reimbursement is absolute, regardless of the characterization or designation of benefits in a settlement or award of the Commission. . . .
>
> The practical effect of allowing a credit to an employer, where an employee has the primary obligation to pay the amount credited, is that claimants will either honor their obligations to the welfare funds and be put in the position of pursuing further claims against their employers, in all likelihood requiring legal representation in the circuit court, to enforce the hold harmless provision of Section 8(j) in order to be made whole and receive the full benefit of their award, or they will default on their obligations and be subject to suit by the health and welfare, with all the attendant adverse effects including loss of union benefits and credit standing, and forced to obtain legal representation to implead the employers and defend such lawsuits. Such an interpretation of Section 8(j) does not serve the legislative intent, expressed in Section 16(a) of the Act, to encourage prompt administrative handling of worker's compensation claims and thereby reduce expenses to claimants for compensation under the Act, nor does it serve principles of judicial economy.

Swanson. As a result of these considerations, the Commission majority in *Swanson* refused to grant Respondent's request for Section 8(j) credit for amounts paid by Petitioner's union's health and welfare fund. Respondent was ordered to pay Petitioner the amount advanced by the union fund.

In *Lomeli v. Levy Const. Co.*, 9 IWCC 163, the Commission affirmed Arbitrator Andros's denial of Section 8(j) credit for medical expenses paid by the claimant's union's health insurance carrier, finding that the medical plan in that case was legally distinguishable from the employer provided health insurance plan for which employers may claim Section 8(j) credit. Moreover, Arbitrator Andros noted that the claimant in *Lomeli* was required to sign a subrogation agreement similar to that signed by Petitioner here. The Arbitrator noted that the claimant had the primary obligation to pay the amount credited if Section 8(j) credit were awarded. Therefore, the claimant would be required to honor his legal obligation to the Welfare Fund and then be placed in a position of having to pursue an additional claim against his employer in the court system to enforce Section 8(j)'s hold harmless provision. Arbitrator Andros concluded, and the Commission agreed, that this interpretation of Section 8(j) does not serve the intent of the legislature to facilitate the handling of Workers' Compensation claims in keeping the expenses chargeable to the ultimate party responsible under the Act.

Similarly, in *Carpenter v. Gallaher & Speck*, 07 IWCC 466, the Commission followed the rationale in *Swanson* and denied Respondent Section 8(j) credit, based upon the existence of the subrogation agreement between Petitioner and his union fund and upon Respondent's failure to introduce any documents which established an entitlement to credit. Respondent was ordered to pay Petitioner the medical bills it had refused to pay at the time they were provided.

However, as noted by Arbitrator Holland in his decision, the Commission took a different position in *Wellington v. Residential Carpentry*, 06 IWCC 301. In *Wellington*, the Commission reversed the Arbitrator's denial of Section 8(j) credit. The Arbitrator had opined that Section 8(j) did not contemplate a situation where the employee has the primary obligation to reimburse the fund for benefits paid (following the Commission's rationale in *Swanson*). On review, the Commission reversed the Arbitrator and allowed Respondent Section 8(j) credit for the medical and disability benefits paid by the Carpenters Welfare Fund. However, the Commission ordered Respondent to pay the amount of the benefits to Petitioner "in accordance with Respondent's 8(j) obligation to hold Petitioner harmless" and Petitioner's obligation to reimburse the Fund.

Arbitrator Holland followed the *Wellington* line of reasoning in allowing Respondent credit and in ordering it to pay Petitioner the same amount as the credit awarded. This award of credit for the Union Fund payments resulted in some confusion, as both parties cited the Section 8(j) credit issue as one of the grounds for appeal to the Commission. Allowing Section 8(j) credit, while at the same time requiring Respondent to advance funds to Petitioner to cover his subrogation obligation, in effect nullifies the award of Section 8(j) credit. Under Section 8(j), Respondent would be required to hold Petitioner harmless "from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit." Under the Arbitrator's ruling and the *Wellington* rationale, Respondent would be required to pay the medical or disability benefit amount to Petitioner regardless of whether the Fund or group insurer sought reimbursement for its payments.

The Commission finds that Respondent failed to prove it was entitled to Section 8(j) credit and confirms its reversal of the Arbitrator's award of Section 8(j) credit for the union fund payments. Respondent is ordered to pay Petitioner those medical expenses previously paid by the Fund at the fee schedule rate and to pay Petitioner temporary total disability for the period during which the Fund paid disability payments.

Chain of events. Arbitrator Holland relied in part on the "chain of events" analysis in reaching his conclusion that Petitioner's need for bilateral total knee replacements was causally connected to his work accident on May 18, 2007. The Arbitrator relied not only upon the "chain of events," but also upon Petitioner's testimony and Dr. Nikkels' medical records and causation opinion. The Commission affirmed the Arbitrator's causation finding that Petitioner's May 18, 2007 accident and the related arthroscopic procedures were at least a contributing cause in the worsening of his pre-existing osteoarthritic condition, which in turn resulted in the need for bilateral knee replacement surgery.

Respondent argued on appeal that Petitioner was not entitled to rely on the "chain of events" analysis, as he failed to prove he was in a state of good health prior to the accident. Respondent maintains that Petitioner was required to prove a state of good health followed by the

accident necessitating medical treatment and lost time. Petitioner here admittedly suffered from bilateral knee pain and had been diagnosed with arthritis prior to the accident. However, despite any chronic degenerative condition, Petitioner was able to perform his job full duty prior to his fall, whereas following the accident, his condition deteriorated so greatly that he required bilateral knee replacements. Even though Petitioner had degenerative arthritis before his accident, it is evident that his condition worsened significantly following his accident, becoming symptomatic and requiring medical treatment for the first time. If a pre-existing condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003); *Rock Road Const. Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 227 N.E.2d 65 (1967). This exacerbation of an ongoing degenerative condition constitutes circumstantial evidence sufficient to prove a causal connection between Petitioner's bilateral knee condition and his work accident.

The "chain of events" analysis is primarily relied upon when other evidence of causal connection is not available. In this case, Petitioner's medical records and Dr. Nikkels' causation opinion support his position that the fall exacerbated his arthritis causing it to become symptomatic, to require arthroscopic repair of his menisci, and, after physical therapy, Supartz and steroid injections, eventually to require bilateral knee replacements. Dr. Nikkels testified at deposition that Petitioner required total knee replacements as a result of the work accident, and even Respondent's expert, Dr. Cohen, agreed that Petitioner's need for bilateral arthroscopic surgery and Supartz and steroid injections was causally related to his accident. Only when it became apparent that Petitioner would require more complex and expensive surgery to cure his work injury did Dr. Cohen find that the proposed surgery was not causally related to Petitioner's work accident. Arbitrator Holland found that the causation chain continued past the arthroscopic surgeries and injections and included the recommended bilateral total knee replacements. The Commission affirmed and now re-affirms that position.

Respondent argued that Petitioner's pre-existing degenerative arthritis progressed independently of his work accident and his related arthroscopic surgeries to cause his need for total knee replacements. According to Respondent's §12 examiner, this natural progression, together with Petitioner's obesity, caused the need for replacements. Arbitrator Holland found this theory untenable and accepted instead Dr. Nikkels' more persuasive causation opinion that the accident and related arthroscopic surgeries were at least contributing factors in Petitioner's need for knee replacements. Although the "chain of events" analysis is sufficient to support a finding of causation, in this case the treating surgeon's opinion supported that analysis. *Shafer v. IWCC*, 2011 IL App. (4th) 100505WC, 976 N.E.2d 1, 364 Ill. Dec. 1.

Penalties and Fees. Arbitrator Holland found Respondent's refusal to pay medical expenses and temporary total disability benefits from April 18, 2011 (the date of Petitioner's bilateral total knee replacement surgery) through November 30, 2011 (the date of hearing) to be unreasonable and vexatious, as was Respondent's reliance on Dr. Cohen's incredible causation opinion, in which he found all of Petitioner's treatments up to the knee replacement surgery to be causally related to his work-related injury. However, when Dr. Nikkels found that there were no other conservative measures likely to improve Petitioner's condition and recommended total knee replacements, Dr. Cohen drew the line, finding that any treatment beyond that point was not work-related.

Employers are entitled to rely upon their medical experts' causation and treatment opinions, but only so long as those opinions are reasonable. Under these facts, it should have been clear to Respondent that if all of the treatment administered to Petitioner's knees prior to April 18, 2011 was causally related to his accident, the surgery proposed by his treating surgeon would also be causally related, despite Dr. Cohen's opinion. So found Arbitrator Holland and the Commission.

The Circuit Court has requested an explanation of the calculation of Section 19(k) and (l) penalties and Section 16 fees. Arbitrator Holland based his award of penalties and fees on Respondent's non-payment of temporary total disability from the date of Petitioner's knee replacement surgery through the date of hearing. The Arbitrator elected not to include in his calculation of penalties and fees the medical expenses related to Petitioner's total knee replacement surgery. This decision was subject to the Arbitrator's discretion. Although he found Respondent's termination of benefits vexatious and unreasonable, the Arbitrator elected to impose penalties only for the non-payment of temporary total disability and not for the non-payment of medical benefits. However, Arbitrator Holland offered no explanation for imposing penalties and fees only on the non-payment of temporary total disability.

The Commission notes that Petitioner testified that the parties had reached a verbal agreement prior to hearing during an informal conference with the Arbitrator in Rock Falls, Illinois. The agreement allegedly provided that Petitioner would proceed with his bilateral knee surgeries under his group health policy in exchange for Respondent's two payments of $15,000.00 each, representing advances against permanency. Petitioner underwent bilateral knee replacements on April 18, 2011, utilizing group health coverage for medical expenses, and in June 2011, Respondent made one payment of $13,015.67, representing a 10% loss of use of one leg. According to Petitioner's testimony at hearing, Respondent failed to make any additional payments pursuant to the verbal agreement. Respondent offered no evidence regarding the alleged agreement.

The Commission will not hypothesize regarding the basis for the Arbitrator's decision not to award penalties and fees for the medical expenses awarded in this case. However, the Commission notes that no evidence of the fee schedule amount for the disputed medical expenses was presented by either party. Petitioner was able to obtain appropriate medical treatment in the form of bilateral total knee replacements, paid for by Petitioner's group health insurer. Respondent has been ordered to pay Petitioner the fee schedule amount of all medical expenses despite group health's payment of those expenses. The Commission finds that the award of penalties and fees on the unpaid temporary total disability from April 18, 2011 through November 30, 2011, $24,882.94, constitutes a sufficient penalty for Respondent's denial of medical and lost time benefits for that period. The Arbitrator awarded Petitioner $12,441.30 in Section 19(k), $6,810.00 in Section 19(l) (227 days at $30.00 per day), and $2,488.26 in Section 16 attorney fees. The Commission affirms the award of penalties and fees.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $763.95 per week for a period of 98-5/7 weeks, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay any reasonable, necessary, and related medical bills pursuant to the medical fee schedule, in accordance with and subject to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties in the amount of $12,441.30, pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner penalties in the amount of $6,810.00, pursuant to Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $2,488.26 in Section 16 attorney fees.

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 injuries.

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

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

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: MAY 16 2014

o-03/19/14
drd/dak
68

Danjel R. Donohoo

Charles J. DeVriendt

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTIE YOUNG,

Petitioner,

vs. NO: 12 WC 28874

KVF QUAD CORPORATION,

14IWCC0369

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, causal connection, medical expenses, temporary total disability, and "Prospective med." and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator for the findings of fact, which is made a part hereof, with the modifications and additions outlined below. 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 Commission finds that Petitioner did sustain accidental injuries arising out of and in the course of her employment on June 20, 2012. The Arbitrator found the facts in this case to be similar to Reeves v SC2/Superior Consolidated, 12 IWCC 1328 (12/5/12), in which the claimant was denied benefits where the shoe lace of one boot became entangled in the speed lace hook of the other boot causing a fall and the Commission found that this was a personal risk not incidental to employment. However, Reeves is easily distinguishable from the case at bar. In Reeves, the petitioner's own personal boots, which he wore outside of work, also had a similar speed lacing system and he was actually wearing similar boots at the time of hearing. This made his choice of boots a risk personal to him. In contrast, Petitioner in the case at bar testified that she never wore these kinds of boots outside of work and does not have any personal boots similar to those. Outside of work, she normally wore tennis shoes. (T.11-12).

Based on the above, the Commission finds that, even though Petitioner chose the specific type of work boot she was wearing on the date of injury, she was nevertheless required to wear steel-toed boots with metatarsal supports that she would not have been wearing "but for" her employment with Respondent. As such, we find that she was exposed to a greater risk than the general public and her injury arose out of and in the course of her employment.

Having found that Petitioner has proven a compensable accident, the Commission awards Petitioner's reasonable, necessary, and related medical bills of $2,263.32 represented in Px7 through Px11 subject to the fee schedule in §8.2 of the Act. Petitioner is also entitled to prospective left shoulder surgery as prescribed by Dr. Wynn. The Commission notes that no lost time from work has been claimed by Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,263.32 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective left shoulder surgery as recommended by Dr. Wynn under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,300.00. 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: MAY 28 2014

Charles J. DeVriendt

Ruth W. White

Daniel R. Donohoo

SE/
O: 3/26/14
49

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

YOUNG, CHRISTIE
Employee/Petitioner

Case# **12WC028874**

KVF QUAD CORPORATION
Employer/Respondent

14IWCC0369

On 4/18/2013, 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:

0347 MARSZALEK AND MARSZALEK
STEVENA GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

0358 QUINN JOHNSTON HENDERSON ETAL
JOHN KAMIN
227 N E JEFFERSON ST
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

- [ ] 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)

CHRISTIE YOUNG ,
Employee/Petitioner

v.

KVF QUAD CORPORATION ,
Employer/Respondent

Case # 12 WC 28874

Consolidated cases: NONE .

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 17, 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, **June 20, 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 not* sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the alleged injury, Petitioner earned **$26,619.00**; the average weekly wage was **$531.14**.

On the date of the alleged accident, Petitioner was **55** years of age, *single* with **one** dependent child.

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

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 for medical benefits.

ORDER

The Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on **June 20, 2012.**

The Arbitrator further finds that the condition of ill-being complained of is not causally related to the alleged accidental injury of **June 20, 2012.**

All claims for compensation made by Petitioner in this matter are thus hereby denied.

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

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

Joann M. Fratianni

Signature of Arbitrator JOANN M. FRATIANNI

April 15, 2013
Date

ICArbDec19(b)

APR 18 2013

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

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

Petitioner testified that she works for Respondent in the shipping and receiving department. As part of her job duties, she was required to access trucks that made deliveries, check in parts, enter part numbers into the computer and tag parts. This job required some lifting up to fifty (50) pounds. Petitioner testified that she was required to wear ankle height steel toe boots with a metatarsal guard. These books contained speed laces with hooks at the top of the shoe. (Px2) Introduced into evidence was the company requirement that such boots be worn by Petitioner on this job and she would be reimbursed $100.00 for each pair purchased for the job by Respondent. (Px1) Respondent chose the type of safety boots worn and identified three (3) stores where they could be purchased. Petitioner purchased her boots at one of those stores at a cost of $185.00.

Petitioner testified that on June 20, 2012, it was warm outside and she was wearing knee shorts. Petitioner introduced evidence that it was as high as 91 degrees on that date. Petitioner testified that her legs felt weak and she went inside for a drink of water. As she turned to open the door of a small refrigerator, the lace of one of her boots caught in the speed hook of the other boot, causing her to fall to th ground on her left arm and shulder.

Respondent disputes that this episode represents an accidental injury that arose out of and in the course of Petitioner's employment on that date.

Mr. Michael Crotty testified in this matter that he was the President of Respondent. Mr. Crotty testified that he did not dispute that the shoelaces became entangled and confirmed that while employees are required to wear steel toe boots with metatarsal guards, Respondent simply approves the footware. (Px1) Mr. Crotty testified that while stores in the area were identified for employees to purchase work boots and shoes, employees were not required to use those stores and could purchase approved shoes elsewhere.

The Arbitrator notes that the facts in this claim are very similar to *Reeves v. SC2/Superior Consolidated,* 12 IWCC 1328. In *Reeves,* the shoe lace of one boot became entangled in the speed lace hook of the other boot, causing a fall. The Commission noted that the claimant had chosen the steel toe boots to wear and they were not company issued. The Commission found that tripping over laces entangled in a speed lace hook was a personal risk not incidental to employment and denied the claim.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment with Respondent on June 20, 2012.

Based further upon said findings, the Arbitrator further finds that Petitioner failed to prove that the condition of ill-being alleged was caused by an injury at work for Respondent.

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?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" and "F" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for certain prospective medical care and treatment for this alleged injury are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Yenifer Deblas,
Petitioner,

vs. NO: 12 WC 28078

Wal-Mart Stores Inc.,
Respondent,

14IWCC0370

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice and medical expenses incurred and prospective 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 affirms and adopts the decision of the Arbitrator but deletes the second to last paragraph in Section C of her decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 5, 2013, is hereby affirmed and adopted.

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

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

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

DATED: MAY 20 2014
o031914
CJD/hf
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

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

DEBLAS, YENNIFER
Employee/Petitioner

Case# **12WC028078**

14IWCC0370

WAL-MART STORES INC
Employer/Respondent

On 4/5/2013, 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:

4037 LAW OFFICES OF CHRISTINE M ORY PC
511 W WESLEY ST
WHEATON, IL 60187

5074 QUINTAIROS PRIETO WOOD & BOYER PA
MICHAEL J SCULLY
180 N STETSON AVE SUITE 4525
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

YENNIFER DEBLAS ,
Employee/Petitioner

v.

WALMART STORES, INC. ,
Employer/Respondent

Case # 12 WC 28078

Consolidated cases: NONE .

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Chicago**, on **December 14, 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. [ ] What was the date of the accident?

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

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

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

N. [x] Is Respondent due any credit?

O. [ ] Other: _____

FINDINGS

On the date of accident, **December 26, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident *was not* given to Respondent.

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

In the year preceding the alleged injury, Petitioner earned **$28,932.80**; the average weekly wage was **$556.40**.

On the date of accident, Petitioner was **25** years of age, *married* with **two** dependent children.

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

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 **$14,020.45** under Section 8(j) of the Act for medical benefits.

ORDER

The Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment by Respondent on **December 26, 2011.**

The Arbitrator further finds that Petitioner failed to prove that she gave Respondent timely notice of this alleged accidental injury as required by the Act.

The Arbitrator further finds that the condition of ill-being complained of is not causally related to the alleged accidental injury of **December 26, 2011.**

All claims for compensation made by Petitioner in this matter are thus hereby 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.

Joann M. Fratianni

Signature of Arbitrator JOANN M. FRATIANNI

April 1, 2013
Date

ICArbDec19(b)

APR 5- 2013

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

Petitioner testified that she works for Respondent as a zone manager in the consumerables department. As part of her job duties, she supervises other employees. Petitioner testified that she reported to work on December 25, 2011 at 9:00 PM. Her duties that day were to condense Christmas decorations and set up for New Years. She began her shift by moving cosmetic products to flag and price them. After lunch, that ended at 1:45 AM, she worked with Mr. Ken Vandeventer to set up New Years celebrations in the store. Petitioner was Mr. Vandeventer's supervisor at that time.

Mr. Vandeventer testified he worked with Petitioner that evening setting up champagne for the early morning hours of December 26, 2011. He helped Petitioner for 10-20 minutes, and then moved to another area of the store during his shift.

Petitioner testified that following Mr. Vandeventer's departure, she continued stacking bottles of champagne alone. When she got to the second section of champagne, she experienced a "pull" in her back, but continued working.

Petitioner testified that she told a coworker named "Rup" that her back started to hurt. Petitioner testified that "Rup" called Mr. Paul Grice to send her some help.

Mr. Grice testified that he was the shift manager that evening. Mr. Grice testified that Mr. Vandeventer was written up for several infractions and quit without providing two weeks notice in April of 2012. He was later caught in a storeroom after quitting going through boxes looking for collectible "Hot Wheels" cars.

Mr. Grice testified that he was working the same shift with Petitioner on December 25-26, 2011. Mr. Grice testified that Petitioner told him her back was bothering her but never said that she injured it at work and continued working her shift. Mr. Grice testified that he helped Petitioner for a period of time and then left to work elsewhere in the store. Mr. Grice testified that Petitioner did not file any paperwork that evening indicating a workers' compensation injury.

Mr. Brian Snyderworth testified that he was a shift manager on that evening. At that time he was setting up an end cap of lotion and asked Petitioner if she could help him, as he was suffering from pain in both knees and ankles and could not reach to the bottom shelving to fill them. Petitioner told him her back hurt and she could not reach the top shelf, but could reach the bottom ones. Mr. Snyderworth testified that Petitioner did not inform him that she had suffered a work injury to her back. Mr. Snyderworth testified that if Petitioner had so informed him, he would have immediately arranged for another manager or himself to complete the proper paperwork.

Petitioner following that date first sought medical treatment on May 14, 2012 with Dr. Singh, an orthopedic surgeon. Dr. Singh prescribed an MRI and referred her to a pain clinic. Dr. Singh was of the opinion that the injury was probably work related, based upon the history of injury received from her. (Rx3)

On May 15, 2012, Petitioner filed for a Family Medical Leave of absence. On the application form, she checked off a box that read "own serious health condition" and not boxes that read "workers compensation," "pregnancy" and "disability."

Petitioner returned to see Dr. Singh on May 16, 2012, who informed her of her MRI results. Petitioner last saw Dr. Singh on June 25, 2012, who felt that she should see a pain specialist and receive steroid injections. Petitioner later received two such injections to her back.

On August 3, 2012, Petitioner sent a letter to Respondent describing her work injury. On August 15, 2012, Petitioner filed the Application for Adjustment of Claim that is the subject matter of this case. Prior to that date, all medical expenses incurred were paid through her group health insurance received from Respondent. Petitioner testified that she was unaware of Respondent's policies about reporting injuries and the methods of reporting. Petitioner worked for Respondent for six years.

Mr. Grice testified that all employees are made aware that even if the slightest injury occurs at work they are required to notify a supervisor and complete an accident report. Mr. Grice reported that Petitioner had complaints of back pain prior to December 26, 2011 that were reported to her supervisor.

Prior to this claim for injury, Petitioner was involved in an automobile accident in February of 2011, in which the airbags in the car she was driving deployed. Petitioner testified that she injured her chest and foot and experienced no neck pain at the time. Medical records received from American Family Insurance for the car accident reflect complaints of pain and treatment for a neck condition as well as the chest and foot.

Based upon the above, the Arbitrator finds that Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment with Respondent on December 26, 2011. This finding is based on the lack of corroborating evidence from other employees and medical providers.

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

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that timely notice of this accident was not provided to Respondent within the 45 day period prescribed by statute. It would appear that notice was actually given in this matter on August 3 2012.

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

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that Petitioner failed to prove that the condition of ill-being alleged was caused by an injury at work for Respondent.

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?

See findings of this Arbitrator in "C" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C" above.

Based upon said findings, the Arbitrator further finds that all claims made by Petitioner for certain prospective medical care and treatment for this alleged injury are hereby denied.

N. Is Respondent due any credit?

See findings of this Arbitrator in "C" above.

As no awards of compensation or medical expenses are being made in this matter, all claims made by Respondent for credit are hereby denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Josefina Danek,

Petitioner,

vs. NO: 07 WC 07034

14IWCC0371

Cook County Department of Public Health,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County. A majority of the Commission found that Petitioner failed to give timely notice to Respondent of her alleged repetitive trauma injuries involving the bilateral upper extremities. The Commission did not clearly state whether Petitioner's untimely notice resulted in prejudice to Respondent. In an order dated December 5, 2013, the Circuit Court of Cook County remanded the case to the Commission for a determination "whether under Section 305 6(c) there was any undue prejudice to the employer due to the timing of Petitioner's notice of accidental injury."

Findings of Fact and Conclusions of Law

In a Decision dated August 18, 2010, the Arbitrator concluded "[E]ven if notice was defective in some fashion, Respondent has not shown any prejudice by the notice it received. Petitioner's supervisor knew Petitioner was having trouble with the typing as Petitioner was using an ergonomic keyboard. Ms. Guajardo knew that Petitioner's hands were hurting while she was typing. Respondent suffered no prejudice from a defect in the notice. Respondent obtained and presented records, a witness and a medical expert." For the following reasons, we disagree with the Arbitrator's finding that there was no prejudice to Respondent.

Ms. Guajardo recalled that at some time she saw Petitioner use an ergonomic keyboard and she reasonably assumed there was a physiological motivation; however Petitioner did not discuss her complaints with Ms. Guajardo. Ms. Guajardo noted that Petitioner was not the only employee who electing to use a non-standard keyboard over the years. The fact that Ms. Guajardo noticed Petitioner's periodic use of an ergonomic keyboard does not negate the undue

prejudicial effect of Petitioner's untimely notice of accident.

Petitioner testified that she experienced symptoms in her hands as early as 1999. She testified that in 2004 her typing duties increased and she primarily used a standard keyboard, and that this caused a noticeable increase of her longstanding symptoms. Respondent disputed that Petitioner's actual volume of typing increased in 2004. Nevertheless, Petitioner testified that her symptoms improved while using an ergonomic keyboard that she brought to work. Whenever she used a standard keyboard, she experienced right hand numbness, tingling, pain and cramping. Petitioner's Application for Adjustment of Claim, filed February 1, 2007, alleged a manifestation date of June 15, 2005, corresponding to the approximate time she returned to using a standard keyboard and decided to seek treatment for her symptoms. Under Illinois law, the date of manifestation for repetitive trauma injuries is the date on which the claimant became aware of the condition and reasonably should have known it may be work related. While Respondent was not prevented from obtaining an after-the-fact examination and opinion by an expert pursuant to Section 12 of the Act, we find no justification in the facts of this case for Petitioner's failure to give timely notice to Respondent. The ability to promptly investigate the facts related to an alleged work accident is a basis for requiring prompt notice.

Petitioner admitted that as a supervisor herself she was familiar with the procedures for reporting injuries and pursuing a workers' compensation claim. She admitted she knew many weeks ahead of time that she would be having surgery in January of 2006. Her accident report was not completed until March 17, 2006, when she returned to work. We have carefully reviewed and considered the remand order from the Circuit Court, and based on that mandate have reexamined the credible record. The preponderance of the evidence shows that Petitioner delayed notice to Respondent, and that this delay was unreasonable under the facts of the case and caused undue prejudice to Respondent.

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

DATED: MAY 20 2014
RWW/plv
o-3/19/14
46

Ruth W. White

Daniel R. Donohoo

DISSENT

I continue to dissent for the same reasons as originally stated in my dissent dated May 4, 2012.

Charles J. DeVriendt

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REBECCA TOON,
WIDOW OF MICHAEL TOON,
DECEASED,

Petitioner,

vs. NO: 10 WC 10626

14IWCC0372

POWER MAINTENANCE &
CONSTRUCTORS, LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, nature and extent, and "fatality, Section 19(d), rulings on objections" and being advised of the facts and law, hereby reverses the Decision of the Arbitrator on the issue of accident but attaches the Decision of the Arbitrator, which is made a part hereof, for the purpose of the findings of fact with the modifications and additions noted below.

The Commission finds that Petitioner failed to meet her burden of proof that her husband, Michael Toon (hereafter "Decedent"), sustained accidental injuries arising out of and in the course of his employment. Although there is conflicting testimony and evidence, we find that it is more likely than not that Decedent's abdominal cellulitis was not caused or aggravated by him rubbing his abdomen on the steering wheel of the lull he drove at work.

The Commission notes that there is no objective evidence regarding Decedent's girth such as photographs or medical records indicating his measurements. No autopsy was performed and, other than Decedent's recorded weight and general descriptions such as "morbidly obese" in the medical records, the evidence is limited to witness testimony regarding the size of his stomach.

Petitioner testified that Decedent was about 6'2" tall and weighed 240-245 pounds but "most of it was the belly." He had very skinny legs and skinny arms but he had a big back and a big stomach. (T.19).

Decedent's sister, Connie Sauerwein, testified that he was "pear shaped" and had a "big round belly." She saw him regularly and he was generally sitting in his recliner wearing shorts. She testified, "If I went to see Mike, he was in his recliner, you would think he was nude because his stomach would come over top of his shorts." (T.44-46).

A long-time friend of Decedent's, Meryl Michael Huch, testified that he had known Decedent for "umpteen years" and he had a "real big" stomach. (T.48-49). Mr. Huch testified that he worked on the same job site as Decedent beginning in October 2009 and, although they worked on opposite ends of the plant, Decedent came to see him periodically. (T.52). Mr. Huch testified that he saw Decedent in the lull with the door opened and that he would walk up to Decedent to talk to him because it was hard for Decedent to get in and out of the lull "because he was so fat." (T.54). Mr. Huch testified that he has operated a lull himself before and there is a knob on the steering wheel for faster steering. (T.51). He testified that when he saw Decedent in the lull facing straight ahead the steering wheel was pushing in to his belly and that it was "obvious" that, if Decedent had been steering, the wheel would have rubbed against his stomach. (T.54-55). Despite this assertion, Mr. Huch testified that Decedent could still operate the machine stating, "You can operate the machine with your right hand. You're just steering it with your left." (Id.)

Directly contradicting Mr. Huch's observations was the testimony of Respondent's witness, John Bush. Mr. Bush testified that he was the Safety Manager at the job site Decedent worked at from June 2009 to the end of January 2010. (T.67). He testified that Decedent didn't have any issues operating the lull but Decedent was driven to and from the lull and around the job site by the operator steward as an accommodation by Respondent due to Decedent's overall health, which included heart trouble. (T.69). Mr. Bush described the job of a lull operator and noted that it has an "assist knob" for steering because they have to make a lot of tight turns. He testified that the seat is adjustable forward/backward close to seven inches. (T.70-72).

Mr. Bush testified that he "absolutely" observed Decedent and other operators while they were operating the lulls. He would check for seat belts and other safety violations and he was also able to see the lulls operating from his office. (T.75-76). Mr. Bush generally spoke to each person to see if things were okay and how they were feeling that day. (T.77). Mr. Bush last spoke with Decedent on January 27, 2010, when Decedent's lull had a flat tire. Decedent turned in his seat to face out of the lull and had the door opened on the cab. Mr. Bush asked Decedent how he was doing and Decedent said he was "feeling pretty good." Mr. Bush testified that they "chatted for quite some time" and, although they talked about other health issues, Decedent did not have any complaints about his stomach. (T.78-79).

Mr. Bush testified that, on the occasions that he spoke with Decedent, he was in a normal position for operating the cab and there was space between the steering wheel and his body every time he saw him. (T.79). Mr. Bush testified that Decedent did not always keep the door to the lull closed and that he had opportunities to observe Decedent while he operated the lull. Decedent's body was always away from the steering wheel. When Mr. Bush would go up into the cab to see if he was wearing a seat belt, there would be three to four inches between Decedent and the steering wheel. (T.81-82).

Mr. Bush testified that he had operated a lull himself 200 times and answered:

Q: Can a lull be operated, can the steering wheel be turned with the operators [sic] stomach against the steering wheel?
A: No.
Q: Why is that?
A: Because when you got to hold the ball, when you come around, you're going to hit your belly on either side, seriously it can't be done.

(T.82-83). Mr. Bush testified that Decedent's operation of the lull was similar to any of the other operators and he maintained the same speed, stopping and starting, turning radius, and there was no problem with the smoothness of his pickup or delivery. (T.83).

Mr. Bush testified that he took photographs (RxA) for the purpose of investigating this claim and that they accurately depict what he observed regarding the lull and other operators within the cab. The measurements are the distance between the steering wheel and the operators who were sitting in the cab, which has an adjustable seat. (T.84). Mr. Bush testified that the lull operators depicted, Rodney Moss and Gerald Bathon, are similar to Decedent in general height and physical size in terms of the stomach. (T.85). Mr. Bush stated that in picture #11, there is 6½ inches between Mr. Moss' stomach and the steering wheel but that even if Mr. Moss pushed the seat all the way up, there was still ¾ of an inch to an inch of distance between the wheel and his stomach (picture #8). (T.86). Mr. Bush explained that, if the seat was all the way up, an operator with their height would have trouble getting to the brake and throttle and that would place the lever farther back for operation. (T.87). When he observed Decedent in the lull, Decedent was never as close to the steering wheel as the position depicted in picture #8. (Id.).

Mr. Bush testified that the video (RxB) accurately depicts Mr. Moss sitting in the cab, the movement of the seat, and the operation of the lull. The end of the video shows that he was using the knob to turn the steering wheel. Mr. Bush explained that nobody steers with two hands on the wheel because it takes multiple turns in tight areas and the knob facilitates making the turns easier. (T.88-89). Mr. Bush testified:

Q: Why can't the wheel be turned, if the operators stomach is pressed against the wheel?
A: You are going, the knob will hit you before you can get it turned, if you are sitting up that close.
Q: So what are you saying, what would have happened to the turn if that happened?
A: That would be as far as you could turn, if you kept continuing forwards, you would probably hit something.
Q: The way Mr. Moss was depicted in this video of operating that lull, is that the way Mr. Toon operated the lull?
A: Yes.

(T.90-91). On cross-examination, Mr. Bush reiterated that Decedent was the same size as the other gentlemen and their hands do not hit their bellies if they are using the knob for steering. Mr. Bush explained that you have to scoot the seat far enough back so that you don't obstruct your steering:

Q: And if Michael Toon was so big that he couldn't get his seat back that far, then he would hit his belly?

A: He wasn't, he was a safe operator.
Q: If other people saw him in the machine with the door opened and his belly up against the wheel – are you just saying you didn't see it that way?
A: No.

(T.92-93). On redirect examination, Mr. Bush testified that if someone else said that Decedent's stomach was up against the steering wheel, that would not make any sense based upon his observations. (T.94).

Mr. Huch testified in rebuttal that he knows Rodney Moss and Gerry Bathon from being in the union and that Decedent had a "lot bigger stomach." However, he did not know how much any of them weighed. (T.99-101).

The Commission resolves the conflicting testimony between Mr. Huch and Mr. Bush by finding that the video and photographs support a finding that Mr. Bush is more credible on the issue of whether Decedent's belly pushed against the steering wheel when he operated the lull. Both Mr. Bush and Mr. Huch testified that Decedent was able to operate the lull without any problems and the Commission finds it highly improbable that Decedent would have been able to perform his job if the steering wheel, or the knob, or his hand was continually in contact with and rubbing his stomach.

After being shown several photographs of the lull and being presented with a hypothetical involving the assumption that Decedent's stomach did, in fact, rub against the steering wheel, Dr. Sri Kolli testified that his work activities could have partly contributed to the trauma that caused the cellulitis. (Px2 at 31-31). However, on cross-examination, Dr. Kolli admitted that she is not an engineer or forensic accident reconstruction expert and she did not do any measurements on Decedent to determine how he fit into the lull. (Id. at 34-35). She did claim that she had "some amount of reasonable certainty by looking at the pictures because I am familiar with Mr. Toon's body, how big he is and how he would look sitting in that chair. Other than that, I cannot tell you beyond that." (Id. at 35). She opined that the lower part of Decedent's abdomen would have been resting on the steering wheel. (Id. at 40).

However, it is clear that Dr. Kolli's opinion is based on speculation:

Q: ... Okay. Well, for instance, looking at...Petitioner's Exhibit Number 2, which shows the wheel and the yardstick and the chair. Do you see that?
A: Yes, I do.
Q: What's the distance between that wheel and the back of the...front of the back of the chair – forward part of the back of the chair?
A: I would imagine it's definitely less than six inches.
Q: This is speculation on your part?
A: Yes.

(Id. at 35-36). The Commission finds that the angle from which this photograph was taken minimizes the visual appearance of the distance between the back of the seat and the steering wheel and it also appears that the seat is pushed forward in this picture. When the other photographs and video evidence are considered, it is clear that there is a much greater distance between the steering wheel and the back of the chair than Dr. Kolli speculated. Furthermore, it does not appear that Dr. Kolli was aware that the seat was adjustable. Nor does it appear that she had viewed the video of the lull in operation or any photographs of anybody sitting in the seat to

be able to compare their body type and size to Decedent.

Therefore, we find that Dr. Kolli's opinion is based on incomplete evidence, an inaccurate perception of the distances involved in the cab, and is not consistent with the other evidence in the record that supports our finding that Decedent would not have been able to perform his job if his stomach was resting on the steering wheel.

We next address the credibility of Decedent's statements to others regarding the cause of his sores. The January 29, 2010 record of Dr. Kolli, which she also testified about, indicates that the E.R. physician noticed redness on Decedent's abdominal wall with several skin abscesses. Decedent told Dr. Kolli that "he started breaking down into abscesses because his stomach wall rubs against the steering wheel while he works. ... This was several weeks ago and he decided to let them go." Another record, by Dr. Orzechowski, indicates that Decedent stated that "the steering wheel rubs on his abdomen, causing the pustules." Petitioner testified that Decedent told her in the hospital that he believed the sores were from "fat and the steering wheel was rubbing on his belly." (T.35). Mr. Huch testified that Decedent told him, also in the hospital, that he believed the sores were caused by the steering wheel rubbing against his stomach. (T.58). The question is whether Decedent's assertions are credible when considered in light of all the other evidence.

The Commission notes that there is no evidence that Decedent ever mentioned to anyone, prior to his hospitalization, that the steering wheel at work was causing him any problems. Mr. Bush testified that when he last spoke to Decedent on January 27, 2010, there was no mention of any stomach problems. Petitioner did not testify regarding any problems with Decedent's abdomen prior to the morning when the ambulance was called. Dr. Kolli admitted that there are no records of Decedent having complaints of pain regarding the skin of his abdomen before he arrived at the hospital. (Px2 at 50).

Petitioner did testify that between the time Decedent began working for Respondent in June 2009 and February 2010 when he was admitted to the hospital, his body shape stayed the same. (T.22). Dr. Kolli testified that, although Decedent had gained about 45 pounds in the year and a half before he died, she did not believe that Decedent gained a lot of weight between his last visit with her on September 24, 2009, when he weighed 268 pounds, and when he went into the hospital on January 29, 2010, because the hospital records indicate that he weighed 265 pounds. (Px2 at 51). Dr. Kolli testified that Decedent did not have skin abscesses on his abdomen when she saw him in the office at his last visit. (Px2 at 17).

The Commission finds that Decedent had been working for Respondent for several months by the time of his last office visit with Dr. Kolli on September 24, 2009, and there was no indication at that time of any complaints by Decedent about his abdomen, no mention of the steering wheel rubbing on his abdomen, and no examination findings consistent with his skin being rubbed by a steering wheel. If Decedent's abdomen had been rubbing on the steering wheel, we find it more likely than not that he would have developed abrasions, pustules, or sores within a short time after beginning his job driving the lull at Respondent.

The Commission notes other inconsistencies in Decedent's statements regarding the timing of the onset of his abdominal condition. Dr. Kolli's record indicates that Decedent said he had been suffering from the abscesses for several weeks but chose to ignore them. However, the record of Dr. Pritz states that Decedent "has not noted the abdominal wall redness until it was pointed out to him in the ER." Dr. Slom wrote that Decedent stated that "he has noticed erythema of his lower abdominal wall for the last few days, but his wife says that over the last few weeks he has had several pustules over his anterior abdominal wall which he has been

scratching."

Even if we were to find that Decedent's abdomen was rubbed occasionally by the steering wheel, it is still speculative whether the area that was rubbed against was also the same area where he developed the sores. Dr. Kolli testified that Decedent had a "fiery red area" that appeared "like a crescent or quarter circle" (Px2 at 19) and that based on the history, the pattern of cellulitis, and by looking at the pictures of the lull, she thought it was related to his work and the steering wheel (Id. at 43). However, she also admitted that she never saw Decedent while he was dressed so she could not say where the cellulitis was located in relation to his belt line. (Id. at 44). She also testified that it was possible that Decedent's personal hygiene was responsible for his cellulitis. (Id.) There is no discussion about whether the shape of the red area followed the normal countours of the human body.

Dr. Kolli testified that she looked all over Decedent's body and there were no other areas on his skin that were abnormal; otherwise she would have mentioned those areas also. (Px2 at 39). However, this is inconsistent with the records of Dr. Wright, who recorded that Decedent also had cellulitis on the upper portion of his lower extremities, and Dr. Slom who recorded that Decedent had erythema over both of his knees along with a pustule above his left kneecap. This is a critical fact. The Commission finds that the presence of cellulitis and pustules in other areas of Decedent's body are inconsistent with Dr. Kolli's opinion that his abdominal cellulitis was caused by the steering wheel at work.

Dr. Kolli admitted that if Decedent's cellulitis could be explained by some other source then it would not be work-related. (Px2 at 56). She also admitted that something as simple as his belt on his abdomen after gaining 40 pounds could have been the source of the cellulitis. (Id.) Respondent's Section 12 physician, Dr. Schrantz, opined that any other chronic chafing would lead to a similar injury and that Decedent's belt or pants that fit tightly could also explain the injury. (RxC). Petitioner testified that Decedent wore jeans at work and that his stomach hung down over the top of them. (T.24, 40-42). Mr. Bush testified that the last time he spoke with Decedent, he was "probably wearing jeans and a sweat shirt." (T.79).

Although the Commission finds that Decedent did not regularly wear a belt, he did regularly wear jeans. Since Decedent had gained significant weight, we find it more likely than not that the location of the abdominal sores and the crescent-like presentation are consistent with Decedent's pants line.

Decedent had numerous, serious, and pre-existing health conditions including COPD, emphysema, high cholesterol, osteoarthritis, high blood pressure, uncontrolled diabetes, and ischemic cardiomyopathy. (Px2-DepPx7). Petitioner testified that Decedent came home from work on a Thursday and said that he told his boss he was sick. Decedent told Petitioner that it was his "stomach." Decedent was not hungry but he took a shower, sat in his recliner to watch television, and fell asleep. Around 4:30a.m., Decedent started screaming and when Petitioner went in to see him he was "shaking terribly" and said he was cold. Petitioner called Decedent's brother, Gary, who came over. Decedent "kept on saying he was sick to his stomach" so Gary pulled down Decedent's shorts. Petitioner testified that Decedent had two "real tiny little sores" about the size of a dime that were not "open." They were both below his navel with one on the right and one on the left. (T.26-29). On cross-examination, Petitioner clarified that these sores were about four to six inches below his navel. (T.41). Petitioner testified that Gary left because Decedent did not want to go to the hospital but he kept shaking so Petitioner called 911. (T.30). When the paramedics came, Decedent said he wanted to change his underwear but they wouldn't let him. Petitioner testified that when they took the blanket off, "another sore had popped up and

it was red." It was in the same general area but "it was a hole with blood in it." (Id.)

The Commission finds Petitioner's testimony significant in several respects. First, Decedent's sores were visible only after Decedent's shorts were pulled down, which indicates that they were either underneath or below the pant line. This would support a finding that the location of the sores is not where they would be if Decedent's protruding abdomen had repetitively and continually contacted the steering wheel while he drove the lull. Second, Petitioner had cellulitis on his thighs and a pustule above one knee. There is no allegation that the steering wheel was rubbing against the thighs and knees. Third, we find it significant that Petitioner did not testify that she saw any crescent shaped abrasions or sores at that time. Fourth, Petitioner did not testify regarding whether Decedent had any sores or pustules in the weeks leading up to his hospitalization. She did not explain the medical record of Dr. Slom, which indicates that Decedent stated that he noticed erythema of his lower abdominal wall for the last few days but that Petitioner ("his wife") said that Decedent had several pustules over the last few weeks and had been scratching them. The Commission finds it significant that Petitioner did not testify at all regarding this record since the inference and implication from her testimony is that she first noticed Decedent's sores on the morning that he was taken to the hospital.

The Commission finds that the steering wheel did not rub against or contact Decedent's stomach. Based on our review of the video and photographic evidence, we find that Mr. Bush's testimony regarding how Decedent fit into the cab of the lull and operated the machine is more credible than that of Mr. Huch. We find that Decedent would not have been able to perform his job if his abdomen was consistently and repetitively resting on the steering wheel. If his abdomen did rub against the steering wheel, we find that there would most likely have been at least some external indication of this by the time he was last examined by Dr. Kolli on September 24, 2009, since he had been working for Respondent since June 2009.

The Commission finds that Dr. Kolli's opinion is speculative and based on inaccurate and incomplete information. Her opinion that Decedent's stomach rested on the steering wheel at work is inconsistent with the video and photographic evidence. Her opinion that the shape of the cellulitis that she observed in the hospital was consistent with being rubbed on a steering wheel is not persuasive as it could also be attributed to Decedent's jeans. Furthermore, there was no explanation why Decedent also had cellulitis on his lower extremities and a pustule on his left knee. This leads us to the conclusion that the cellulitis was caused by something other than the steering wheel at work.

Dr. Kolli admitted that something as simple as his belt on his abdomen could have been the source of the cellulitis. There were no initial indications of abrasions or trauma to Decedent's abdomen that would be consistent with a mechanical trauma from the steering wheel. Petitioner testified that there were initially only two small, closed, dime-sized sores on Decedent's abdomen about four to six inches below and on the sides of his belly button. These were only noticed after pulling down Decedent's shorts. These facts indicate that Decedent's sores were underneath his pants line or below it. Either way, it is inconsistent with the claim that they were from his abdomen resting on and rubbing against the steering wheel. Based on all of the above, we find it more likely than not that Decedent's sores were caused by his jeans or some other idiopathic cause and we find that Petitioner has failed to meet her burden of proof that Decedent's job was a causal or aggravating factor in his development of the abdominal sores. We find that Petitioner has failed to meet her burden of proof that Decedent sustained accidental injuries arising out of and in the course of his employment

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated April 2, 2013, is hereby reversed and the awards are vacated.

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: MAY 2 0 2014

Ruth W. White

Ruth W. White

Daniel R. Donohoo

Daniel R. Donohoo

SE/
O: 3/26/14
49

DISSENTING OPINION

I must respectfully dissent as I would have affirmed the Arbitrator's decision. I believe that the testimony of Mr. Huch was credible that Decedent's abdomen rubbed against the steering wheel of the lull at work. I also find Dr. Kolli's opinion on accident and causation to be supported by the evidence. Therefore, I would find that Decedent's employment with Respondent was at least *a* contributing factor in his development of abdominal cellulitis.

Charles J. DeVriendt

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

TOON, REBECCA WIDOW OF TOON, MICHAEL DECEASED
Employee/Petitioner

Case# **10WC010626**

14IWCC0372

POWER MAINTENANCE & CONSTRUCTORS LLC
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:

0071 BONIFIELD & ROSENSTENGEL PC
JERALD BONIFIELD
16 E MAIN ST
BELLEVILLE, IL 62220

1109 GAROFALO LAW FIRM
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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
FATAL

Rebecca Toon, Widow of Michael Toon, Deceased
Employee/Petitioner
v.
Power Maintenance & Constructors, LLC
Employer/Respondent

Case # **10** WC **10626**

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 **January 30, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

C. [x] Did an accident occur that arose out of and in the course of Decedent'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 Decedent's current condition of ill-being causally related to the injury?

G. [ ] What were Decedent's earnings?

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

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

J. [ ] Who was dependent on Decedent at the time of death?

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

L. [ ] What compensation for permanent disability, if any, is due?

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

N. [ ] Is Respondent due any credit?

O. [x] Other **19(d) Insanitary or injurious practices**

FINDINGS

On the date of accident (manifestation), **January 28, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned **$82,194.32**; the average weekly wage was **$1,580.66**.

On the date of accident, Decedent was **63** years of age, *single* with **0** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$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.

The Arbitrator finds that Decedent died on **February 11, 2010**, leaving **one** survivor(s), as provided in Section 7(a) of the Act, including **Rebecca Toon**.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 4 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

Respondent shall pay to Rebecca Toon, widow of Michael Toon, $1,053.77 per week for one and five-sevents (1 5/7) weeks commencing January 29, 2010, through February 10, 2010, that being the period of disability sustained by Michael Toon prior to his death on February 11, 2010.

Respondent shall pay to Rebecca Toon, widow of Michael Toon, $1,053.77 per week, commencing February 11, 2010, through January 30, 2013, and shall continue to pay that weekly amount until $500,000.00 or 25 years of benefits have been paid, whichever is greater, because the injuries caused the employee's death, as provided in Section 7 of the Act.

If Rebecca Toon remarries, Respondent shall pay her a lump sum equal to two years of compensation benefits, and all further rights of Rebecca Toon shall be extinguished.

Respondent shall pay $8,000.00 to Rebecca Toon for burial expenses as prescribed in Section 7(f) 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
Signature of Arbitrator

March 29, 2013
Date

APR 2 - 2013

Findings of Fact

Petitioner, Rebecca Toon (hereinafter referred to as "Petitioner"), filed an Application for Adjustment of Claim which alleged that she was the widow of Michael Toon (hereinafter referred to as "decedent"), and that her husband sustained an accidental injury arising out of and in the course of his employment for Respondent on February 3, 2010, that caused his death. According to the Application, decedent's accident occurred as a result of his being a lull operator and that this caused cellulitis of the abdominal wall and a systemic infection. Respondent denied liability on the basis of accident and causal relationship.

At trial, Petitioner testified that she was the widow of the decedent, and that they were married on July 17, 1976. Petitioner testified that her deceased husband spent most of his work life in construction but that he had most recently work for Respondent as an operating engineer. For several months prior to his death, decedent operated a device called a "lull" which is a large forklift type device that is used to move and raise various materials as required by whatever construction is taking place.

Petitioner described her husband's body type as being "pear-shaped" and that he was approximately 6'2" in height and weighed 240 to 245 pounds. She described that decedent had very skinny legs and arms, a large back and an absolutely huge stomach. At work, decedent would wear jeans and a t-shirt and would usually not wear a belt. He would generally not wear a jacket because, according to Petitioner, he was hot almost all of the time. When he returned home after work, decedent's customary practice was to take a shower and put on a pair of basketball shorts. Decedent generally did not wear a shirt and his lower abdominal area would hang over his shorts. Decedent would then eat his supper, sit in a recliner and watch television until it was time to go to bed. Petitioner testified that decedent had a number of other significant health issues in regard to his heart and lungs. Decedent was also a long–term smoker.

Connie Sauerwein testified on behalf of the Petitioner. Sauerwein was the decedent's sister and she also described decedent as being "pear-shaped" with a big stomach that protruded over his shorts. She did have occasion to personally observe decedent sitting in his recliner at home wearing just his basketball shorts.

Merryl Huch, one of decedent's co–workers, also testified on behalf of the Petitioner and stated that he knew decedent very well. Huch described decedent as being very fat and that his stomach protruded. Huch described the lull as being and all–terrain forklift and identified some photos of it. The lull has a steering wheel and a knob on the steering wheel so that it can be turned easier. Huch testified that, on numerous occasions, he personally observed decedent operating this device as well as getting in and out of it. Huch observed that decedent experienced difficulties in getting both in and out of the lull as well as operating it because he was so fat. Huch specifically noted that the steering wheel of the lull would rub against decedent's stomach.

Petitioner testified that on a Thursday evening, decedent informed her that he was sick, having stomach pains and that he needed to be seen by a doctor. Decedent slept in has recliner but his condition worsened to the point that Petitioner called Gary Toon, decedent's brother, to come over to their residence. Because of the severity of decedent's symptoms, the decision was made

to call an ambulance. At approximately that same time, Petitioner pulled down decedent's basketball shorts and observed two red sores on decedent's lower abdominal area which she described as being about the size of a dime with one below and another to the right of the navel. Shortly before the ambulance arrived to transport decedent to the Hospital, decedent started shaking and Petitioner observed another lower abdominal sore which appeared to be bleeding.

On January 29, 2010, decedent was taken to St. Anthony's Hospital, and was transferred into the intensive care unit. Decedent was treated by Dr. Sri Kolli, an internal medicine specialist, who had previously treated decedent since August, 2007. Dr. Kolli treated decedent for a number of medical conditions; however, the only treatment provided by her for any stomach issues was in January, 2008, when it was determined that decedent had esophagitis due to yeast which was successfully treated with medication.

The medical records of St. Anthony's Hospital were received into evidence and it was noted that decedent was admitted to the hospital for abdominal cellulitis. The records stated that decedent had several skin abscesses on the abdominal wall and that he informed them that he started breaking down into abscesses because his stomach wall rubbed against a steering wheel of a device that he operated. Decedent advised he had initially observed these abscesses several weeks prior but did not seek medical attention until that morning when they became "fiery red" and decedent felt extremely weak. Decedent's extreme obesity was also noted in the record.

While in St. Anthony's Hospital, decedent was seen by a pulmonary specialist, Dr. Zygmont Orzechowski, who also noted that a steering wheel rubbed on decedent's abdomen causing the pustules. One of his impressions was acute cellulitis of the abdomen possibly causing septic shock.

When decedent was hospitalized, Petitioner again observed his lower abdominal area and observed that the area of the sores began to turn black. Huch also visited decedent in the hospital and observed that the lower abdominal area had a crescent shape across it. Petitioner testified that for a brief period of time, decedent's condition improved; however, on one of her visits, decedent had difficulty breathing, attempted to get up out of bed and fell to the floor. Decedent had to be resuscitated and was returned to the ICU. A couple of days thereafter, decedent was totally unresponsive and comatose. He died on February 11, 2010. Dr. Kolli's note in the record stated that decedent has cellulitis due to an abdominal abscess and that decedent's death was because of septic shock.

Dr. Kolli was deposed on January 18, 2011, and her deposition testimony was received into evidence at trial. Dr. Kolli testified that she had treated decedent for a variety of health problems from August 1, 2007, until his death in February, 2010. Prior to decedent's hospitalization on January 29, 2010, Dr. Kolli had most recently seen him on September 24, 2009. At that visit, decedent weighed 268 pounds and had been gaining weight for the preceding several months. She did describe him as being obese. When Dr. Kolli saw decedent on January 29, 2010, she observed that he had several skin abscesses on the lower abdominal wall. She described the area as being fiery red and that it appeared "...like a crescentic area." Dr. Kolli opined that the cause of decedent's death was cellulitis of the abdominal wall and indicated this as being the cause of death on decedent's death certificate.

In regard to the issue of causality, Dr. Kolli testified in response to a hypothetical question that decedent's work activities, which included his lower abdominal wall being rubbed by the steering wheel of the lull, that this trauma could have caused or aggravated the cellulitis. On cross-examination, Dr. Kolli testified that she had reviewed the photographs of the lull and that she was familiar with the size and shape of decedent's body and that she was reasonably certain that his lower abdominal area would have come into contact with the steering wheel. Dr. Kolli also stated that the amount of infection and the location were very unusual and that it was unusual that it was limited to that specific area of the anatomy. Dr. Kolli further opined that a steering wheel rubbing back and forth across the stomach could cause a "mechanical trauma." Dr. Kolli reaffirmed her opinion that the cellulitis was either caused or aggravated by the contact between the lower abdominal wall and the steering wheel.

Dr. Kolli was questioned about whether poor hygiene on the part of decedent, which Respondent's counsel referred to as decedent's failure to seek medical care earlier, could have caused the cellulitis condition to spread. Dr. Kolli agreed that ignoring it could have caused her to spread. The medical records indicated that decedent had observed some abscesses several weeks prior, but it was not until they became "fiery red" and extremely symptomatic that he sought medical treatment.

John Bush, Respondent's Site Safety Manager, testified at the trial of this case and stated that he knew decedent and that decedent did have a very large lower abdominal area. Bush testified that he observed decedent operating the lull and that decedent's stomach did not come into contact with the steering wheel. Bush also stated that it would have been virtually impossible for someone to operate the lull if there stomach was in contact with the steering wheel because of the turning mechanism. He further testified that the lull operator's seat was adjustable.

Bush also took a number of photos that were introduced into evidence at trial. Some of the photos included measurements of the interior of the cab of the lull. There were a number of other photos which two other employees, Rodney Moss, and Jerry Bathon, were seated in the lull and neither of their lower abdominal areas came into contact with the steering wheel. One of the photos revealed that there was a gap between Moss' lower abdomen and the steering wheel of approximately six and one-half inches. A video showing Moss operating the lull was also received into evidence. Bush testified that Moss had a very similar physique to that of decedent and that the other employee, Jerry Bathon, also operated the lull and that his stomach did not come into contact with the steering wheel.

Petitioner's counsel recalled Huch to testify and he stated that he knew both Moss and Bathon and that decedent had a substantially larger lower abdominal area than what they did.

At the direction of Respondent, Dr. Stephen J. Schrantz, an infectious disease specialist and internist, reviewed decedent's treatment records. Dr. Schrantz's report of December 12, 2012, was received into evidence at trial. In regard to the steering wheel rubbing against Petitioner's lower abdominal area, Dr. Schrantz stated that "this is a plausible theory from a mechanism of injury viewpoint, but it is suspect regarding the amount of repeated injury that would have to be ignored in order to lead to this condition." Dr. Schrantz was not able to opine as to how a

steering wheel could cause the injury in this specific situation; however, he also commented that "any other chronic chafing could lead to a similar injury."

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that the decedent, Michael Toon, sustained a repetitive trauma injury arising out of and in the course of his employment for Respondent that manifested itself on January 28, 2010.

The Arbitrator further concludes that as a result of the aforementioned repetitive trauma injury, Michael Toon died on February 11, 2010.

In support of these conclusions the Arbitrator notes the following:

The Arbitrator notes that the Application alleged a date of accident of February 3, 2010; however, Michael Toon's symptoms manifested themselves on January 28, 2010.

The testimony at trial of the witnesses, the testimony of Dr. Kolli and the medical records consistently noted that the decedent, Michael Toon, was extremely obese and had a very large lower abdominal area. Both Rebecca Toon and Connie Sauerwein described the deceased as being "pear-shaped."

The Arbitrator notes that the rubbing of the steering wheel of the lull on Michael Toon stomach area was consistently noted in the St. Anthony's medical records.

The Arbitrator finds the testimony of Merryl Huch to be more credible than the testimony of John Bush, in regard to decedent's physique and the fact that the steering wheel of the lull rubbed against decedent's lower abdominal area. Huch specifically testified that decedent's lower abdominal area was considerably larger than those of the two other employees, Moss and Bathon.

The Arbitrator finds the testimony of the treating physician, Dr. Kolli, to be credible in regard to the issue of causality. The Arbitrator also notes that Respondent's medical expert, Dr. Schrantz, was in agreement that the mechanism of injury was plausible.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator finds that all of the medical services provided to Michael Toon were reasonable and necessary and that Respondent is liable for the payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 4 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that the decedent, Michael Toon, did not engage in any insanitary or injurious practices.

In support of this conclusion the Arbitrator notes the following:

The unrebutted testimony was that Michael Toon would shower every day shortly after returning to his residence after work.

The medical records indicate that Petitioner had noticed some lesions in his lower abdominal area several weeks prior to January 28, 2010; however, the symptoms did not become severe and the appearance was not "fiery red" until that time. The fact that the decedent did not seek medical treatment prior to that time does not constitute an insanitary or injurious practice.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Sansardo,
Petitioner,

vs. NO: 13 WC 05477

14IWCC0373

Benchmark Construction Company,
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 average weekly wage and penalties, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Mr. Sansardo's overtime, in addition to his grease time, was mandatory and is to be included in his average weekly wage.

According to Section 10 of the Act,

> If the employee's employment began during the 52 week period, the earnings during employment are divided by 'the number of weeks and parts thereof' during which the employee actually earned wages.

According to Petitioner's exhibit A, Mr. Sansardo worked 46 days between Thursday, July 26, 2012 and Thursday, September 20, 2012, representing 9.2 weeks. His hourly rate of pay was $43.30. He worked 429.5 hours. His earnings during this period were $18,597.35. This yields an average weekly wage of $2,021.45.

The Commission further vacates the Arbitrator's award of penalties and finds that the Respondent's actions were not unreasonable or vexatious. The Respondent paid TTD benefits, but did not include overtime in its calculation. They did, however, include the mandatory grease time. In excluding overtime, the Respondent relied on the union contract, which was silent as to whether overtime was mandatory and Mark Atkins' testimony that overtime was voluntary. The exclusion of overtime was not unreasonable.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 3, 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 $1,295.47 per week for a period of 45-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $4,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

MAY 20 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

drd/tdm
o- 03/19/14
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SANSARDO, ANTHONY
Employee/Petitioner

Case# **13WC005477**

14IWCC0373

BENCHMARK CONSTRUCTION CO
Employer/Respondent

On 9/3/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

2999 LITCHFIELD CAVO LLP
ROBERT LAMMIE
303 W MADISON ST SUITE 300
CHICAGO, IL 60606-3309

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)

Anthony Sansardo
Employee/Petitioner

v.

Benchmark Construction Co.
Employer/Respondent

Case # 13 WC 05477

Consolidated cases: _____

14IWCC0373

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **August 2, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?

G. [x] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? **ISSUE DEFERRED**

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [x] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **September 20, 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.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

The parties agreed to defer the issue of incurred medical expenses to a future hearing. T. 6.

Respondent shall be given a credit of **$53,800.35** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$53,800.35**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent contested "arising out of" at the hearing but took accident out of dispute in its proposed decision. The Arbitrator finds that Petitioner sustained a compensable work accident on September 20, 2012. At the hearing, Respondent agreed that the Arbitrator should find causation if she found accident. Accordingly, the Arbitrator finds that Petitioner established causal connection.

For the reasons set forth in the attached decision, the Arbitrator finds that all of Petitioner's overtime was mandatory. Based on this finding, the Arbitrator includes all of Petitioner's overtime earnings (at a straight time rate) in her wage calculation and finds Petitioner's temporary total disability rate to be the applicable maximum, or $1,295.47 per week. The parties stipulated Petitioner was temporarily totally disabled from September 20, 2012 through the hearing of August 2, 2013. T. 5. The Arbitrator awards Petitioner temporary total disability benefits at the rate of $1,295.47 per week from September 20, 2012 through August 2, 2013, a period of 45 2/7 weeks. Respondent is to receive credit for the $53,800.35 in TTD it paid prior to the hearing, per the parties' stipulation. Arb Exh 1.

For the reasons set forth in the attached decision, the Arbitrator finds that Respondent acted in an objectively unreasonable manner in calculating Petitioner's average weekly wage and, based on that calculation, underpaying temporary total disability benefits. The Arbitrator further finds that Respondent is liable for Section 19(k) penalties in the amount of $888.36, Section 19(l) penalties in the amount of $9,510.00 and Section 16 attorney fees in the amount of $355.35.

Petitioner claimed prospective care at the hearing but withdrew this claim, for the time being, in his proposed decision. The Arbitrator denies Petitioner's claim for prospective treatment, without prejudice.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

9/3/13
Date

ICArbDec19(b)

SEP 3 - 2013

Anthony Sansardo v. Benchmark Construction Company
13 WC 5477

Discussion re Remaining Disputed Issues

On August 2, 2013, the Arbitrator conducted a hearing pursuant to Sections 19(b) and 8(a) of the Act. At that hearing, the parties placed a number of issues in dispute. Respondent agreed that Petitioner, a heavy equipment operator, sustained an accidental fall at a Respondent jobsite on September 20, 2012, but contended that this fall did not arise out of Petitioner's employment. Respondent also indicated it would not contest causation if the Arbitrator found in Petitioner's favor on the issue of accident. T. 6-7. Petitioner placed prospective care at issue and indicated he was seeking an award of psychiatric care and certain medication. Arb Exh 1. T. 5-6.

The parties narrowed the disputed issues in their proposed decisions. Respondent is no longer contesting accident and Petitioner is no longer seeking prospective care. Accordingly, the Arbitrator focuses on the remaining disputed issues of average weekly wage and penalties/fees. Petitioner claims a wage of $2,257.79, based on his argument that his overtime was mandatory. Petitioner also claims that Respondent is liable for penalties and fees based on its failure to include all overtime earnings in calculating his wage and paying temporary total disability. Respondent claims an average weekly wage of $1,787.67 based on its argument that only a limited portion of Petitioner's overtime, i.e., "grease time," was mandatory. Respondent also claims it is not liable for penalties and fees. Respondent agrees with the claimed period of temporary total disability, i.e., September 20, 2012 through the hearing of August 2, 2013. T. 5. Arb Exh 1.

Wage-Related Evidence

Petitioner testified he began working for Respondent about two months before his accident of September 20, 2012. T. 15. On September 20, 2012, he fell backward while on top of an excavator. He fell diagonally, about 7 or 8 feet, and landed on a steel bucket, striking his right upper back against the "teeth" of the bucket. T. 16. He was initially taken via ambulance to Christ Hospital, where he was diagnosed with several injuries, including multiple rib and vertebral fractures. On September 23, 2012, he was transferred to Northwest Community Hospital, where he stayed until October 1, 2012. T. 18-19. He was readmitted to Northwest Community Hospital on June 18, 2013. Dr. Regan performed a lumbar fusion during this re-admission. T. 20.

Petitioner testified he has been a member of Local 150, the AFL-CIO International Union of Operating Engineers, since about 1995 or 1996. T. 25. His union hall "dispatched" him on July 25, 2012 and instructed him to report to Respondent the following day. He first worked for Respondent on July 26, 2012, a Thursday. He continued working as a union operating engineer for Respondent until the accident. T. 25-26.

Petitioner testified he maintained a diary or log during the entire time he worked for Respondent. In his diary, he logged each job location and foreman. He also logged the machines he operated and the hours he worked each day. He testified he made entries in his diary at the end of each workday. T. 27. His primary purpose in maintaining the diary was to ensure he was being paid correctly. T. 27. He relied on the entries in the diary in testifying as to his assignments and hours before the accident.

Petitioner testified that, on July 26, 2012, he reported to a Respondent foreman named Eric at a jobsite at 55th and Damen. Eric did not tell him his normal work week would be Monday through Saturday. T. 30. Eric told him he would be operating a front end loader for two days, filling in for an operator who was absent. T. 31. Petitioner testified he operated the front end loader for 10 ½ hours each day on July 26 and 27. T. 28, 31, 36, 38. Petitioner testified that, as an operator rather than a foreman, he has no discretion as to when his workday ends. It is his foreman who makes that decision. He starts at 6:30 AM, begins digging at 7:00 AM and continues working until his foreman says he can stop. T. 37-38, 77.

Petitioner testified that, on Saturday, July 28, 2012, he operated a Caterpillar 314 at a jobsite on Wacker Drive at the direction of a foreman named Richie. T. 38-39. Petitioner testified he operated this machine for 8 ½ hours that day, with the ½ hour representing "grease time" at time and a half per the collective bargaining agreement. Petitioner explained that, when he operated certain types of "Class 1" equipment for eight hours, he was automatically entitled to an extra half hour of "grease time." T. 39, 67.

Petitioner testified he next worked for Respondent on Monday, July 30, 2012. On that day and the next, he again operated a Caterpillar 314 at the Wacker Drive site, under Richie's direction. On each of those days, he operated the Caterpillar 314 for 8 ½ hours, including "grease time." T. 40.

Petitioner testified that, on August 1st, 2nd and 3rd, he operated a JCB excavator at a jobsite at 55th and Prairie. His foreman at that site was Raphael. On August 1st and 2nd, he worked 9 hours per day, including "grease time." On Friday, August 3rd, he worked 8 ½ hours, including "grease time." T. 42-43.

Petitioner testified he did not work on Saturday, August 4th. On Monday, August 6th, he began working at a jobsite at 119th and Harvard. He operated a Komatsu 138 excavator at this site. Jorge Cantu was his foreman. Cantu told him when his workday ended. He was "just there to run the machine." T. 45. On August 6th, he worked 9 hours, including "grease time." On August 7th, he worked 9 ½ hours, including "grease time." On August 8th, he continued operating the same excavator but at a different location, 119th and Yale. Cantu was still his foreman. He worked 9 hours, including "grease time," that day. T. 45. On Thursday, August 9th, he continued operating the excavator at 119th and Yale. He worked 10 ½ hours that day, including "grease time." In his diary, he wrote "owes one," meaning that Cantu owed him an extra hour from Monday, August 6th, when he had actually worked 10 rather than 9 hours due to it taking time for the newly formed crew to "gel." T. 46-47.

Petitioner testified he continued operating the same excavator thereafter, until September 7, 2012 (with the exception of Labor Day), at which point he began operating both the excavator and a bobcat. Cantu remained his foreman during the entire period between August 6, 2012 and the accident. Petitioner testified he was the only operator on this crew. The crew consisted of him, Cantu, two laborers and a pipefitter. T. 47-48.

Petitioner testified he alternated, or "jumped," between the excavator and bobcat all day on September 7th, even though the union contract allows only one "jump" per workday. He "jumped" back and forth on September 7th because he enjoyed the work and did not want to cause any trouble for Cantu. Even though he "jumped," he was entitled to "grease time" on September 7th because the excavator qualified as a "grease time" piece of equipment. T. 51.

Petitioner's job diary, PX A, was admitted into evidence, with Respondent waiving hearsay. T. 59.

Petitioner identified PX B as a group of all the paychecks he received from Respondent prior to the accident. T. 61. Of the weeks he worked before the accident, the first and last weeks were partial. T. 61. Respondent always paid him at the rate of $43.30 per hour. T. 61. PX B was admitted into evidence, with Respondent waiving hearsay. T. 62.

Petitioner identified PX C as a group of all the paychecks he received from Respondent other than the paychecks covering the first and last weeks. T. 64. PX C was admitted into evidence, with Respondent waiving hearsay. T. 65.

Petitioner identified PX D as the union contract. Petitioner testified he is familiar with parts of this contract. T. 66. Petitioner testified that, if he is the only operator at a jobsite, and the work at that site is going to continue beyond eight hours, he cannot abandon his machine. T. 66. If he did this, he would be replaced. If he told the employer in advance that he had to leave after eight hours, he is not sure what would happen. There have been times when the work at a site has come to a standstill because he had to leave at the eight-hour point and there was no other operator at the site. T. 67. As soon as he starts a machine at a site, he is entitled to 8 ½ hours of pay, even if he does not work that long, assuming the machine he is operating is a "Class 1" machine. If he left a site at the eight-hour point and the company called in another operator to take over for him on a "Class 1" piece of equipment, that replacement operator would be entitled to 8 ½ hours of pay. T. 67. The Arbitrator admitted PX D into evidence, with Respondent waiving hearsay. T. 71.

Petitioner's counsel identified PX E as a group of letters he sent to Respondent's counsel between May 9 and June 30, 2013, claiming an underpayment of temporary total disability benefits and asking Respondent to correct the underpayment. T. 68-69. The Arbitrator admitted PX E into evidence, with Respondent waiving hearsay. T. 72.

Petitioner acknowledged speaking with Stephanie Bolen, the adjuster, concerning the issue of overtime. Petitioner testified he spoke with Bolen via telephone on the second or third day he was in the hospital. He had so much medication in him he cannot completely recall the conversation. He asked Bolen if she would be recording the conversation. Bolen replied, "yes." He then told Bolen he respectfully declined to give a recorded statement. He recalls Bolen telling him that Respondent would have accommodated him had he wanted to leave a jobsite after working for eight hours. T. 77. He could not recall whether he told Bolen the overtime he performed was voluntary. T. 77-78.

Petitioner testified that Jorge Cantu never told him he could leave at the eight-hour point and Respondent would arrange for a replacement. On some days, he questioned Cantu as to what their goal was and how long they were likely to work. T. 78. Cantu told him and the other crew members their goal was to perform "20 water services per day." Each water service consisted of disconnecting the existing service and tying on the new service. Work-wise, this involved excavating a trench, getting down to the existing water main, putting in the new water main, dropping a trench box if the hole was deeper than 4 or 5 feet and having a laborer and plumber get in the hole to disconnect the old service and tap into the new service. Once this was accomplished, they would move on to the next house. T. 79.

Petitioner testified his crew met Cantu's goal on only one day, the Friday before his accident. Petitioner testified they were able to meet the goal that day only because they had three trucks available to them. That enabled him to excavate directly into a truck. On every other day, they had only one truck available, which meant he had to "move [his] spoil" twice. Petitioner testified it is impossible to complete 20 water services in eight hours if only one operator and one truck are available. T. 80-81.

Petitioner testified that, during the period he worked for Respondent, he worked with another operator only the first two days. Thereafter, he was the only operator and worked only with his own crew. He did not know what other Respondent operators might have done, work-wise, after the first two days. T. 89-90.

Petitioner testified he underwent therapy, four epidural injections and two SI joint injections before ultimately undergoing back surgery. T. 81. Respondent's various Section 12 examiners agreed with the surgical recommendation. Respondent authorized and paid for the surgery. T. 87. Petitioner was wearing a back brace as of the hearing. To his recollection, Dr. Regan, his surgeon, prescribed this brace. T. 82-83. Dr. Regan does not want him to re-start therapy until November of 2013. T. 84. He is scheduled to return to Dr. Regan on August 9, 2013. Since the accident, no physician has released him to work. T. 92-93. He remains under active medical treatment. T. 93.

Under cross-examination, Petitioner testified he insisted on being transferred from Christ Hospital to Northwest Community Hospital. He insisted on this because Christ Hospital was far from his home and his doctors were on staff at Northwest Community. T. 95-96. He had taken Norco at his doctor's recommendation at some point prior to the work accident but

"was not taking any narcotics" on the day of the accident. T. 96. He had not worked for about two weeks as of July 25, 2012, the day his union hall "dispatched" him to Respondent. T. 97. Between August of 2011 and July 14, 2012, he worked for NPL. When a job ends, you call "dispatch" to put yourself back on the "out of work" list. When you call, you are put at the end of the list. T. 99.

Petitioner acknowledged he could have worked on Kedzie rather than Damen on July 26th. He knows the cross street was 55th. He does not live in Chicago. He is positive he made an entry in his diary at the end of each workday. T. 100. The "grease time" he is paid for operating certain types of equipment is mandatory overtime per the union contract. The contract does not otherwise speak to the issue of mandatory overtime. T. 101. He contends that his non-grease time overtime was mandatory even though the contract does not characterize it as such. He bases this on his experience. If he is in the middle of a dig and has guys working in an 11-foot hole at the eight-hour point, he cannot simply leave. If he were to do so, he would not have a job the next day. T. 102. He acknowledged that his non-grease time overtime hours were irregular. Each workday is different. On some jobs, he has to finish up by putting a plate over a hole for safety reasons. T. 103-104.

On redirect, Petitioner reiterated he was not on Norco when the accident occurred. He recalled having his blood drawn for testing after he arrived at the hospital, following the accident. T. 108. He probably used his asthma inhaler on the day of the accident, before the accident occurred, but that did not affect his ability to work. T. 112. He has been an asthmatic for over twenty years. T. 106. The accident took place between 2:00 and 2:30 PM. He worked several hours before the accident. T. 113. He did not take any Norco between the time he got up that morning and the time the accident occurred. T. 113.

Jorge Cantu testified on behalf of Petitioner, pursuant to subpoena. PX G. Cantu denied discussing the claim with Petitioner's counsel or Respondent's witnesses prior to testifying. T. 119-120.

Cantu testified he was Petitioner's foreman between August and September 20, 2012. He ran a 5-man crew during this period. Petitioner was the only operator on this crew. T. 121. Cantu testified as follows about the length of Petitioner's workday:

> "Q: Did [Petitioner] have to work until the job was finished every day, sir?
>
> A: Yes.
>
> Q: And that was your instructions to him?
>
> A: To [Petitioner]?
>
> Q: Yes.

A: Yes.

Q: Now, many times he worked over 8 hours, correct?

A: Correct.

Q: And he worked more than 8 hours because he had to stay until the job was finished, correct?

A: Until the equipment is not used. If we have to do just something light or something, we dismiss, you know, [Petitioner] could go.

Q: If you were still in need of an operator, he had to stay until it was finished, correct?

A: Yes, if we need an operator, yes."

T. 122-123.

Cantu testified he tried to have his crew complete as many water services as possible each day. He wanted to complete eight to twelve per day, "fifteen if [he] could." T. 123. Petitioner showed up every day and did his job "okay." T. 124. Most days they only had one truck available that Petitioner could dump his excavations into. Cantu did not recall having three trucks available on a day shortly before the accident. T. 125. His crew never completed twenty water services in one day. T. 126. Petitioner operated an excavator and sometimes a bobcat. There were no days when Petitioner alternated between these pieces of equipment many times because Cantu operated the bobcat most of the time. T. 126-127.

Cantu testified he is a member of Local 2, the laborers union. He is not a member of Local 150, the operating engineers union. As of August 2013, he will have worked one year for Respondent. T. 127. Cantu admitted being told he was not supposed to operate a bobcat since he is not a Local 150 member. Despite this, he operated the bobcat "a bunch of times." T. 128-129.

Under cross-examination, Cantu testified he does not know what the operating engineers' contract provides with respect to overtime. T. 129. Regardless, he told Petitioner he had to work overtime to complete the work from time to time. T. 129. No one affiliated with Respondent told him that his crew members could not leave work at the eight-hour point and had to stay until the work was finished. T. 130.

On redirect, Cantu reiterated that Petitioner was the only operator on his crew in August and September of 2012. Petitioner had to stay past the eight-hour point if work remained to be done. T. 131.

Under re-cross, Cantu could not recall any instance where he called a substitute operator to finish the work because Petitioner had to leave. T. 132-133.

Stephanie Bolen, a senior claims adjuster with Third Coast Underwriters, testified on behalf of Respondent. Bolen testified that Respondent was her client as of Petitioner's accident. T. 136. On September 25, 2012, she spoke with Petitioner via telephone. She believes Petitioner called her that day. T. 136. Petitioner called her because he wanted to be transferred from Christ Hospital to Northwest Community Hospital, which was closer to his home. T. 137. She attempted to take a recorded statement from Petitioner at that time. Petitioner declined to give a recorded statement but indicated he would answer her questions. T. 137. She took detailed notes of this conversation while she was speaking with Petitioner. She identified RX 2 as her notes. T. 138. She asked Petitioner about the accident and about his earnings. Petitioner told her he is a Local 150 member and his hourly rate of pay is $43.40. Petitioner also told her he receives time and a half "for anything over eight hours." T. 139. She asked Petitioner if overtime was voluntary or mandatory and he indicated it was voluntary. T. 139.

Under cross-examination, Bolen acknowledged speaking with Petitioner several times. T. 140. Over Respondent's objection, she testified she followed up with Respondent after speaking with Petitioner about overtime. She obtained a wage statement from Respondent. She inquired about overtime and "was told that [Local] 150 operators get a mandatory half hour daily" of what is called "grease time." She included this mandatory overtime in her calculation of Petitioner's average weekly wage. She believes she discussed the overtime situation with Donna Cibelli, her contact person at Respondent. T. 144. She assumed Petitioner worked Monday through Friday and that he thus worked 42 ½ hours per week, including the mandatory "grease time." She believes she multiplied 42 ½ hours by $43.40, after verifying Petitioner's hourly rate with Respondent. She assumes, based on her handwritten notes, that Petitioner told her he worked 52 to 58 ½ hours per week and that he started at 6:30 AM and stayed until the work was done. T. 146-147. She did not call Petitioner's foreman, Jorge Cantu, to verify this. She talked with Respondent and obtained a wage statement. T. 147. She recalled receiving letters from Petitioner's counsel claiming an underpayment. She also recalled receiving Petitioner's paychecks. T. 147. PX B.

Mark Atkins, Jr. also testified on behalf of Respondent. Atkins testified he works as a project manager for Respondent. T. 153. He is familiar with the operating engineers contract. PX D. Article 8, Section 1 of the contract provides that, when an operator uses certain kinds of equipment, he is entitled to a half hour of pay at time and a half in order to grease/maintain that equipment. T. 154. That extra time is mandatory overtime. T. 154. The contract does not contain any other provision concerning mandatory overtime. T. 155. Respondent does not require any mandatory overtime of its operators other than the mandatory "grease time." T. 156.

Under cross-examination, Atkins testified that Cantu was in charge of the crew that Petitioner worked on. He was present in the courtroom during Cantu's testimony. He never worked on Cantu's crew. He visited the jobsites that Petitioner worked at. Typically, he stays at any one jobsite for about fifteen to twenty or thirty minutes. The work that he does at a jobsite is purely supervisory. T. 157-158. He has no reason to disagree with the overtime hours reflected on Petitioner's paychecks. T. 158-159. He does not know whether only one truck was available at the sites where Petitioner worked. He can say that Cantu typically orders one truck for the work he performs. T. 159. If a Respondent operator had to leave at the eight-hour point and he had to obtain a replacement operator from the union hall, he would have to pay that replacement operator eight and a half hours. Typically, however, he is able to obtain a replacement operator from one of his other crews. Respondent generally has eight to ten crews working, mainly on the south side. He would call another crew and get an operator to cover for an hour or two at the end of the workday. He never did this during the time that Petitioner worked on Cantu's crew. T. 160. He has never been unable to find a replacement operator from another Respondent crew because most Respondent employees "jump at" the chance to perform overtime. T. 161. It is he, rather than a foreman, who is supposed to arrange for a replacement. It could happen that a Respondent foreman would delve into personnel issues but that is not normal procedure. T. 161.

On redirect, Atkins testified that Petitioner never asked him if he could leave at the eight-hour point. T. 162.

Under re-cross, Atkins acknowledged calling Petitioner when Petitioner was in the hospital following the accident. He told Petitioner he thought he was a good employee. It is his impression that Petitioner is currently unable to work. T. 162.

On rebuttal, Petitioner reiterated he had more than one truck available to him on only one day, the Friday before his accident. It was on this day that he and the other members of Cantu's crew completed twenty water services. The following week, the superintendent, Barney, told them they were "one shy of the company record last Friday." T. 165.

Under cross-examination, the following exchange took place:

> Q: Did you ever seek to leave at the end of 8 hours for any emergency or anything like that?
>
> A: There was days that I needed to take care of stuff at home where I'd ask Jorge if we can maybe have an early day for personal matters. But other than that, at the time [Respondent] had so much work and I was happy to work it.
>
> Q: But you were able to get the day when you requested it, correct?

A: Oh, yes, if I needed to get a day off, absolutely, not a day off but to leave early after 8 hours, sure."

T. 165.

On redirect, Petitioner testified he could not recall exactly how often he left early but he knew there were "not many" occasions when this occurred. On those occasions, he was "able to go" once he had parked his trench boxes and machine and plated up the machine. The other members of his crew would still have work to do at that point but he would be finished. His duties revolved solely around operating the equipment. If, however, his required operator duties were not finished at the eight-hour point he had to stay until he finished. T. 167.

Under re-cross, Petitioner acknowledged he enjoyed the overtime pay. T. 167.

Respondent offered into evidence RX 4, the check register that Bolen testified she relied on in calculating Petitioner's average weekly wage. The parties stipulated that Bolen made the handwritten notes that appear on RX 4. T. 183. RX 4 reflects the straight time and overtime earnings Petitioner received from Respondent between July 30, 2012 and September 20, 2012. RX 4 reflects the date of each paycheck and the hours Petitioner worked. With the exception of the last week of employment, RX 4 does not reflect the exact dates on which Petitioner worked.

Respondent also offered into evidence RX 5, a check register pertaining to a different Respondent employee. This check register covers the period January 1, 2012 through January 4, 2013. Respondent offered RX 5 as the wage records of a "comparable" employee, pursuant to the fourth method of wage calculation set forth in Section 10 of the Act. Section 10 describes the circumstances under which a comparable employee's wages are to be considered:

> "Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which, **during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer."**

[emphasis added]. The Arbitrator sustained Petitioner's objection to the admission of RX 5 and marked RX 5 as a rejected exhibit. T. 186-188. The Arbitrator does not view Petitioner's employment by Respondent as casual. Petitioner was a union employee. The parties agree on all wage-related issues other than the narrow issue of whether his non-grease time hours

should be included in calculating his wage. Petitioner's pre-accident employment by Respondent was relatively brief but there is no lack of information concerning his earnings. The Arbitrator further notes that the earnings set forth in RX 5 do not cover the 52 weeks preceding Petitioner's September 20, 2012 accident. Rather, they cover the calendar year 2012.

CONT'D

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on September 20, 2012 arising out of and in the course of his employment by Respondent? Did Petitioner establish causal connection?

At the hearing, Respondent acknowledged Petitioner fell at a jobsite on September 20, 2012 but maintained this fall did not arise out of Petitioner's employment. T. 7. Respondent took the position that the fall resulted from Norco usage. Petitioner denied using Norco as of the accident.

In its proposed decision, Respondent took accident out of dispute and acknowledged there were no toxicology studies in the initial hospital records other than a negative blood alcohol test result. PX 1, p. 22 out of 85.

Based on the foregoing, the Arbitrator views accident as a now-stipulated issue. The Arbitrator finds that Petitioner sustained a compensable work accident on September 20, 2012. The Arbitrator also finds in Petitioner's favor on the issue of causation, noting that, at the hearing, Respondent's counsel stated the Arbitrator should find in Petitioner's favor on the issue of causal connection if she found accident. T. 6.

What is Petitioner's average weekly wage? What is Petitioner's TTD rate? Was there a TTD underpayment? Is Respondent liable for penalties and fees?

As stated at the outset, Respondent agrees that Petitioner's hourly rate was $43.40 and that Petitioner was entitled to mandatory "grease time" overtime, i.e., a half hour at time and a half, after eight hours if he used certain equipment that required greasing. The dispute lies in whether the non-grease time overtime, which was substantial but varying, was also mandatory and includable in the calculation of Petitioner's wage.

In attempting to arrive at Petitioner's average weekly wage, the Arbitrator has compared Petitioner's testimony and diary entries concerning the dates and hours he worked against Respondent's check register (RX 4) and accompanying handwritten notes by Bolen. The Arbitrator notes that, while RX 4 states the date of each paycheck and the amount of regular and overtime hours Petitioner worked each week, it does not reflect the exact dates on which Petitioner worked. Nor does it reflect which of the many listed overtime hours represent mandatory "grease time" overtime hours. The handwritten notes on RX 4 reflect that Bolen arrived at an average weekly wage of $1,787.67 by taking earnings of $12,513.71 [$1,840.25 (representing 40 regular hour and 2.5 overtime hours @ $43.40) multiplied by 6 plus $1,472.20] and dividing those earnings by 7, representing 7 weeks. It appears to the Arbitrator that Bolen

did not include any of Petitioner's earnings from the first and last weeks of employment in her calculation, even though those earnings are reflected on RX 4, PX B and PX C. Bolen offered no explanation for this at the hearing.

Initially, the Arbitrator calculates wage without giving consideration to the non-grease time overtime. The Arbitrator arrives at total earnings of $14,727.11 by adding $737.80 (representing 17 hours at straight time) for the first week of employment, during which Petitioner worked two weekdays (per RX 4) on a piece of equipment that entitled him to grease time and $1,475.60 (representing 32 hours at straight time) for the last week of employment (i.e., through 9/20/12), during which Petitioner worked four days on a piece of equipment that entitled him to grease time, to $12,513.71 [$737.80 + $1,475.60 + $12,513.71 = $14,727.11]. The Arbitrator divides $14,727.11 by 8 rather than 7 because the evidence supports the conclusion Petitioner worked a total of about 8 rather than 7 weeks. [RX 4 reflects that Petitioner worked 40 days through September 20, 2012. In its proposed decision, Respondent agrees that Petitioner's work week consisted of 5 days. 40 divided by 5 equals 8.] The result is $1,840.88. When $1,840.88 is divided by 2/3, the result is $1,227.25. When $1,227.25 is multiplied by 45 2/7 weeks, the stipulated TTD period, the result is $55,577.03.

The Arbitrator turns to the issue of whether the non-grease time overtime was mandatory. Petitioner maintains that, in those instances where the machine he was operating was still in use at the 8-hour point, he was not free to simply shut the machine off and leave work. He testified that, had he abandoned his machine at a point where his crew members were working in a deep hole of his creation, he would not have had a job the next day. T. 102. Petitioner's foreman, Jorge Cantu, confirmed that Petitioner had to continue operating his assigned machine "until the job was finished." T. 121-122. Cantu also confirmed that his goal was to have his crew complete as many water services as he could per day. T. 123. He did not recall any instance where he had to request another operator to replace Petitioner. T. 132-133. Bolen testified that Petitioner told her his overtime was voluntary. Bolen further testified that she discussed Petitioner's earnings with Respondent and learned that "grease time" was in fact mandatory. Bolen indicated she included Petitioner's "grease time" in her wage calculation. T. 144. Atkins testified that "grease time" is the only mandatory overtime addressed in the union contract. T. 154-155. Atkins further testified that Respondent does not require any overtime other than the "grease time" specified in the contract. T. 156. Atkins acknowledged that Petitioner worked many overtime hours for Respondent, with those hours varying from week to week, that Petitioner was the only operator on Cantu's crew and that Cantu typically ordered only one truck. Atkins also acknowledged he never had to arrange for a replacement operator on Cantu's crew during Petitioner's tenure. T. 160, 162. He indicated he would typically have no difficulty arranging for such a replacement since his employees "jump at" overtime. T. 160.

In Freesen, Inc. v. Industrial Commission, 348 Ill.App.3d 1035, 1042 (4th Dist. 2004), the Appellate Court held that the Commission erred in including overtime earnings in calculating wage where there was no evidence that: "1) [the claimant] was required to work overtime as a condition of his employment; 2) he consistently worked a set number of overtime hours each

week; or 3) the overtime hours he worked were part of his regular hours of employment." [emphasis added] The Arbitrator, having considered the foregoing testimony and the wage-related documents, finds that Petitioner was required to work overtime as a condition of his employment and as a result of the unique nature of the skills he brought to the job. Cantu's crew included only one operator. Cantu's crew was charged with the task of removing old water services and installing new ones. Petitioner's operator/excavator skills allowed this task to be accomplished. Petitioner's co-workers could not "get in a hole" to do the changeover unless and until a hole was created. If the changeover was still in progress at the 8-hour point, Cantu would not let Petitioner leave. Nor would safety concerns have allowed Petitioner to leave without "buttoning up" the street by placing a plate over the hole. T. 103. See Weyker v. Imperial Crane Service, 2008 Ill.Wrk.Comp. LEXIS 925 and Mazurkiewicz v. City of Chicago/Department of Aviation, 2012 Ill.Wrk.Comp. LEXIS 562.

Based on RX 4 and the calculations set forth in PX C and D, the Arbitrator finds that inclusion of all of Petitioner's overtime earnings creates a wage giving rise to the maximum applicable temporary total disability rate of $1,295.47.

The Arbitrator turns to the issue of whether there was an underpayment of benefits. The Arbitrator finds there was an underpayment regardless of whether all overtime, or only the "grease time," is included in the wage calculation. The parties agree that Respondent paid $53,800.35 in TTD benefits prior to trial. As stated above, when a TTD rate of $1,227.25 is multiplied by 45 2/7 weeks, the stipulated TTD period, the result is $55,577.03. When the applicable maximum TTD rate of $1,295.47 is multiplied by 45 2/7, the result is $58,666.27.

The Arbitrator turns to the issue of whether Respondent is liable for penalties and fees. Petitioner maintains that Respondent acted in an objectively unreasonable manner in failing to consider all of his overtime hours and pay benefits at the applicable maximum rate. Respondent contends it is not liable for penalties or fees, arguing that it included the mandatory "grease time" overtime in its wage calculation.

The Arbitrator takes a somewhat different view. The Arbitrator finds that Respondent acted in an objectively unreasonable manner in failing to include all of Petitioner's regular and mandatory "grease time" earnings in its wage calculation. RX 4, considered in the context of Bolen's testimony, makes it clear that Bolen failed to consider all of Petitioner's "actual earnings" and the "weeks and parts thereof" per Section 10. Bolen did not include Petitioner's regular and "grease time" earnings from July 26 and 27, 2012 and from September 17 through September 20, 2012. Had Bolen included these earnings, and divided the total by 8 weeks, she would have arrived at a TTD rate of $1,227.25, as demonstrated above. The Arbitrator elects to award penalties and fees on the difference between $55,577.03 [$1,227.25 x 45 2/7 weeks] and $53,800.35, i.e., $1,776.73. The Arbitrator awards Section 19(k) penalties in the amount of $888.36 [50% of $1,776.73] and Section 16 attorney fees in the amount of $355.35 [20% of $1,776.73]. The Arbitrator also awards Section 19(l) penalties in the amount of $9,510.00 [$30.00/day multiplied by the 317 days that passed between September 20, 2012 and the

hearing of August 2, 2013.]

Is Petitioner entitled to prospective care?

At the hearing, Petitioner indicated he was claiming prospective care, i.e., a psychiatric evaluation, per Section 8(a). T. 6. Arb Exh 1. In his proposed decision, Petitioner acknowledged the evidence he produced at the hearing did not support this claim. The Arbitrator denies Petitioner's claim for prospective care, without prejudice.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marque M. Smart,
Petitioner,

vs. NO. 12 WC 08366

14IWCC0374

Central Grocers,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering, the issues of the nature and extent of Petitioner's disability and penalties and attorneys' fees for Petitioner, and permanent partial disability, average weekly wage, and impairment rating for Respondent and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 14, 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $36,400.00. 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: MAY 20 2014

Daniel R. Donohoo

o-03/19/14
drd/wj
68

Charles J. DeVriendt

DISSENT

I do not believe the Arbitrator had the authority to determine permanent partial disability because no impairment rating based on the AMA Guides was submitted into evidence. Accordingly, I respectfully dissent from the affirmation of that award by the majority. P.A. 97-18, the Workers' Compensation reform legislation enacted in 2011, added the new section 8.1b, which established that the AMA Guides regarding impairment shall be considered in the determination of permanent partial disability. The new section provides (emphasis added):

"For accidental injuries that occur on or after September 1, 2011, permanent partial disability **shall** be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order."

It is cardinal rule of statutory construction that the word "shall" is mandatory, as opposed to the word "may" which is directory. *See, Schultz v. Performance Lighting, Inc., 984 N.E.2d 569* (2nd Dist. 2013). In addition, in debate in the Senate, the sponsor of the bill, Senator Kwami Raoul, informed the body (emphasis added):

"For the first time ever, the State of Illinois will be embracing the AMA's guidelines with regards to rating impairment. So the Illinois Workers' Compensation Act will have a provision in there that says physicians' impairment shall be rated by physicians that are certified to apply AMA guidelines to rate impairment and that will be the only way that rating of impairment will take place within the Illinois Workers' Compensation System. Thereafter, **rating of disability by arbitrators will take into account the rating impairment**, the occupation of the injured employee, the age of the injured employee, and the employee's future earning capacity and finally, evidence of disability corroborated by the treating medical records."

In addition, although the language of the new section specifies that no single factor shall be the sole factor in establishing determining permanent partial disability, the section also specifies that "the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." That provision does not apply to any other of the specified factors. Therefore, while the impairment rating is not the exclusive factor, it is a factor of such importance that the relevance and weight of any other factor must be "explained in a written order." That language indicates to me that the General Assembly intended the impairment rating to be a fundamental basis for a disability award and deviation from that rating shall be explained. In my opinion the impairment rating becomes a preeminent piece of evidence, similar to a proper utilization review report, which presumptively absolves an employer from the imposition of penalties and fees if it acts in accordance with the report.

Finally, I believe the interpretation of the new section 8.1b is of sufficient importance that it should be addressed by the Appellate Court or the General Assembly. I hope this dissent brings this issue to their attention for possible clarification or amendment. For these reasons, I respectively dissent from the decision of the majority.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMART, MARQUE
Employee/Petitioner

Case# **12WC008366**

CENTRAL GROCERS
Employer/Respondent

14IWCC0374

On 5/29/2013, 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:

1067 ANKIN LAW OFFICE LLC
DEREK S LAX
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

3998 ROSARIO CIBELLA LTD
LAURA D HRUBEC
116 N CHICAGO ST SUITE 600
JOLIET, IL 60432

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

Marque Smart
Employee/Petitioner

v.

Central Grocers
Employer/Respondent

Case # **12 WC 8366**

Consolidated cases:

14IWCC0374

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **February 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?

G. [x] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] What temporary benefits are in dispute?
[x] TPD [ ] Maintenance [x] TTD

L. [x] What is the nature and extent of the injury?

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [x] Other __The need for an impairment rating_____

FINDINGS

On 1/11/12, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between the Petitioner and Respondent.

On this date, the 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, the Petitioner earned $51,480.00; the average weekly wage was $990.00

On the date of accident, Petitioner was 40 years of age, ***single*** with 2 children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$23,833.63** for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$23,833.63**.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of **$577.50** commencing **1/24/2012** through **2/16/2012**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$660.00**/week for **41-2/7** weeks, commencing **2/17/2012** through **12/2/2012**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $145.32 to Physician's Immediate Care, $739.30 to Midwest Orthopedics at RUSH, $1,223.34 to Instant Care, $1,855.00 to Advance Physical Medicine and $5,110.08 to Accelerate Rehabilitation as provided in Sections 8(a) and 8.2 of the Act. Consistent with the stipulation of the parties, Respondent shall receive a credit for all bills paid.

Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of **$594.00** per week for **125** weeks because the injuries sustained caused **25%** loss to the Person as a Whole as provided in Section 8(d)(2) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/23/13
Date

MAY 29 2013

STATEMENT OF FACTS

Petitioner, Marque Smart, worked for Respondent, Central Grocers, as an Order Picker. Petitioner testified that he was as an Order Selector in the frozen foods department who goes around the warehouse and select orders for stores. Petitioner testified that his responsibilities include repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. Petitioner testified this is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Petitioner testified that he is a Union Steward for Respondent as well, and his responsibilities also include training new employees on how to be an Order Selector.

Petitioner testified that on January 11, 2012 he was selecting an order of 90 lbs when he felt a sharp pain in his lower back. Petitioner testified it was his first or second day back to work from being released from a previous injury he sustained. Petitioner testified he was accommodating his supervisor's request to work in the meat department, an area that Petitioner doesn't normally work in. Petitioner testified that he stopped for a minute or two finished his shift and went home. The next day the pain got worse and when he came into work, which was actually that same day as he works the evening shift, he reported it to his supervisor Ozzie, and a report was initiated. Petitioner testified that he continued to work because he felt that he could work through the pain.

Petitioner testified that he began his treatment on January 18, 2012 after he could no longer continue to work because of the pain. Petitioner was sent by Respondent to Physicians Immediate Care. The doctor noted "[Petitioner] had just returned to full-duty work on January 10, 2012 after being off of work for a year with other work-related injuries. He worked as a picker for Central Grocers and he reports that at the end of his shift on Tuesday, January 10, 2012 he was lifting several 90-pound cases of meat when he felt a pain in his left low back. He was able to finish his shift. This incident occurred about a half hour prior to the end of his shift that day. [He] returned to work the next day and reported his back pain to his supervisor. He was offered evaluation at the clinic. He declined and took what he described as a personal day... He stated that he did return to work on Thursday and Friday and worked 8 hours of full duty on each of those days. He was then off Saturday, Sunday and Monday because of the holiday and returned to work again yesterday, which was Tuesday, January 17, 2012. He said that he had persistent pain in his lower back. He says it is much worse in the morning after being in bed. He denies any radiation into his buttock or leg, except for today, he felt for the first time, tingling down his left leg to his foot. [He] denies any non-work-related incident or event correlating with the development of that condition. He rates his pain at a constant 8/10 which is worse at times, sore in quality." Petitioner was given a back support, and diagnosed with a lumbar strain. He was given the day off and told to report back to full duty the next day. (PX 7)

Petitioner followed up with Physicians Immediate Care on January 24, 2012. He again was diagnosed with a lumbar strain, released to full duty but was told to work reduced hours of 4-6 hours. (PX 7)

On February 8, 2012, Petitioner sought the care of Dr. Kern Singh at Midwest Orthopedics at Rush. Petitioner provided a consistent history. After performing an examination, Dr. Singh diagnosed a lumbar muscular strain. The doctor ordered physical therapy and returned Petitioner to full duty on a four-hour per day basis. (PX 13) From February 10, 2012 through March 5, 2012, Petitioner underwent Physical Therapy at Advanced Physical Medicine.

On February 20, 2012 Petitioner returned to Dr. Singh. The doctor noted that Petitioner had started therapy and was experiencing increased pain especially in the refrigeration unit at work. It extended in the axial

low back down the left leg into the posterior thigh and posterolateral calf. His pain was increasing. He was diagnosed with a lumbar strain and was taken off work and prescribed an MRI. On February 27, 2012 Dr. Singh took Petitioner off work until March 7, 2012. (PX 9)

On February 28, 2012, Petitioner underwent an MRI at Instant Care which showed: (PX 9)

1. L3-4 subligamentous posterior disc herniation with extruded nucleus pulposus measuring 5-6 mm indenting the ventral surface of the thecal sac with generalized spinal stenosis and bilateral neuroforaminal narrowing slightly greater on the left.

2. L4-5 6-7 mm broad-based subligamentous posterior disc herniation with extruded nucleus pulposus elevating the posterior longitudinal ligament and indenting the thecal sac with generalized spinal stenosis greater on the right with bilateral neuroforaminal narrowing also greater on the right.

3. At L5-S1 there is a 3-4 mm subligamentous posterior disc protrusion herniation also elevating the posterior longitudinal ligament and indenting the ventral surface of the thecal sac without spinal stenosis with mild bilateral neuroforaminal narrowing, slightly greater on the right.

On March 7, 2012, Dr. Kern Singh noted that he reviewed the MRI which he felt demonstrated a large central disc herniation at L4-5 causing severe spinal stenosis. He also noted there was a central disc osteophyte at L3-4 with moderate to severe stenosis. Dr. Singh diagnosed L3-L5 spinal stenosis and opined that Petitioner needed a minimally invasive L3-5 laminectomy. (PX 10)

At Respondent's request Petitioner underwent an IME with Dr. Carl Graf on March 12, 2012. Dr. Graf obtained a history, and reviewed medical documentation through Dr. Singh's February 8, 2012 visit. After performing an examination, Dr. Graf opined that Petitioner suffered from a lumbar strain. He opined that four weeks of therapy prescribed by Dr. Singh would be considered reasonable and appropriate and further opined that after that point Petitioner would be at maximum medical improvement. The doctor did not feel there was any reason Petitioner required limited hours and stated that he agreed with Physician's Immediate Care that Petitioner could have worked full duty throughout this time. He felt Petitioner could return to work at full duty in an unrestricted fashion. (RX 3)

On May 2, 2012 , Petitioner followed up with Dr. Singh. The doctor continued Petitioner's off work status and prescribing an L3-5 laminectomy/discectomy pending approval. (PX 10)

On May 10, 2012, a deposition of Dr. Singh was performed. Dr. Singh testified that the initial history Petitioner provided was consistent with the injury that he presented with. Dr. Singh stated " ...I would say this is definitely an acute event that there appears to be a causal connection in the sense that lifting heavy objects in a forward flexed position would result in a disk herniation which I do believe was reasonable in [Petitioner's] case." The doctor provided that his provisional diagnosis was L4-5 central disk herniation, L3-L5 spinal stenosis. He recommended a L3-L5 laminectomy and an L4-5 discectomy. Dr. Singh added "[Petitioner has a large disk herniation that would be unlikely to be asymptomatic. His mechanism of injury is a plausible source for a disk herniation. His symptoms are progressive and correlate with an L5 radiculopathy. He develops motor weakness over a period of six to eight weeks once again suggesting an acute change..." (PX 13)

Petitioner testified that following the deposition testimony of Dr. Kern Singh, Respondent authorized the surgical procedure and paid TTD forward from the date of the procedure until he returned to work. Petitioner testified that he did not receive TTD benefits until this time, nor did he receive TPD for reduced shift hours.

On July 6, 2012, Petitioner underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. (PX 10)

On August 6, 2012 Petitioner was seen by Dr. Singh. Petitioner provided that he had complete resolution of his left leg pain and only had residual low back pain but felt significantly improved. He was to continue off work and start therapy three times a week for four weeks. Documents submitted also provide that Petitioner could work with a ten pound lifting, pushing and pulling restriction. As well as minimum bending and stooping. (PX 9)

On August 14, 2012, Petitioner began therapy at Accelerated on referral from Dr. Singh. (PX 8)

On September 10, 2012, Petitioner returned to Dr. Singh stating he had complete resolution of his leg pain and occasional lower back pain. He did still have some symptoms but they were mainly improved. He had been attending therapy and noted increased strength in his low back as well. The diagnosis was the same. The doctor at this time recommended he remain off work and attend a functional capacity evaluation and work conditioning. He would return to the office in six weeks. (PX 10)

On September 21, 2012, Petitioner underwent a FCE at Accelerated Rehabilitation which indicated he provided consistent performance and gave maximum effort. The FCE indicated that he could only perform 91.6% of the physical demands of his job as an order picker. It was determined that Petitioner was unable to successfully achieve occasional squat lifting, occasional overhead lifting, occasional bilateral carrying, frequent power lifting and frequent shoulder lifting. The FCE determined that he was functioning at a medium-heavy level of work which did not meet the requirements of an Order Selector. It was recommended that Petitioner participate in a daily Work Conditioning program 4hrs/day for 3-4 weeks. (PX 8)

On October 22, 2012 Petitioner returned to Dr. Singh in follow-up. Dr. Singh noted that he had a functional capacity evaluation exam on September 21, 2012 that showed valid, consistent effort and put him at the medium to heavy category of work when his job is heavy duty in nature. The doctor also noted that Petitioner's last work conditioning note placed him at 97.6% of his job demand level. Petitioner reported that overall he was doing quite well but still had some increased axial back pain with bending and squatting. The therapist suggested four more weeks of work conditioning. The doctor recommended that he complete the course of work conditioning and remain off work. He was also prescribed Mobic. (PX 10)

On November 26, 2012, Petitioner returned to Dr. Singh. The doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was only having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. He was also having trouble with the occasional bilateral carry of more than 60 pounds. Dr. Singh provided that Petitioner was at maximum medical improvement and was to return to work in the medium to heavy physical demand level as of December 3, 2012. Dr. Singh provided that if Petitioner had an increase in symptoms he could return to the office as needed. The doctor also added that Petitioner had permanent restrictions per his last work conditioning note dated November 21, 2012. (PX 10) (The November 21, 2012 work conditioning functional progress note indicates Petitioner demonstrated the ability to perform 97.3% of the physical demands of his job as an order picker. The test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. Petitioner was discharged from work conditioning. (PX 8))

On November 28, 2012 Dr. Singh prepared a work status note indicating that per the last work conditioning note dated November 21, 2012 Petitioner was placed at the heavy demand level and could return to full-time work. (PX 10)

Petitioner testified that he returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

Petitioner testified that when he returned to work in January of 2012 he was earning $24.95/hour and that was based on his union contract (Pet. Ex. #1). Petitioner testified that all Central Grocers employees that are full time are guaranteed 40 hours per week, and that on May 1st every year based on their union contract, all Central Grocers full time employees receive a pay increase based on the type of shift they work day or night, and the type of department that they work in. Petitioner testified that all employees in the same classification would receive the same rate of pay. Further, Petitioner testified that all overtime is mandatory.

Petitioner testified that he received a back TTD check dated November 14, 2012 paying him from his first day off of February 17, 2012 to June 3, 2012. Petitioner testified that he never received his TPD benefits at all during the time that he worked reduced hours and that he followed all company policies and procedures. Petitioner testified he was given no justification for why he did not receive his TPD benefits after he was placed on a reduced shift schedule by both the company doctor at Physicians Immediate Care and his treating physician, Dr. Kern Singh.

Petitioner testified that he currently does not experience a lot of pain, "just stiffness in [the] lower back from time to time." Petitioner stated that he was unable to "do any heavy lifting below my waist." He provided that lifting anything over 50 lbs "really bothers my lower back" and he was unable to participate in sports.

Petitioner offered the testimony of both Dominic Rossi and Robert Ryske who are also union stewards for Central Grocers, Union 703. Mr. Ryske has more than 27 years of experience along with Mr. Rossi who are full time employees of Central Grocers. Both of these witnesses testified that Articles 10 and 11 of the Collective Bargaining Agreement, or Union Contract cover hours worked, wages earned, and talk about mandatory overtime. Both witnesses testified that all full time employees of Central Grocers earn a wage increase on May 1st of each contract year. (Pet. Ex. #1) Both witnesses testified that the wage is based on the department classification and that all employees in the same classification would receive the same rate of pay. Both witnesses testified that they were aware that Petitioner was injured on January 11, 2012, and that it is not a requirement that any employee sign any written statements regarding an injury. Further, both testified that it is Management's responsibility to fill out the accident report. It is only the job of the injured employee to report it to their supervisor.

Respondent offered the testimony of Jorge A. Villadares who is the safety supervisor at Central Grocers. Mr. Villadares testified that he was aware that Petitioner was injured on January 11, 2012. Mr. Valladeres confirmed Petitioner's testimony that he did not seek medical attention initially and that he attempted to return to work. Mr. Valladeres testified that it is his job to fill out to prepare all of the injury report documentation for injuries that occur on the night shift. Mr. Valladeres testified that Petitioner complied with all procedures of reporting the accident.

WITH REGARD TO ISSUE (C), WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he worked for Respondent as an order selector. As an order selector, Petitioner "picks" orders, which involves lifting boxes to fulfill orders. Petitioner testified while selecting an order on January 11, 2012, while working in the meat department, he lifted between 90 and 95 pounds of boxes containing meat when he felt a sharp pain in his lower back. Petitioner testified that he reported this accident the next day, January 12, 2012, to his supervisor, Ozzie. An accident report was initiated at that time. Petitioner testified that he attempted to continue to work, but could not do so due to severe pain. Petitioner was sent by Respondent for treatment with Physician's Immediate Care on January 18, 2012. Petitioner's initial visit to Physician's Immediate Care on January 18, 2012 contains a history of the accident that is consistent with his testimony at trial. Additionally, the histories provided to his medical providers as well as Respondent's IME physician are also consistent with his testimony at trial. The Arbitrator finds Petitioner's testimony credible.

Accordingly, the Arbitrator finds that Petitioner has proved that he was injured in an accident that arose out of and in the course of his employment by Respondent on January 11, 2012.

WITH REGARD TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he had returned to his employment with Respondent following a period of absence due to a previous work related injury. The injury was adjudicated in 11 WC 07226. According to that award, Petitioner was temporarily totally disabled from December 21, 2010 through January 10, 2012, the day before this accident. Accordingly, Petitioner did not accrue any wages for the 52 week period immediately preceding this injury.

The Illinois Supreme Court has held that when it is impractical to determine average weekly wage by calculating the total amount of wages earned prior to an injury, one must look to the wages earned or those that would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. Sylvester v. Indus. Comm'n., 197 Ill. 2d 225, 231 (2001). Accordingly, the fourth method of average weekly wage calculation is applicable to this case. (*Id.*)

Petitioner introduced a copy of the Labor Agreement with Respondent that was in place at the time of Petitioner's January 11, 2012 injury. (Pet. Ex. #1) According to Article 10 of that document governing "hours", Petitioner is guaranteed 40 hours of work per week. Further, workers for Respondent receive an increase in hourly every May 1. Petitioner testified that fellow employees employed on the same pay scale were making $24.30 per hour prior to May 1, 2011. After May 1, 2011 and according to Petitioner's pay stubs introduced as Petitioner's Exhibit #3, Petitioner's pay at the time of the accident was $24.95. Therefore, taking the hourly rate of $24.30 in conjunction with pay raise to $24.95 that a worker in Petitioner's position would earn after May 1, 2011, Petitioner's average weekly wage at the time of the accident was $990.00, or the average that a worker in Petitioner's position would have made during the 52 weeks immediately preceding this work related injury.

IN REGARD TO ISSUE (K), WHAT TEMPORARY BENEFITS ARE IN DISPUTE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims entitlement for TPD benefits for the period between January 24, 2012 and February 16, 2012 for 3-2/7 weeks. Petitioner was released by Dr. Jim Kell of Physician's Immediate Care on January 24, 2012 with restrictions of only working four to six hour shifts. These restrictions were initially accommodated by Respondent. Petitioner's Exhibit 4 outlines that of the 3-2/7 weeks he is claiming TPD he was paid for working a full day on January 25, January 30 and February 6. He testified that some days he can be a floater; this is an excused absence for which he receives full compensation. He was a floater, and thus paid full salary, on February 2, 7 and 14. He was not scheduled to work on January 28 or 29, February 1, 3, 4, 5, 11 or 12. He

had an excused absence on February 8th. Thus, 6 of the days he is claiming TPD he was paid full salary and 8 of the days he was not scheduled to work, 1 day was an excused absence, for a total of 10 of the 23 days. (PX 4)

Petitioner worked partial days on January 24 (6 hours), 26 (5 hours), 27 (4 hours), 31 (5 hours), February 9 (4 hours), 10 (4.5 hours), 13(4 hours), 15 (4 hours) and 16 (.5 hours) for a total of 9 days. This results in a net of TPD rate of 35 hours. Applying an average weekly wage of $990.00, that results in an hourly wage of $24.75. Two-thirds of those hours at the regular rate is $577.50 that he would be owed in TPD. (PX 4) The Arbitrator notes that Petitioner submitted three pay stubs into evidence for the period between January 21, 2012 and February 9, 2012. (PX 3) Since he is claiming benefits between January 24, 2012 and February 16, 2012, these stubs are not helpful in calculating the proper TPD. Lastly, the Arbitrator notes Petitioner received 8 hours of floater compensation on February 18th. (PX 4) Petitioner received TTD between February 17, 2012 and December 2, 2012. (RX 5) The Respondent therefore is awarded a credit of one day, or $81.91.

With respect to TTD benefits from February 17, 2012 through December 2, 2012, Petitioner was provided work restrictions on February 8, 2012 by Dr. Kern Singh. (Pet. Ex. #10) Petitioner testified that Respondent initially accommodated these work restrictions. However, after February 17, 2012 Respondent was unable to provide further accommodation. Thereafter, Petitioner was taken off work completely by Dr. Singh during his next appointment of February 20, 2012. (*Id.*) Petitioner was kept in an off work status by Dr. Singh until being released on November 28, 2012 consistent with the last work conditioning note dated November 21, 2012 placing him at the heavy demand level. (*Id.*) Petitioner returned to work for Respondent on December 2, 2012.

Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 17, 2012 through December 2, 2012, a period of 41-2/7 weeks, less the stipulated credit for TTD benefits previously paid.

WITH REGARD TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE PETITIONER'S INJURIES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a permanent partial disability can and shall be awarded in the absence of an impairment rating or impairment report being introduced. The plain language of Section 8.1(b) reads that, "In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity, and; (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability."

It is axiomatic that the plain and ordinary meaning of statutory words be used in determining how to construe the law. The plain language of the Act dictates that an impairment rating is but one of the factors to be use in determining permanent partial disability. Further, the use of the word "factor" merely shows that it is to be considered. Further, the fact that the Act dictates that no single factor shall be determinant shows that logically, the converse is also true. This means that the absence of one of the enumerated factors cannot be determinant of the permanent partial disability award.

Further, Petitioner's Exhibit #14, a memorandum from the Illinois Workers' Compensation Commission dictates that "If an impairment rating is not entered into evidence, the Arbitrator is not precluded from entering a finding of disability." The plain language of this memorandum indicates that an Arbitrator is not precluded from entering a finding of disability in the absence of an impairment rating. The language is definitive and leaves no room for misinterpretation. Accordingly, the Arbitrator finds that the absence of an impairment rating does not preclude this Arbitrator from making a finding as to disability.

Based on the factors enumerated in Section 8.1b of the Act, the Arbitrator finds the follow:

i. Neither party submitted evidence of a reported level of impairment.

ii. On the date of accident Petitioner worked for Respondent as an Order Picker. As an Order Picker Petitioner's responsibilities included repetitive lifting of pallets and boxes weighing 75 pounds and cases of food weighing in excess of 5 to 100 pounds. This is repetitive and continuous all day and can require lifting of 1800 to 2300 cases per day. Subsequent to the accident, Petitioner returned to work in a lighter position on December 7, 2012 due to his ranking inside of the company. Petitioner is now a fork lift driver for Respondent The position does not require heavy lifting and allows him to be seated moving pallets from point A to point B.

iii. Petitioner at the time of the injury was 40 years old.

iv. Petitioner's future earning capacity is likely unimpaired by his accident. His future earnings is dictated by his Union contract.

v. There is evidence of disability corroborated by the treating medical records. Petitioner was diagnosed with L4-5 central disk herniation, L3-L5 spinal stenosis. As a result he underwent 1.) minimally invasive L3, L4, L5 laminectomy with bilateral facetectomy and foraminotom; and 2.) Left-sided L4-5 microscopic discectomy. Petitioner last saw his treating physician, Dr. Singh on November 26, 2012. At that time the doctor noted Petitioner had completed eight weeks of work conditioning and the last note indicated he could perform 97.3% of his job demand level. Petitioner was having trouble with the occasional squat and lift of over 50 pounds and occasional power lift over 50 pounds. The work conditioning functional progress note indicated that the test items Petitioner was unable to successfully achieve were occasional squat lifting, occasional power lifting and occasional bilateral carrying. It was determined that Petitioner demonstrated the ability to perform at the heavy physical demand level based on the 2-hand frequent lift of 50 lbs floor to waist. It was noted that as an order picker Petitioner was classified within the heavy physical demand level. The Arbitrator observed the demeanor of Petitioner while he was testifying and finds his current complaints to be credible and consistent with the treating records.

Based on the above criterion, the Arbitrator finds that as a result of accidental injuries sustained on January 11, 2012, Petitioner is permanently disabled to the extent of 25% under Section 8(d)2 of the Act.

WITH REGARD TO ISSUE (M), SHOULD PENALTIES AND FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

The Arbitrator finds that Respondent's conduct in this matter was not unreasonable. A legitimate dispute existed as to whether Petitioner sustained an accident on the first day he returned to work after being off for a previous work accident. As such, Petitioner's request for penalties are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF BUREAU)

☐ 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

Dennis Taylor,
Petitioner,

vs. NO: 05 WC 32131

Senica's Interstate Towing,
Respondent.

14IWCC0375

DECISION AND OPINION ON REMAND

This case is on remand from the Circuit Court of Bureau County, *Senica's Interstate Towing v. IWCC*, No. 11 MR 42, consolidated with LaSalle County 11 MR 210. The employer appealed the Commission's decision to the Circuit Court, and the Circuit Court entered an order on October 26, 2012, remanding the case to the Commission for re-calculation of the medical bills. The Circuit Court's instructions to the Commission are as follows:

> "This Court hereby confirms the decision of the Workers' Compensation Commission on all issues except concerning the employer's credit for medical expenses; the case is hereby remanded to the Commission with instructions to determine the amount of the medical bills to be paid in light of Tower Automotive v. IWCC, 407 Ill. App. 3d 427 (2011), which the Court relied upon in the remand."

The Commission notes that there is no §8(j) credit issue on remand. On the parties' Request for Hearing, Respondent stipulated that it was entitled to no §8(j) credit for payment of medical expenses. However, the following sentence was added to paragraph 7 of the Request: "Resp. paid $110,554.21 in medical." Arbitrator Andros found that the total amount of related medical expenses was $330,336.60 and awarded Petitioner $219,782.39, allowing Respondent credit for the $110,554.21 it claimed on the Request for Hearing. The Commission modified the Arbitrator's findings as to medical expenses and §8(j) credit, finding that Respondent had failed to prove that it had paid the $110,554.21 in medical expenses itself or that it was entitled to §8(j) credit for a third party's payment of those medical expenses. The Circuit Court affirmed all findings of the Commission except for the amount of medical expenses awarded and has remanded the matter with instructions for the Commission to determine that amount pursuant to the Appellate Court's ruling in *Tower Automotive.*

In *Tower Automotive v. IWCC,* 407 Ill. App. 3d 427, 943 N.E.2d 153, 943 Ill. Dec. 863 (1st Dist. WC 2011), the Appellate Court found that an employer's liability for medical expenses extends only to the amount actually paid to and accepted by medical providers, or the negotiated rate, and not to the full amount billed and not the fee schedule amount. This rule was codified in a 2005 amendment to §8(a) of the Act and applied to all claims for post- February 1, 2006 injuries. In this case, as in *Tower Automotive*, the injury occurred prior to the

effective date of the amended §8(a). In *Tower Automotive*, the employee's wife's insurer paid part of the medical expenses. The employee argued that the employer was liable for the full amount billed by the medical providers, not for the amount actually paid by his wife's insurer and himself. The Appellate Court held that the purpose of the Act would not be defeated by requiring the employer to pay only what had been paid by the third party insurer and accepted by the medical providers.

In this case, Petitioner testified that a third party insurer, MedFinance, agreed to cover the costs associated with his recommended fusion surgery after Respondent refused to authorize the treatment. Petitioner sought the full amount of medical bills or $330,336.60. Arbitrator Andros found that Respondent was entitled to a credit of $110,554.21; the Commission reversed the award of credit, finding that Respondent failed to prove that it had paid any medical expenses itself or that it was entitled to §8(j) credit for the payments. The Commission awarded Petitioner the full amount of the medical expenses.

On appeal to the Circuit Court, Respondent argued that, under these circumstances, it was not liable for the full amount of the medical expenses ($330,336.60), but was entitled under *Tower Automotive,* to reduce its liability to the amount actually paid by the third party insurer and accepted by the medical providers ($110,554.21). Immediately prior to the last date of hearing, on December 18, 2009, Respondent sought a *dedimus potestatem* to obtain the deposition of someone from Hinsdale Orthopaedics and Hinsdale Hospital to explain what medical charges remain outstanding and what the negotiated rate was that they accepted from MedFinance. Arbitrator Andros denied Respondent's request for *dedimus*, primarily based upon the timing of the request. Respondent had known about MedFinance's involvement in paying some of Petitioner's medical expenses since 2008, but did nothing to discover how much MedFinance had paid until during trial in December 2009. It is unclear whether the $110,554.21 was ever paid by MedFinance, for what expenses that amount might have been paid, and to which providers. Moreover, it is clear from the record that, at least when they were subpoenaed, all of Hinsdale Orthopaedics's and Hospital's bills remained unpaid. Subpoenaed billing records were admitted into evidence and should represent sufficient proof of Petitioner's medical expenses.

However, pursuant to the Order of the Bureau County Circuit Court, the Commission remands this case to Arbitrator Andros, or any other qualified Arbitrator sitting in his stead, for reconsideration of the calculation of medical expenses for which Respondent is liable in light of *Tower Automotive* and for the taking of any additional evidence necessary for the determination of such issues only. The Commission notes that all charges incurred after February 1, 2006 are subject to the fee schedule, pursuant to §8.2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that this claim be remanded to an Illinois Workers' Compensation Commission Arbitrator for further findings as instructed by the Circuit Court of Bureau County. In no event shall Respondent be required to reimburse Petitioner for any charge which it has previously satisfied.

DATED: MAY 20 2014

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

o-02/19/14
drd/dak
68

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leo P. Marchiorello,
Petitioner,

vs. No. 11 WC 36510

Bechtel Construction Co.,
Respondent.

14IWCC0376

DECISION AND OPINION ON REVIEW
WITH SPECIAL FINDINGS

Timely Petitions for Review having been filed by Petitioner and Respondent, and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, nature and extent of the permanent disability, and penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission further makes, in response to Petitioner's timely Request, the following Special Findings with regard to the Arbitrator's denial of penalties and fees:

1. Petitioner worked light duty for 20 weeks following his work accident on May 1, 2011. Respondent paid appropriate temporary partial disability benefits for the first 10 weeks, then suspended payment of benefits. Petitioner asks how Respondent rebuts the presumption that these benefits were unreasonably denied or delayed. At hearing, Petitioner testified that he and Respondent's insurance adjuster had "worked [things] out," so that he would receive 10 weeks of temporary partial disability. However, the terms of the agreement were unclear. Respondent suspended payment of benefits when it became clear that major surgery was recommended. Respondent was entitled to take a reasonable amount of time to investigate Petitioner's right to a total knee replacement by obtaining either a Utilization Review or §12 evaluation before continuing or permanently terminating benefits.

2. Petitioner was fired on September 16, 2011, while he was still on light duty, and Respondent refused to provide benefits. Petitioner asks whether it was unreasonable and vexatious for Respondent to deny Petitioner benefits after terminating him while he was on light duty. Petitioner was terminated because there was no longer light duty available. Respondent is entitled to obtain and rely on the causation opinion of its §12 examiner, Dr. Lehman, that Petitioner's degenerative knee condition was pre-existing and required a total knee replacement. If Petitioner's work accident were not the cause of his disability, Respondent is not obligated to provide benefits following his termination even though he was on light duty at that time.

3. Dr. Lehman admitted during his deposition that Petitioner's work-related meniscal tear was "a contributing factor" to his restrictions and need for total knee replacement. Petitioner asks if it was unreasonable and vexatious for Respondent to continue to deny benefits after this admission. The Commission notes that Dr. Lehman maintained that Petitioner's two conditions, torn meniscus and osteoarthritis, were separate and distinct and that, even absent the tear, Petitioner would have required a total knee replacement for his ongoing degenerative condition. If Petitioner already needed surgery for his degenerative condition, the fact that his work-related condition also would benefit from the surgery does not make Respondent liable for the treatment.

4. Dr. Lehman also testified during his deposition that arthroscopic surgery to repair Petitioner's meniscal tear would likely work to his detriment, due to his underlying degenerative condition. Respondent's adjuster defended Respondent's refusal to provide benefits by arguing that Petitioner had declined the meniscal surgery which it had offered to authorize and therefore terminated his rights to additional treatment and temporary total disability. Petitioner asks if Respondent's refusal to provide additional benefits after he declined the offer of meniscal repair was unreasonable and vexatious, especially in view of Dr. Lehman's admission that the repair would not benefit him and would likely be detrimental. Respondent's adjuster was wrong. Respondent was justified in denying additional benefits, based upon its reasonable reliance on Dr. Lehman's causation opinion, not because Petitioner declined to have the offered surgery. If Respondent's termination of benefits had, in fact, been based solely upon Petitioner's refusal to have what Respondent's expert admitted was potentially damaging surgery, that termination would have been vexatious and unreasonable. However, Respondent's termination of benefits was based upon Dr. Lehman's opinion that Petitioner's need for further treatment was not related to his work injury, but rather to his ongoing degenerative condition. Termination of benefits based upon the reasonable reliance upon Dr. Lehman's opinion was not vexatious or unreasonable.

14IWCC0376

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 13, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary partial disability benefits of $426.55 per week for 20 weeks commencing May 2, 2011 through September 16, 2011, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary total disability benefits of $1,243.00 per week for 34 weeks commencing September 17, 2011 through May 5, 2012, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent partial disability benefits of $669.64 per week for 86 weeks because the injuries sustained caused the 40% loss of use of the left leg as provided in Section 8(e) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties and Fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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: MAY 20 2014

Daniel R. Donohoo

Daniel R. Donohoo

o-04/22/14
drd/dak
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Charles J. DeVriendt

Charles J. DeVriendt

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARCHIORELLO, LEO
Employee/Petitioner

Case# **11WC036510**

14IWCC0376

BECHTEL CONSTRUCTION CO
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:

2259 JOHNSON, MICHAEL D & ASSOC
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

0180 EVANS & DIXON LLC
MICHAEL A KERR
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

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

Leo Marchiorello
Employee/Petitioner

v.

Bechtel Construction Co.
Employer/Respondent

Case # 11 WC 36510

Consolidated cases: _____

14IWCC0376

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 24, 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?
[x] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On May 1, 2011, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship did exist between Petitioner and Respondent.

On this date, Petitioner did sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $100,000.00; the average weekly wage was $2,268.86.

On the date of accident, Petitioner was 56 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 $4,925.20 for TTD, $4,265.51 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $9,190 .71.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $426.55 per week for 20 weeks commencing May 2, 2011, through September 16, 2011, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,243.00 per week for 34 weeks commencing September 17, 2011, through May 5, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64 per week for 86 weeks because the injuries sustained caused the 40% loss of use of the left leg as provided in Section 8(e) of the Act.

Based upon the Arbitrator's conclusions of law attached hereto, Petitioner's claim for penalties and attorneys' fees is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

William R. Gallagher, Arbitrator

June 7, 2013
Date

JUN 13 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on May 1, 2011. According to the Application, Petitioner sustained an injury to his left knee when he twisted it on the job site. There was no dispute that Petitioner sustained a work-related injury on May 1, 2011; however, Respondent disputed liability on the basis of causal relationship. Because of this dispute, Respondent denied liability for a significant period of both temporary total and temporary partial disability benefits and medical bills of approximately $109,000.00. Petitioner filed a petition for Section 19(k) and Section 19(l) penalties and Section 16 attorneys' fees.

At the time of this accident, Petitioner worked for Respondent as an electrician on a major project in Lively Grove, Illinois. Petitioner's primary job duties were installation of conduit and cable which Petitioner described as being very physically demanding because the conduit is extremely heavy and it is necessary to get in awkward positions when moving and installing it, etc. Further, Petitioner was working 10 hours a day, six days a week, for a total of 60 hours a week. On May 1, 2011, Petitioner was walking in front of some storage tanks when he stepped into a rut and felt something snap in his left knee. Petitioner testified that this was extremely painful and that he was unable to bear weight.

Prior to May 1, 2011, Petitioner had problems with both his left and right knees. In 2000, Petitioner was treated by Dr. E. J. Bartucci, who performed arthroscopic medial meniscus surgeries on both knees on May 18, 2000. Following the surgeries, Petitioner had some symptoms with his knees but more so in regard to the left knee. Dr. Bartucci's medical record of April 17, 2002, noted that Petitioner had more symptoms to the left knee and that its medial compartment was damaged which caused pain, catching and crepitus. An MRI was performed on April 18, 2002, which revealed some degenerative osteoarthritic changes. Dr. Bartucci gave Petitioner Hyalgan injections to the left knee on April 29, May 6, and May 13, 2002.

Petitioner testified that these injections helped his left knee and that other than taking some anti-inflammatory medications that he did not have any further medical treatment to his left knee until he was seen by Dr. Anthony Lin, his primary care physician, on April 21, 2011. Dr. Lin's record of that date noted that Petitioner had long-standing left knee pain with mild swelling. Dr. Lin administered a cortisone injection to Petitioner's left knee on that date. At trial, Petitioner testified that he had been experiencing left knee pain for approximately one month preceding the accident but he had not lost any time from work because of it. Petitioner stated that the cortisone injection did not give him much relief.

Subsequent to the accident of May 1, 2011, Petitioner went to the ER of Sparta Community Hospital. Petitioner informed the ER personnel of sustaining an injury to his left knee when he stepped into a hole as well as the prior arthroscopic surgeries. X-rays of the left knee revealed degenerative arthrosis and the radiologist recommended an orthopedic consultation to consider joint replacement. Petitioner returned to Sparta Community Hospital on May 9, 2011, and reported some improvement in the prior symptoms and that he had been working light duty. Petitioner again return to Sparta Community Hospital on May 13, 2011, and it was still noted that he had left knee symptoms so an MRI was recommended. An MRI scan was performed on

May 17, 2011, which revealed an acute tear of the medial meniscus within an area of advanced degenerative arthrosis.

On June 10, 2011, Petitioner was seen by Dr. Tony Chien, an orthopedic surgeon, who confirmed the diagnosis of a torn medial meniscus of the left knee and recommended arthroscopic surgery. He opined that Petitioner could work but with restrictions of no lifting more than 15 pounds and that he be confined to a desk or sitting type job.

On July 1, 2011, Petitioner was seen by Dr. Evan Ellis, an orthopedic surgeon. Petitioner provided Dr. Ellis with a history of the accident of May 1, 2011, and stated that he had been experiencing pain and swelling since that time. Dr. Ellis noted that Petitioner previously had arthritis but had been managing and coping with it up until the accident. Dr. Ellis had x-rays taken which revealed bone-on-bone arthritic changes in medial compartment of the left knee. He also reviewed the MRI and opined that there was a meniscal tear; however, he suspected that this was not a new tear but, more likely, a chronic tear. Dr. Ellis' impression was left knee pain with end-stage osteoarthritis and arthritic flare. Dr. Ellis opined this was an aggravation of an injury that was previously under good control and recommended Petitioner have a knee brace to delay undergoing a total knee replacement; however, given the arthritic changes that were present, Dr. Ellis noted that Petitioner ultimately would probably require a total knee replacement.

At the direction of Respondent, Petitioner was examined by Dr. Richard Lehman, an orthopedic surgeon, on August 2, 2011. Dr. Lehman obtained a history from Petitioner, reviewed medical records and the MRI scan and examined the Petitioner. Dr. Lehman opined that Petitioner had a degenerative arthritic knee with an acute medial meniscus tear. In regard to treatment, Dr. Lehman stated that Petitioner could have a knee arthroscopic procedure to address the torn meniscus; however, if he were to undergo this surgery it would have only dealt with the meniscal pathology. Because of the pre-existing arthritis, Dr. Lehman opined that Petitioner should have a total knee replacement but that this component of his knee symptomatology was not related to the accident. In his report, Dr. Lehman stated "There has been no exacerbation or pathology in this injury that has in any way altered his arthritis." Dr. Lehman agreed that work/activity restrictions were required, specifically, no climbing, no squatting, no kneeling and no standing more than two to three hours per day; however, he stated that these restrictions were temporary and directly related to the arthritis.

From May 3, 2011 through September 16, 2011, Petitioner continued to work for Respondent performing light duty. Petitioner testified that while performing light duty his hours were reduced from 60 hours a week to 40 hours a week and that he was paid 10 weeks temporary partial disability benefits. On September 16, 2011, Petitioner's employment with Respondent was terminated because there was no light duty work available for him to perform. Petitioner was paid temporary total disability benefits for four and one-sevenths (4 1/7) weeks, from September 16, 2011, through October 14, 2011. At that time (based on an e-mail sent to Petitioner's counsel on September 23, 2011) temporary total disability benefits were terminated.

On October 15, 2011, Petitioner returned to Dr. Lin, but Dr. Lin did not examine Petitioner at that time but had a discussion with him regarding his knee pain and the completion of a disability claim for Petitioner's life insurance. On October 17, 2011, Dr. Lin completed and signed a

document entitled "Attending Physician's Statement" for Fidelity & Guaranty Life Insurance Company in which he stated Petitioner's symptoms appeared in 1993 and that he first treated Petitioner for left knee problems on April 21, 2011. On October 18, 2011, Dr. Lin signed a document provided by the Illinois Workers' Compensation Commission entitled "Rehabilitation Plan" which stated that Petitioner sustained an accidental injury on May 1, 2011, that caused an acute meniscal tear and aggravated Petitioner's degenerative arthritis leading to an onset of enhanced symptoms and that a total knee replacement was indicated.

Dr. Lin referred Petitioner to Dr. Joshua Jacobs, an orthopedic surgeon, who saw Petitioner on November 1, 2011. Dr. Jacobs noted that Petitioner had a long history of left knee pain and was disabled from working as an electrician. There was no reference to the work-related accident of May 1, 2011, in Dr. Jacobs' record of that date. Dr. Jacobs obtained x-rays and reviewed the MRI scan and opined that Petitioner had severe osteoarthritis of the left knee. Dr. Jacobs recommended that Petitioner have a total knee replacement, but, due to his unavailability to perform surgery, he referred Petitioner to Dr. Scott Sporer, an orthopedic surgeon, who saw Petitioner on November 2, 2011. Dr. Sporer's record also lacked a history of the work-related accident of May 1, 2011, and he likewise diagnosed Petitioner with left knee degenerative arthritis and recommended a total knee replacement surgery.

Dr. Sporer performed total knee replacement surgery on Petitioner's left knee on November 17, 2011. Petitioner remained under his care following the surgery, received physical therapy and was released to return to work May 6, 2012.

Dr. Lehman was deposed on February 13, 2012, and his deposition testimony was received into evidence at trial. Dr. Lehman's deposition testimony was consistent with his narrative medical report. Dr. Lehman agreed that the meniscal tear was related to the accident of May 1, 2011, and that Petitioner suffered from two distinct conditions, the pre-existing degenerative arthritis and the torn meniscus. Dr. Lehman strongly recommended against performing the meniscectomy because that procedure would increase the likelihood of internal collapse of the knee compartment. Dr. Lehman testified that both the arthritis and the meniscal tear were components and that the only appropriate surgical procedure that would permit Petitioner to return to work was a total knee replacement.

Dr. Lin was deposed on April 12, 2012, and his deposition testimony was received into evidence at trial. Dr. Lin is a family practitioner and he opined that the accident of May 1, 2011, could aggravate the arthritic condition and Petitioner's left knee. He also testified that he agreed with the work restrictions imposed by Dr. Lehman; however, he opined that they were related to the accident of May 1, 2011. In regard to the Rehabilitation Plan form, Dr. Lin testified that he did not complete the form; however, he testified that he agreed with the statements contained therein. He did not have any specific knowledge as to who drafted the statement.

At trial, Petitioner testified that he still experiences some discomfort in his knee, that it lacks full mobility and that while he was able to return to work as an electrician, he is generally more cautious now than he was previously especially when doing any climbing on ladders or working with heights.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's condition of ill-being is causally related to the accident of May 1, 2011.

In support of this conclusion the Arbitrator notes the following:

There is no dispute that Petitioner had pre-existing degenerative arthritis in the left knee; however, with the exception of the one cortisone shot of April 21, 2011, Petitioner had not had any active medical treatment for his left knee since May, 2002.

Respondent's Section 12 examiner, Dr. Lehman, opined that the tear of the medial meniscus was related to the accident of May 1, 2011, but that the degenerative arthritic condition was neither related to nor aggravated by the accident. While Dr. Lehman opined that the two conditions were separate and distinct from one another, he also opined that meniscus surgery would not resolve Petitioner's knee problems and could actually worsen his knee condition. He described both of these conditions as being components which contributed to the overall condition in Petitioner's left knee.

No one ever recommended that Petitioner have a total knee replacement surgery performed any time prior to the accident of May 1, 2011, and meniscal surgery was not performed following the accident. Consistent with Dr. Lehman's opinion, the Petitioner ultimately had a total knee replacement surgical procedure performed on him by Dr. Sporer.

Dr. Lin opined that there was a causal relationship between the accident of May 1, 2011, and that the accident aggravated the pre-existing degenerative arthritis.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner is entitled to temporary partial disability benefits of 20 weeks commencing May 2, 2011 through September 16, 2011.

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 34 weeks commencing September 17, 2011, through May 5, 2012.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 40% loss of use of the left leg.

In regard to disputed issue (M) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is not entitled to Section 19(k) or Section 19(l) penalties or Section 16 attorneys' fees.

In support of this conclusion the Arbitrator notes the following:

Given the opinion of Dr. Lehman as to causality, the Arbitrator concludes Respondent's position denying liability in this case was neither vexatious nor unreasonable.

William R. Gallagher, 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lori A. Wedel,

Petitioner,

vs. NO: 12 WC 10671

Illinois Department of Transportation,

14IWCC0377

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAY 21 2014
TJT:yl
o 5/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WEDEL, LORI
Employee/Petitioner

Case# **12WC010671**

STATE OF ILLINOIS
Employer/Respondent

14IWCC0377

On 9/4/2013, 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 0.05% 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:

0332 LIVINGSTONE MUELLER O'BRIEN ET AL
MARTIN J HAXEL
PO BOX 335
SPRINGFIELD, IL 62705

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

4390 ASSISTANT ATTORNEY GENERAL
ERIN DOUGHTY
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

SEP 4 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lori Wedel
Employee/Petitioner

v.

State of Illinois
Employer/Respondent

Case # 12 WC 10671

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **August 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **October 20, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**49,317.84**; the average weekly wage was $**948.42**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit for all medical expenses it paid pursuant to RX2 under Section 8(j) of the Act.

ORDER

Mr. Haxel, on oral and written motion, is by stipulation substituted in as the Petitioner's attorney.

Respondent shall pay Petitioner temporary total disability benefits of $632.28 for 2 1/7 weeks commencing 5/09/2012 through 5/23/2012 as provided in Section 8(b) of the Act.

Petitioner has not proven that she sustained any permanent disability as a result of her accident, and no permanency is awarded.

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. Thomas McCarthy
Signature of Arbitrator

Aug. 29, 2013
Date

SEP 4 - 2013

Mr. Haxel is substituted in as the attorney for the Petitioner. See the stipulation attached and made part of the order.

In support of (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F), is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following facts:

Jennifer Sunderland testified on behalf of the Petitioner. She has been Petitioner's immediate supervisor since February of 2011. She is familiar with all of Petitioner's job duties, observes Petitioner working on several occasions each day and actually has performed Petitioner's job duties when Petitioner is away on vacation or during other absences from work.

Sunderland further testified that she does not like doing Petitioner's job. She has to stop and rest because her hands and wrists hurt. Petitioner is responsible for all of the data input for payroll for approximately 400 district employees. During the winter months, the number of employees increase by approximately 200. Payroll needs to be completed every two weeks. Petitioner receives time sheets, overtime sheets and leave slips from the employees. Time sheets are received from at least half of all employees. Leave slips number approximately 2,000 each month. Each of these sheets or forms or slips is a piece of paper that Petitioner reads, calculates the accuracy of the data and then enters the data into the computer system.

When entering the data into the computer, each employee has an employee number. The particular type of data being entered must also be identified by a code number. The date must also be entered. Then the data from the paper forms are entered into the computer which then generates a written report which is reviewed for accuracy and returned to the Petitioner.

Sunderland further testified that she recalls Petitioner rubbing her left little finger and ring fingers together because they were numb. She also recalls Petitioner putting her left elbow on top of her desk and immediately pulling it off because of the pain she experienced. Sunderland testified that these actions occurred before Petitioner had her surgery. Petitioner is left handed.

Petitioner testified and corroborated the testimony of her immediate supervisor. Petitioner also stated that there were additional forms she handled for each and every payroll period including vehicle usage slips, automatic payroll deduction forms, sick bank forms, direct deposit forms, etc. Consistent with Sunderland's testimony, each of these is a piece of paper that Petitioner examines by hand and determines the accuracy of the information on the paper before entering all of the data into the computer. Petitioner gets two 15-minute breaks during the day with an additional 30 minutes for lunch. All other time during the work day is spent working and there really is no down time. This testimony was corroborated by the testimony of supervisor Sunderland.

Petitioner further testified that her job duties used to be performed by two employees but when the other employee retired eight to 10 years ago, she was not replaced and Petitioner has been completing all of the job tasks ever since. Petitioner further testified that she is left handed and does everything with her left hand and arm.

Petitioner further testified that when she examined each piece of paper, her left arm is resting on top of the desk. When she is keyboarding, her elbows are at an approximate 90 degree angle, sometimes at a greater angle and sometimes at a lesser angle. When her arms tire while keyboarding, she will rest them on armrests.

Petitioner testified that when she would leave on vacation, her symptoms significantly improved but would return after she resumed working again. Her date of accident is October 20, 2011 because that is the date Dr. Gelber performed an EMG test which confirmed a diagnosis of left cubital tunnel syndrome (PX2). Petitioner underwent cubital tunnel surgery by Dr. Greatting on May 9, 2012 (PX3).

Petitioner must also answer the phone and demonstrated her elbow position when talking on the phone as hyperflexed. Petitioner must also write by hand many messages throughout the day.

Jennifer Sunderland's supervisor is Nicole Aleman-Hughes who prepared a form entitled "DEMANDS OF THE JOB" after Petitioner reported this as a work injury. According to this form, Petitioner's job duties required the use of her hands for gross manipulation tasks and fine manipulation tasks six to eight hours per day (RX1).

Petitioner first saw Dr. Greatting on April 12, 2012. Petitioner's history of her cubital tunnel syndrome and her work activities as contained in the doctor's office visit note of that date is consistent with the evidence presented at arbitration. Dr. Greatting opined that Petitioner's work activities caused, contributed to the develop of or aggravated her cubital tunnel syndrome (PX3).

Petitioner was examined by Dr. James R. Williams at the request of the Respondent. In conjunction with this examination, Dr. Williams reviewed medical records from various doctors who have treated the Petitioner. One of these doctors is Dr. Stephen Kozak of Springfield Clinic. He is the doctor who referred Petitioner to Dr. Greatting (PX3). Dr. Williams notes in his IME report that Dr. Kozak opined that Petitioner's cubital tunnel syndrome was likely caused by her desk work at the Illinois Department of Transportation. The records of Dr. Gelber were also reviewed and he opined that Petitioner's work activities caused or contributed to Petitioner's cubital tunnel syndrome (RX3).

Dr. Williams was of the opinion that Petitioner's job activities were not repetitive and that typing alone was not a cause for cubital tunnel. However, Dr. Williams also stated that resting her left arm and forearm on her desk while performing work activities could possibly aggravate her condition depending upon all of the surrounding circumstances such as the frequency with which this occurs (RX3).

Upon consideration of all of the evidence, it is quite clear that Petitioner's job duties either caused or aggravated her cubital tunnel syndrome thereby entitling her to benefits. The detailed testimony of both Petitioner and her immediate supervisor described activities which completely fill the entire work day and always involve the use of Petitioner's left hand and left arm. Petitioner literally handles thousands of pieces of paper each month as well as hours of keyboarding each day. The evidence describing Petitioner's job duties is both repetitive and consistent with the histories provided to all of the doctors who either treated her or examined her. This conclusion is supported by the "DEMANDS OF THE JOB" form prepared by Nicole Aleman-Hughes which indicates the use of her hands (and, obviously, also her arms) for six to eight hours each day.

Lastly, three different treating physicians (Kozak, Gelber and Greatting) all opined that Petitioner's work activities were a causative factor in the development of her cubital tunnel syndrome. The only dissenting opinion came from Respondent's examining physician, Dr. Williams, and even he acknowledged the possibility that the positioning of Petitioner's left arm could aggravate her cubital tunnel syndrome.

Ample proof has been submitted by the Petitioner who has proven the existence of an accident arising out of and in the course of her employment and also that her current condition of ill-being is causally related to the accident.

In support of (K), what temporary benefits are in dispute, the Arbitrator finds the following facts:

Petitioner testified that her treating surgeon, Dr. Greatting, kept her off work following her surgery on May 9, 2012. Petitioner also testified that she did not work on the date of the surgery. Dr. Greatting released Petitioner to return to work without any restrictions beginning on May 24, 2012 (PX3).

The evidence indicates that Petitioner is entitled to receive temporary total disability benefits for the above-mentioned period of time which constitutes 2 1/7 weeks.

Issue (L): What is The Nature and Extent of the Injury?

The Arbitrator notes that Petitioner's date of injury is October 20, 2011, thereby subjecting her to the §8.1b guidelines of the Illinois Workers' Compensation Act. According to §8.1b(b) "the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of injury; (iv) employee's future earning capacity; (v) evidence of disability corroborated by treating medical records."

Both parties waved the submission of an AMA report. (T, pg. 63). With regard to subsection (ii) Petitioner is still a human resources associate for IDOT. (T, pg. 62). She has held that position for approximately 13 years. (T, pg. 38). Her current job is clerical in nature, and involves intermittent typing, data entry, answering telephones, filing, and checking paperwork for correctness. (T, pg. 11-46, 51-55). Her job duties are varied. (T, pg. 54). Petitioner was 55 years old at the time of her alleged accident. Petitioner continued to work regular duty after filing her claim, and returned to work full duty following her elective surgery. She did not testify as to her post surgery symptoms. Her ability to perform her job duties has not been impacted by her injury, and as such her future earning capacity is not diminished. With regard to subsection (v) in the final records from her IME, approximately 3 months after her surgery, Petitioner reported that her pain was a 0/10, and that she no longer experienced any numbness or tingling. (RX 3). In his final office note of July 13, 2012, Dr. Greatting noted that the Petitioner, six weeks after returning to work, reported that her numbness had resolved and that her strength was good. He said she had a good range of motion, and released her from care. (PX 3) Based upon the culmination of these factors, the Arbitrator finds that Petitioner has suffered no permanent partial disability and therefore is entitled to no award of permanency related to the October 20, 2011 injury.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Holder,

Petitioner,

vs. NO: 12 WC 21097

14IWCC0378

Funk Pest Control & Tree Service,

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, notice, causal connection, medical expenses, prospective medical expenses, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 18, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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: MAY 21 2014
TJT:yl
o 5/6/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HOLDER, KEVIN
Employee/Petitioner

Case# **12WC021097**

FUNK PEST CONTROL & TREE SERVICE
Employer/Respondent

14IWCC0378

On 11/18/2013, 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:

4551 LAW OFFICE KEITH SHORT PC
1801 N MAIN ST
EDWARDSVILLE, IL 62025

2795 HENNESSY & ROACH PC
JENNIFER YATES WELLER
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF Adams)

- [ ] 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)

KEVIN HOLDER
Employee/Petitioner

v.

FUNK PEST CONTROL & TREE SERVICE
Employer/Respondent

Case # 12 WC 21097

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 **Springfield**, on **September 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [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, **03/09/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$25,616.24**; the average weekly wage was **$492.62**.

On the date of accident, Petitioner was **41** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on March 9, 2012 or that his current condition of ill-being in his lower back and neck is causally connected to his March 9, 2012 accident. Petitioner's claim is denied. No benefits are awarded.

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.

Nancy Lindsay
Signature of Arbitrator

November 14, 2013
Date

ICArbDec19(b)

NOV 18 2013

Petitioner alleges he injured his neck and lower back on March 9, 2012 when he was struck by a tree limb. The issues in disputes are accident, notice, causal connection, prospective medical care, temporary total disability, and medical expenses. At the time of arbitration the following witnesses testified: Petitioner; Derek Boxdorfer; and Garrett (a/k/a Gary) Funk.

The Arbitrator finds as follows:

Pre-Arbitration

Petitioner presented to the emergency room at Passavant Hospital on May 29, 2012. According to the Passavant Hospital "Facesheet" (PX 2, p. 13/34) Petitioner provided an accident date of May 29, 2012 and listed the time as 10:05 a.m. The reason for admission was "back pain." (PX 2, p.13/34) Petitioner had no primary care physician. His chief complaint was back pain and the Nursing Record indicates that a few months back Petitioner had a tree limb fall onto his shoulders and he was stuck in a bucket for less than fifteen minutes with problems off and on since then, including burning between his shoulder blades that radiated to his low back. Petitioner had not been taking any pain medication but reported being unable to sleep due to the pain. According to Petitioner it was "just getting worse" and he was unable to work without experiencing pain. (PX 2, p. 21/34) When examined by Dr. Savage he noted a sixty day history of back pain with a current problem of difficulty sleeping. He further noted Petitioner's history of a branch falling on his shoulders while he was trimming a tree at work. Petitioner's pain drawing revealed a dull back pain between the shoulder blades and at the belt-line, mid-back. (PX 2, p. 25/34) Petitioner also complained of headaches. Thoracic spine x-rays revealed degenerative disc disease. Dr. Savage's impression was acute thoracic and lumbosacral back strains. Petitioner was given a prescription for Flexeril and Naproxen and told to follow up with Dr. Griffin. Petitioner was also given a medical certificate certifying he was unable to work for one day. (PX 2, p. 32/24)

Petitioner was next examined by nurse practitioner, Abby Fry, on May 31, 2012, in follow-up from the emergency room. Petitioner's chief complaint was upper back pain. Ms. Fry noted Petitioner's onset date of the "first part of March" and he reported trimming a tree when it landed on his shoulder blades. Petitioner had gone to the emergency room and been given Flexeril and Naproxen with some relief. Petitioner reported the inability to sleep, a burning sensation in his neck and shoulders, increased pain with range of motion, and chronic numbness in his hands since a heart attack. Petitioner also stated that he experienced lower back pain if he stood for too long. On physical examination Petitioner had full range of motion but experienced pain with full elevation on the right. Petitioner was also noted to have increased pain on the left when reaching behind. He was tender to palpation along the bilateral trapezius. Petitioner was given a script for a cervical x-ray and physical therapy and given a prescription for Tramadol, to be taken as needed for pain. He was taken off work through June 11, 2012 and was to follow-up in one week. (PX 5)

Petitioner presented to the emergency room at Passavant Hospital later that same day. According to the Passavant Hospital "Facesheet" (PX 2, p. 7/34) Petitioner provided an accident date of March 5, 2012 and listed the time as 7:00 a.m. The reason for admission was "xr sc." (PX 2, p. 7/34) A script for a cervical spine x-ray is found in PX 2. It originated with Jacksonville Family Medical Associates. (PX 2, p. 11/34) the cervical spine x-ray report recites a history of neck pain, injury three months earlier, and temporal headaches. The x-rays showed minor degenerative changes at C5-6. (PX 2, p. 12/34)

As previously instructed, Petitioner presented to Physical Therapists Clinic, Ltd. on June 1, 2012. According to the Initial Evaluation form, Petitioner reported that back in March he was at work trimming trees when he cut a large branch and the pole saw he was using slipped and the branch snapped toward him landing on his shoulders and the boom and pushing him down into his bucket. Petitioner had a really bad headache that day but was able to continue working with use of some aspirin. Since then Petitioner had been experiencing progressive pain and increasing headaches. Petitioner's headaches were now daily and he was experiencing burning between his scapulae and his central lower neck region. Petitioner also reported chronic tingling in his fingers bilaterally as well as some shoulder pain bilaterally. Petitioner also reported difficulty sleeping although the muscle relaxers were helping a little. Finally, Petitioner reported he was worse if he used his left arm away from his body. On examination, shoulder flexion and abduction was painful bilaterally. Cervical rotation, extension, and bending were painful. The therapist noted Petitioner's grip strength testing demonstrated a non-bell shaped curve bilaterally. Petitioner's rapid exchange grip testing results exceeded the normal anticipated results. Due to the latter findings, the therapist noted a possible inconsistent effort on Petitioner's part. Petitioner was scheduled for three visits a week to help with cervical range of motion. (PX 5)

Petitioner returned for physical therapy on June 4, 2012, reporting no change in his neck pain. At his June 6, 2012 visit he reported a very intense headache the day before. Stretching and manual techniques were utilized. (PX 5)

Petitioner signed his Application for Adjustment of Claim on June 6, 2012, alleging he injured his neck and low back on March 9, 2012 when he was stuck by a tree limb. (AX 2)

Petitioner returned to see Ms. Fry on June 7, 2012, reporting that therapy was of no long-term benefit. While it felt good, he would tighten right up afterwards. Movement of Petitioner's neck was reportedly very painful and his right arm had gone numb on the 6th after his therapy session. Range of motion increased his pain. Ms. Fry also noted that Petitioner had been trying to get hold of his boss but he would not return his call. Petitioner's physical examination was similar to his last one with painful range of motion and increased pain with right shoulder movement and reaching behind. Petitioner's left-sided pain was not as bad and he could go above 90 degrees. Petitioner was advised to continue his medications and therapy. He remained off work. Petitioner reported he was getting an attorney. Petitioner was to follow up after seeing a specialist. (PX 5)

When Petitioner next presented for therapy on June 8, 2012 he reported increased right arm pain after his June 6th visit. Modifications in stretching were utilized with no increased symptoms being reported. When Petitioner returned on June 11th he reported no change and feeling somewhat worse that particular day. Petitioner was only performing his stretching exercises once a day, rather than two to three times as recommended. As of June 13, 2012 Petitioner felt he was still worsening. He had a frontal headache that day with limited neck rotation. He had been compliant with cervical exercises. Gentle manual traction made his headache worse. Petitioner also believed his headaches were getting worse. (PX 5)

According to the physical therapy report of June 15, 2012 Petitioner was improving with much less of a headache the past couple of days but significant ongoing neck pain radiating to his scapular areas. As of June 18, 2012 Petitioner reported feeling really good on Friday but noting a significant increase in pain over the weekend and his entire right upper extremity went numb yesterday for no known reason. The numbness in Petitioner's left arm was primarily in the area of his biceps. Continued inconsistencies in grip strength testing was noted which the therapist indicated could be due to sub maximal effort. Petitioner's next therapy session was held on June 20, 2012. Petitioner reported experiencing right arm pain during the night which went away after he woke up and stretched a bit. After therapy Petitioner reported a mild decrease in his stiffness. (PX 5)

Petitioner continued with therapy through July 16, 2012. Petitioner had to cancel one appointment in late June of 2012 due to being pulled over with no valid driver's license. (PX 3) At his June 27, 2012 visit Petitioner reported he was scheduled to see Dr. VanFleet on July 16, 2012 but his case worker was trying to get him in sooner. Petitioner continued to note ongoing, fluctuating complaints of headaches and neck and back pain. In the final therapy note, the therapist reported that Petitioner originally complained of left arm pain; however, in mid-June it changed to the right upper extremity and Petitioner has had ongoing tingling intermittently on the right. Grip testing and rapid exchange grip both indicated inconsistent effort during testing. Petitioner's range of motion was noted to be "slightly" improved. While Petitioner's strength in his left arm had improved, Petitioner's right arm was worse than at his initial visit. Finally, Petitioner's progress was described as "limited recently."(PX 3)

Petitioner presented to Dr. VanFleet on July 17, 2012. As part of the examination, Petitioner completed a Spine Sheet in which he listed his injury date as April 11, 2012, and the injured body parts as his neck and back. Petitioner described the accident as follows: "Tree limb crashed down on my shoulders causing headaches, numbness in arms, upper back and lower back pain, and stiffness to neck." Petitioner denied having had any bed rest, traction, physical therapy exercises, chiropractic manipulation, injections, or pain medication. He acknowledged having taken Ibuprofen, Motrin, Advil, Aleve, Relafen, and/or Naprosyn but claimed none of them helped. Petitioner also completed a pain drawing in which he identified his complaints as headaches, neck pain, bilateral arm numbness, and mid to lower back pain of a burning, achy nature. Petitioner described his pain as an "8/10." When examined by Dr. VanFleet Petitioner provided a history of the incident with the tree branch noting it struck him on his back and while he was able to continue working, he did so with "tremendous" pain. Petitioner reported working until the end of May when he was unable to continue doing so secondary to pain across the base of his neck. Petitioner also reported that he was experiencing pain into his right arm and was having difficulty using his right arm and hand noting that his fingers and hand felt numb. Petitioner's current medications were Tramadol and Ibuprofen and he was undergoing physical therapy which was reportedly helping him. Petitioner denied any prior difficulties with his back and had been off work since May. On physical examination Petitioner had minimal range of motion and some giving-way on the right side. Dr. VanFleet believed Petitioner was suffering from cervical and thoracic strains. Wanting to rule out cervical stenosis the doctor recommended an MRI. He thought the strains should improve with time. (PX 4)

Petitioner underwent a cervical MRI on July 24, 2012. It revealed moderate central bulging at C5-6 which extended to the right of midline causing extra dural indentation of the thecal sac with mild spinal stenosis. Petitioner also had evidence of a mild central bulging disc at C6-7. (PX 2, p. 6/34)

Petitioner returned to see Dr. VanFleet on August 21, 2012. Petitioner reported ongoing pain in his right upper extremity consistent with the C5-6 disc disease shown on the MRI. He also had a C6 radiculopathy. Dr. VanFleet recommended a C5-6 anterior cervical discectomy and fusion with allograft bone and anterior cervical plating. Petitioner wished to think about it. (PX 5)

Petitioner telephoned Dr. VanFleet's office on August 28, 2012 requesting a work excuse. Petitioner was advised that Dr. VanFleet agreed to address his work status from the date of his initial visit and that the excuse would be mailed to him. Dr. VanFleet's records include a chart note of that date indicating "Petitioner has been off work since July 17, 2012 and remains off work until released. Awaiting MRI results." (PX 5)

At Respondent's request, Petitioner was examined by Dr. Robert Bernardi on December 12, 2012, in St. Louis, Missouri. Thereafter, a report was issued. (RX 1, dep. ex. 2) Petitioner denied any history of spine pain before the onset of his current symptoms which was on/about March 9, 2012. At that time Petitioner was working in a boom trimming trees above power lines. He cut through a large limb which fell onto him with two

branches striking the top of both of his shoulder and pushing him down into the bucket. With use of a chain saw, Petitioner was able to extricate himself. He denied any loss of consciousness and reported the event was witnessed. According to Petitioner he continued to work without restrictions after the accident until May 29, 2012 when he first sought medical care and was taken off work. Petitioner reported he had not returned to work since then.

Petitioner noted a severe headache immediately after the accident. He also noticed swelling in his neck associated with burning pain between his shoulder blades. Petitioner reported that his boss would not answer his phone call when he attempted to report his injury. According to Petitioner he woke up in late may with more intense pain and, again, reported the symptoms to his employer at which time he was told it was his responsibility to seek out medical attention. Petitioner then contacted an attorney and went to the local emergency room where he began a course of treatment as reflected in the medical records which Dr. Bernardi reviewed in his report.

Dr. Bernardi described Petitioner's symptom diagram as "unusual," noting Petitioner described paresthesias and aching pain involving the posterior aspect of the right side of his head with similar symptoms across the vertex of his skull. Petitioner also noted burning and aching pain along with paresthesias in the lower posterior cervical region and similar symptoms (along with stabbing pain) in the thoracic and lumbar spine. Petitioner also described burning and aching pain in the posterior aspect of both thighs and burning pain involving the anterior and posterior aspect of his left shoulder with aching pain along the left upper arm circumferentially. Similar symptoms, along with paresthesias and numbness, were noted in the entire right arm.

On examination Dr. Bernardi did not note any Waddell's signs. Petitioner's neck extension was limited to approximately fifty percent of normal and worsened his neck discomfort. Abduction of the left shoulder produced pain complaints along the suprascapular. Abduction and external rotation of the right shoulder resulted in popping of the joint. Petitioner's lower lumbar spine was slightly tender to palpation and straight leg raising on the right produced right posterior thigh pain complaints. Flexion and extension of Petitioner's hips also produced back pain complaints. Petitioner did not bring any imaging studies with him to the appointment.

Dr. Bernardi's diagnoses included: headaches of uncertain etiology; neck and non-radicular right arm pain of uncertain etiology; C5-6 and C6-7 disc disease; mid-back pain of uncertain etiology; thoracic degenerative disc disease; and low back and bilateral non-radicular leg pain of uncertain etiology. Dr. Bernardi recommended that some additional imaging studies be performed and really could not opine regarding the necessity of surgery until he reviewed Petitioner's MRI. He believed Petitioner's changes as described on the cervical MRI were degenerative in nature and not post-traumatic. The work-relatedness of Petitioner's symptoms was felt to be difficult to address. Dr. Bernardi noted Petitioner denied any prior history of spinal pain before his work accident and his history regarding the mechanism of injury has remained consistent across time and different examiners. Additionally, the mechanism of injury is certainly one that could plausibly produce neck/mid-back/low back pain. On the other hand, Respondent denied knowledge of Petitioner's injury until late May when he filed his claim. Dr. Bernardi noted Petitioner disagreed with that and told him his boss was aware of the accident and would not speak to him about it. He also noted in his report that Petitioner's claim was filed shortly after Petitioner was disciplined and suspended from work. While the mechanism of injury is certainly one that could produce spinal pain, his complaints were, in Dr. Bernardi's words, "really quite diffuse" extending from his skull, down his spine, and throughout all four extremities and remaining persistent and more severe with time, which is contrary to most post-traumatic spine pain which generally improves with time. Additionally, Dr. Bernardi noted Petitioner did not show any evidence of objective abnormalities on examination that would correlate with his symptoms and he noted in particular Petitioner's inconsistent effort during physical therapy which suggested a nonorganic factor might be influencing his presentation. With all of

the foregoing in mind, Dr. Bernardi concluded that if Petitioner's accident occurred as he described, it would be reasonable to conclude that it was responsible for his acute headaches, spinal and extremity pain. However, pending the review of imaging studies, he felt it would be difficult to attribute Petitioner's "now very chronic symptoms" to that accident.

Dr. Bernardi went on to address Petitioner's ability to work. Noting Petitioner's job as a tree trimmer was a very physically demanding and dangerous job and pending review of the additional studies, Dr. Bernardi did not believe Petitioner should be working full duty as a tree trimmer but should refrain from occupation driving, avoid climbing/overhead work, steer away from repetitive bending and twisting movements, and refrain from lifting more that 15 to 20 lbs. (RX1, dep. ex. 2)

Deposition Testimony of Dr. Timothy VanFleet(1/17/13)

Dr. VanFleet, an orthopedic surgeon specializing in spine surgery, testified that he evaluated Petitioner at the referral of Abby Frye, nurse practitioner. Dr. VanFleet testified consistent with his office notes as discussed above. Dr. VanFleet also testified that Petitioner's accident was the cause of his condition and his need to be off work. (PX 1, pp. 15-16, 19) While he testified that he had no opinion as of July 17, 2012 whether Petitioner was capable of working, he later testified that as of August 28, 2012 he kept Petitioner off work, noting that Petitioner had apparently been off work since July 17, 2012. (PX 1, pp. 14-15, 19) Dr. VanFleet testified that he has recommended that Petitioner undergo a cervical fusion and he attributed the accident to the need for that procedure because it aggravated Petitioner's pre-existing spondylosis resulting in Petitioner's persistent neck pain and radicular findings and complaints. (PX 1, pp. 18-20) Until Petitioner undergoes the surgery, Dr. VanFleet would not place Petitioner at maximum medical improvement. (PX 1, p. 22) Finally, Dr. VanFleet testified that his services were reasonable and necessary to treat petitioner's spine condition as aggravated by his accident. (PX 1, p. 22)

On cross-examination, Dr. VanFleet explained that it was his understanding Petitioner was struck on the top of the back of his thoracic spine and that it jarred him rather significantly. He was also under the impression Petitioner was able to work after the accident until the end of May when the pain at the base of his neck made him unable to continue working. (PX 1, pp. 24-25) acknowledged that Petitioner described pain in his right arm noting the fingers and hands felt numb. Dr. VanFleet was not aware that Petitioner had prior complaints of chronic numbness in his hands since a heart attack in 2009. Dr. VanFleet testified that he would have no way of knowing whether his complaints of numbness in his right hand were from his heart attack or from the alleged injury. (PX 1, p. 25)He clarified that the finding of giving way on the right side biceps and triceps during physical examination can be consistent with someone who is not providing a significant effort in a strength examination testing. (PX 1, p. 26)

Dr. VanFleet testified regarding a Physical Therapy Clinics note dated July 16, 2012, the day prior to his initial evaluation. That report documents Petitioner complaining of left arm pain. However, in mid-June, his complaints changed to the right upper extremity. Dr. VanFleet testified that this is not as commonly seen but not impossible. Dr. VanFleet also noted inconsistent effort on grip testing and rapid exchange grip. The significance of this finding is that it is consistent with Petitioner not providing 100% effort. Dr. VanFleet testified that this could occasionally impact his diagnosis and recommendations for treatment. (PX 1, pp. 28-30)

Dr. VanFleet testified that the MRI findings of moderate central bulging at C5-6 and mild central bulging at C6-7 are degenerative findings and that these can occur without injury or trauma. (PX 1, p. 30) Specifically, Dr. VanFleet testified that there was no evidence of acute degeneration or herniation in the cervical spine on the

MRI. In addition, Dr. VanFleet testified that his findings were consistent with what the radiologist found. However, Dr. VanFleet identified the MRI as showing bilateral foraminal stenosis at C5-6 secondary to an osteophyte but the radiologist's report specifically states there was no foraminal stenosis at C5-6. Dr. VanFleet did admit that this is inconsistent with his review of the film. Dr. VanFleet testified that disc osteophytes are bone spurs that are degenerative in nature and take months to years to develop. He also testified that Petitioner's foraminal stenosis at C5-6 is secondary to these disc osteophytes.

Dr. VanFleet testified that an individual with disc osteophytes can become symptomatic without any injury or trauma. Dr. VanFleet testified that his diagnosis of cervical radiculopathy and cervical disc disease with recommendations for surgery is based in part on Petitioner's complaints of numbness in the right upper extremity. Dr. VanFleet testified that Petitioner's degenerative condition could have become symptomatic absent any injury or trauma necessitating a need for surgery.

Petitioner underwent a thoracic MRI on February 5, 2013. While the report itself is not a part of the record, it appears to have shown mild multilevel degenerative disc disease with no focal abnormality and no spinal cord compression. On the axial images, there was no central or foraminal stenosis at any segment. (RX 1, dep. ex. 3)

Petitioner also underwent a lumbar MRI on that same date. At L4-5 there was mild to moderate degenerative disc disease and loss of disc hydration. There was possibly some slight loss of disc height and minimal posterior disc bulging. The other lumbar discs were entirely normal. No foraminal stenosis was seen on the parasagittal views. On the axial images, there was evidence of multilevel degenerative facet disease. No central, lateral recess, or foraminal narrowing at any segment was noted. (RX 1, dep. ex. 3)

Lumbar and cervical plain films were taken on February 11, 2013. Degenerative changes at L4-5 were noted. A heald L5 limbus vertebra was possible. The cervical films showed no evidence of scoliosis and on the lateral films, only minimal reduction of the normal cervical lordosis. (RX 1, dep. ex. 3)

Dr. Bernardi issued an addendum on May 28, 2013 after being provided with the new and older imaging studies and Dr. VanFleet's deposition transcript. (RX 1, dep. ex. 3) His diagnoses remained unchanged. While he believed the accident caused the acute pain for which Petitioner sought treatment in May of 2012 he could not conclude that it was the cause of his now chronic symptoms. He did not believe that persistent complaints equated with proof of injury. He did not feel there was any sound medical explanation for Petitioner's pain. While Dr. Bernardi did feel Petitioner's accident could have caused skeletal trauma he did not believe it do so in this instance in light of the imaging studies which showed no evidence of bony injury. He also did not believe the accident caused any ligamentous injury citing the same studies. He did not believe Petitioner's work accident aggravated Petitioner's pre-existing C6 degenerative foraminal stenosis nor could he attribute Petitioner's current symptoms to an aggravation of his pre-existing degenerative disc disease. While he acknowledged that Petitioner did have an objective abnormality at C5-6 (foraminal stenosis and degenerative disc disease), Petitioner's symptoms did not suggest that his foraminal stenosis was the source of his pain. In sum, Dr. Bernardi felt Petitioner had diffuse spinal complaints of uncertain etiology and inconsistent with any specific diagnosis. His x-ray findings and scans were age appropriate and he simply could not correlate them with the accident on March 9, 2012. He did not believe Petitioner had any radicular symptoms. He did not feel a fusion was appropriate to treat Petitioner's neck pain. He could not recommend the procedure nor did he feel Petitioner required any additional treatment as he was at maximum medical improvement and, objectively, was capable of working without restrictions. If Petitioner felt otherwise, Dr. Bernardi recommended a functional capacity evaluation. (RX 1, dep. ex. 3)

Dr. Bernardi opined that if Petitioner's work accident occurred as he alleged, he thought that it is reasonable to conclude it caused the acute pain for which he sought treatment in May 2012. However, Dr. Bernardi indicated he was unable to conclude that it was the cause of his now chronic symptoms. In Dr. Bernardi's opinion, there is no sound medical explanation for Petitioner's pain. Dr. Bernardi opined that there is no evidence of skeletal trauma and no evidence of ligamentous injury. He did feel that the work accident could have caused myofascial sprain/strain, but that this would not account for his chronic symptoms.

Dr. Bernardi further opined that Petitioner's foraminal stenosis was not symptomatic and that Petitioner did not have cervical radiculopathy as Petitioner lacked radiating arm pain that followed a dermatomal distribution and extended past his elbow. Petitioner described numbness that involved the middle three fingers of his right hand. According to Dr. Bernardi, an irritated C6 nerve root would produce numbness in the thumb. Petitioner did not have nerve root tension signs. He had normal strength and normal symmetric reflexes. Dr. Bernardi saw no reason to conclude that Petitioner's C6 foraminal stenosis was the source of his symptoms.

Dr. Bernardi also noted Petitioner had diffuse spinal complaints, the etiology of which was uncertain. Petitioner's symptoms were not consistent with any specific diagnosis and there were no objective abnormalities on his general physical or neurological exams. He also had presence of non-organic findings to include an inconsistent effort at physical therapy, and give way weakness when evaluated by Dr. VanFleet.

Dr. Bernardi opined that there was no solid medical evidence to support the utility of anterior cervical discectomy fusion and the management of cervical degenerative disc disease that is not associated with radiculopathy or myelopathy. He did not recommend that Petitioner have a cervical fusion. He opined that Petitioner did not require any additional treatment and had reached MMI from any symptoms he developed after the alleged injury on March 9, 2012. Dr. Bernardi concluded that there is no objective reason why Petitioner should not be capable of working without restriction. (RX 1, dep. ex. 3)

Deposition Testimony of Dr. Robert Bernardi (7.26.13)

Dr. Robert Bernardi, a neurosurgeon, testified consistent with his two reports. He testified that it was his understanding that Petitioner was trimming some power lines when a large limb fell on him pinning his head between the fork of the limbs with the limbs landing on his shoulders. Petitioner described experiencing an immediate headache, swelling in his neck and pain between his shoulder blades thereafter. (RX 1, p. 9) Having noted in his report that Petitioner had no evidence of a radicular problem, Dr. Bernardi explained that radiculopathy coming from a pinched nerve in one's neck generally results in pain concentrated along the inner border of the shoulder blade or beneath it which radiated down one's arm in a band-like dermatomal distribution. Sometimes it terminates as a numb and tingling sensation in one or two fingers of the hand and which finger is affected depends upon which nerve root is being compressed. (RX 1, p. 17) In all there is a very set of well-defined, distinct symptoms and physical findings accompanying radiculopathy and, according to Dr. Bernardi, Petitioner lacked those symptoms and findings. (RX 1, p. 18) Thus, he did not feel the surgery being recommended by Dr. VanFleet was appropriate. (RX 1, p. 18)

Dr. Bernardi also testified that when he initially examined Petitioner he thought it was reasonable to assume that Petitioner's acute symptoms were related to his work accident. However, he was uncertain as to whether his chronic and persistent complaints were related and, therefore, recommended, additional imaging studies. According to the doctor those studies did not show any evidence of ligamentous instability in Petitioner's neck or low back. Furthermore, the plain films did not show any signs of bony trauma or skeletal injury. (RX 1, pp. 19-20) With regard to the cervical MRI, it showed, at most, some degenerative disc disease and formainal stenosis at C5-6. (RX 1, p. 21) Thus, Dr. Bernardi concluded that Petitioner has degenerative disc disease in the

cervical, thoracic, and lumbar spine along with pain in those areas and headaches but they are of uncertain etiology and consistent with his age. (RX 1, pp. 21 – 22) He also explained that while the accident could have aggravated Petitioner's pre-existing degenerative disc disease it is usually a short-lived and well-tolerated process and one usually does not see persistent, severe, continuous, and disabling pain going on for weeks and weeks and months and months. Dr. Bernardi also felt it simply "unlikely" that Petitioner simultaneously aggravated his disc disease in his neck, thoracic, mid and low back when he had the accident. (RX 1, pp. 23-24)

On cross-examination Dr. Bernardi clarified that while most people over the age of forty have evidence of arthritis he agreed that most people don't' have evidence of bilateral stenosis at C5-6. (RX 1, p. 27) He further acknowleged that if Petitioner's accident history was accurate it would have caused a temporary exacerbation of some degenerative conditions in Petitioner's cervical spine which returned to his pre-injury level at some point. (RX 1, p. 29) He also clarified that he cannot say the proposed surgery is unreasonable but he does think it's not necessary. (RX 1, p. 32) He also acknowledged that the mechanism of injury, if accurate, could aggravate degenerative stenosis in one's spine. (RX 1, p. 32) He also explained that the problem he has with Petitioner's case is that Petitioner's history is not consistent with an aggravation of degenerative disc disease. According to Dr. Bernardi, an aggravation is usually accompanied by severe/bad pain which diminishes to a lower level and may persist at that lower level but it always improved. In Petitioner's case, it's not that he's had chronic or continuous neck pain, it's the fact it has never remitted in any way during the entire time. (RX 1, p. 35)

On redirect examination Dr. Bernardi testified that Petitioner was not taking any pain medications when initially seen on December 12, 2012. (RX 1, p. 42)

Arbitration

Testimony of Petitioner

Petitioner testified that he is 42 years old and resides in Whitehall, Illinois. He was employed with Respondent as a tree trimmer in March of 2012, having started for Respondent seven to eight years earlier. Petitioner's job duties as a trimmer included trimming the trees around power lines, climbing trees, and performing ground work. He regularly used chainsaws, ropes and saddles. The chainsaws weighed anywhere from 15 to 50 lbs. He was also required to cut trees up in the air for which he used a bucket truck and a 65 foot boom.

When asked if he had ever had problems with his neck or back prior to March 9, 2012 Petitioner testified that he always had pain in his back due to the nature of his job. Petitioner testified that he performed his job climbing trees although when his back "got to hurting" he would save the climbing activities for the end of his circuit (ie., shift/day). Petitioner testified he would climb the trees, "kind of" lean back on his ropes and saddle and it would pop his back from the bottom all the way up to the top. Despite the foregoing, Petitioner denied seeking any medical treatment for those complaints before March 2012.

Petitioner testified that Respondent is owned by Garrett Funk, also known as Gary. Mr. Funk was Petitioner's supervisor the entire time he worked for Respondent.

Petitioner testified that on or about March 9, 2012, he was working with Derek Boxdorfer when he was injured. As Petitioner explained it, he was in the boom above some power lines approximately 50 feet off the ground. He was cutting through a limb when he stopped and turned around to grab the joystick on the boom and the limb fell on him. Petitioner testified he did not know how much the limb weighed. Petitioner testified that he pushed the limb up and used his chainsaw to take pieces off of it. His pole saw was reportedly smashed. Petitioner was able to get back down on the ground with the boom.

Petitioner testified that Derek, his ground man, had seen "it" and was kind of upset and trying to figure out what to do. According to Petitioner, Derek was yelling at him and at first he didn't respond but then he did and told Derek not to move anything due to the position Petitioner found himself in (ie., the tree limbs were almost touching the wires). Petitioner then testified that "after he came to" he pushed the limb up and off him he was able to get his chain saw and start taking little pieces of tree limb one by one. Eventually he was able to get out and get down to the ground. At that point he was pretty dazed and had a "really massive headache." Petitioner testified they then decided they needed to go and call Gary to let him know and so they folded up the boom and moved the truck to a location where they had reception on his cell phone.

Petitioner testified that he then attempted to contact Gary Funk, but he would not answer his phone and his voicemail was full so he couldn't leave a message.

Petitioner denied having any communication with Mr. Funk during that remaining two months of his employment with Respondent.

Petitioner testified that he did not seek any medical care that day and did not miss any time from work. He continued to work through March, April, and May of 2012.

Petitioner testified that in the first part of April, he received a call from Gary Funk wanting to know if he could work at Bodine, a factory. Petitioner expressed interest as Bodine was a good paying job. When Petitioner got to Bodine to work that day, he had a conversation with Mr. Funk about trimming and dragging brush. Petitioner was asked which activity he wanted to do. Petitioner testified that he told Mr. Funk he could not drag any brush because after the limb hit him at Pearl, he did not feel like he needed to be dragging any brush. According to Petitioner, Gary then walked away.

Petitioner testified that he told Gary about the branch falling on him. When asked if there was a detailed conversation, Petitioner testified there wasn't. It was just like I just said."

Petitioner testified that thereafter in May of 2012 he began having severe pain in his back. According to Petitioner he would go about his routine doing his ground work first and then beginning his climbing and he noticed his back would not pop and it just felt like "fire." Petitioner also testified to the onset of numbness in his fingers on his right hand, a sensation he denied experiencing before the accident. Petitioner testified that he called Gary Funk and told him he would not be coming in due to his neck. Petitioner testified that he subsequently went to Jacksonville Passavant Hospital for the first time at the end of May 2012. He received an injection and was referred to Abby Fry, a nurse practitioner.

Petitioner explained that he didn't get any treatment before this time because he is the type of person who thinks he is a "Superman" and can keep going without even thinking about his problems. Consequently, he tried to work through the pain.

Petitioner testified that he attended physical therapy. Petitioner also testified that his condition worsened while he underwent physical therapy. His migraines went "berserk" and while he would feel better during therapy he would start getting migraines and back pain when he got home.

Petitioner testified that Abby Fry subsequently referred him to Dr. VanFleet in July of 2012. Dr. VanFleet has recommended cervical spine surgery. Petitioner testified that he last worked on or around May 17th or 18th of 2012. He testified that Dr. VanFleet took him off of work on July 17, 2012.

Petitioner also testified that he could not explain why he told Dr. VanFleet his accident occurred on April 11, 2012. He believed he must have been confused "or something."

Petitioner testified that he still has back and neck pain. His lack of sleep has been tremendous and he sleeps with his arm straight out which he has never had to do before, having previously been a stomach sleeper. Petitioner denied being able to get comfortable when sleeping and his arm would go to sleep.

Petitioner testified that his bills from Dr. VanFleet, Passavant Hospital, and physical therapy are unpaid.

On cross-examination Petitioner testified that the accident occurred about 7:00 in the morning. He thought the conversation with Gary regarding the Bodine factory work and the accident occurred around April 3-4. When asked if that was the only conversation he had with Gary about the incident, Petitioner testified "I don't even talk to or even see Gary…." He denied seeing Gary or having any conversations with him during the two months he continued working for Respondent. He testified he tried to call him on other occasions but Gary wouldn't answer his phone. He believed those attempts occurred every Monday morning when he needed fuel. According to Petitioner, Gary simply wouldn't answer his phone. Petitioner also testified that before the accident Gary would talk with him but after the accident they had no conversations regarding Petitioner's job duties.

On further cross-examination Petitioner acknowledged that from May 21st through May 25th he was suspended from his job without pay because Petitioner had supposedly "cussed" out a customer. The following Monday after his week's suspension was Memorial Day. Petitioner testified that on Tuesday, May 29th he called Gary and told him he wasn't going to make it into work. He didn't actually remember the conversation but he did recall telling him he wouldn't be in that day due to his neck. He did not recall having any conversation with Gary that day concerning his employment status. He did not recall if Gary fired him that day or told him not to return to work. He didn't recall any such conversation with Gary; however, it is his understanding that he was fired. That same Tuesday was the first day Petitioner sought medical care.

Petitioner acknowledged that Respondent had a post injury drug policy and that he had experienced "issues" with that policy in the past. According to Petitioner, he was the only one that took one and passed it. There was also a time when he was asked to take one but refused. He was then fired by Respondent but rehired because he was needed. Thus, Petitioner knew that at the time of his injury on March 9, 2012 he would have had to take a post injury drug test. One has never been taken, however.

Petitioner also acknowledged having a heart attack in 2009 and getting stents. Following that he did experience chronic complaints of numbness and tingling in his upper extremities bilaterally.

Petitioner also agreed that some time during his physical therapy his arm complaints switched from the left arm to the right arm. While he told Dr. VanFleet he was injured on April 11, 2012 Petitioner could not recall anything happening on that date. He simply gave the wrong date.

Petitioner also testified that while he hasn't gone back to see Dr. VanFleet since August of 2012 he has spoken with his nurse. Petitioner testified that he called the nurse shortly after he tried to call Gary in August of 2012 about going back to work but that went "nowhere." According to Petitioner, Gary told him he had nothing to say to him, that he needed to call workman's comp or his corporation and that he should turn his saw in. He then called Dr. VanFleet's office to talk to them about going back to work. When asked if he called the Dr.'s office to e released to go back to work, Petitioner denied same. Rather, he wanted an excuse so he could "save his job"

and go back to work light duty. Petitioner denied speaking with anyone other than Gary about working. He denied doing any roofing jobs.

On redirect examination Petitioner was asked to explain why he didn't take a drug test the day he got hit. According to Petitioner, nobody else had ever taken a drug test for Gary. Petitioner also explained the difference in his hand symptoms before and after the accident, most notably that he couldn't close his hands after his heart attack. After his March 2012 accident, the numbness just stayed in his fingers. During the therapy his left-sided arm symptoms improved.

Petitioner testified that he hasn't proceeded with the surgery because he has no way to pay for it.

Testimony of Derek Boxdorfer

Derek Boxdorfer testified on behalf of Petitioner. Mr. Boxdorfer is 28 years old and resides in Hardin, Illinois. In March 2012 he was employed at Funk Pest Control & Tree Service as a ground helper. His supervisor was Gary Funk, the owner. He testified that he worked with Petitioner having started just a few weeks earlier after returning from a hand injury. Mr. Boxdorfer testified that on March 9, 2012 he was working with Petitioner while Petitioner was in the bucket trimming a tree. Mr. Boxdorfer testified that his back was actually turned to him at the time, but when he turned around and looked, Petitioner was covered in the bucket by a limb that had fallen. Petitioner was crouched down in the bucket with the limb resting on top of the bucket. He did not actually see the limb hit Petitioner. Mr. Boxdorfer testified that Petitioner got the limb pushed off of the bucket and got the bucket down to the truck. It took a couple of minutes for Petitioner to gather himself. Shortly thereafter, they went up the road to use their cell phone to try to get a hold of Mr. Funk. They were not able to reach him.

Mr. Boxdorfer testified that he continued to work with Petitioner for the next couple of weeks but then he had some days off because of some incident. Mr. Funk brought a couple of other guys over to work with him.

Mr. Boxdorfer did testify that he continued to work with Petitioner in the month of April 2012, but that he was not working like his usual self. Mr. Boxdorfer described Petitioner as a "go-getter" but during this time after the accident Mr. Boxdorfer did most of the work (ie., the trimming) and Petitioner would help drag the bush {**} According to Mr. Boxdorfer they were not working their normal workload.

Mr. Boxdorfer also testified that he himself never tried to call Gary Funk about Petitioner's injury because Gary would not answer the phone because of his hand injury or speak with him whatsoever. Mr. Funk would tell him where to go and work but that was about it.

Mr. Boxdorfer testified that he had his own personal worker's compensation injury. He was drug tested after that injury at the hospital. He also testified that Mr. Funk filled out the accident report or Form 45 for him after his work injury. When asked if he ever heard Mr. Funk talk about Petitioner's injury, Mr. Boxdorfer testified that about a month after the alleged incident, he heard Mr. Funk say something about Petitioner's injury in the shop to which Mr. Boxdorfer replied that the accident did happen. Thereafter, Mr. Funk kind of shut his mouth and went on.

Mr. Boxdorfer testified that he no longer works there because he did not feel comfortable any longer after his accident. Mr. Boxdorfer's wife was also employed by Respondent but left but she too was not happy with her employment there.

Testimony of Garrett Funk

Garrett Funk testified on behalf of Respondent. Mr. Funk owns Funk Pest Control & Tree Service and has since 1986. The company does residential and commercial pest control and tree service, mostly contract utility line clearing. At the present time, he has 14 employees. He testified Petitioner used to work for him. He last worked for Mr. Funk in May 2012.

Mr. Funk testified that he fired Petitioner around May 20, 2012. Petitioner was suspended the week of May 20, 2012 after which he was supposed to return to work. Petitioner was suspended following a complaint about his language and actions at a job site. He also left work early. He was suspended for a week without pay from May 21st to May 25th, 2012. Mr. Funk testified that he had conversation with Petitioner on Tuesday, May 29, 2012. According to Mr. Funk, Petitioner did not show up to work that day and Mr. Funk called to ask him what was going on. Mr. Funk testified that Petitioner told him he didn't think he was being treated fairly and Mr. Funk told Mr. Holder that he was no longer employed by his company due to the complaints from the utility company. Petitioner did not tell Mr. Funk about a work injury during that conversation.

Mr. Funk went on to testify that he first learned of the alleged work injury the following day on May 30, 2012. At that time, Mr. Funk called the Petitioner wanting to know where his chainsaw was. At that time, Petitioner told Mr. Funk that he had to go to the doctor because of injuries he sustained. He did not advise Mr. Funk on the date that he was injured, but just said that it was about a month prior. He told him he got hit by a tree limb.

Mr. Funk denied having any conversations with Petitioner prior to May 30, 2012 about an alleged work injury. He also denied hearing from any other employees about an alleged work injury.

Mr. Funk testified that he does have frequent communication with his employees, specifically Petitioner. He testified that he would go out at least once a week and put fuel in the trucks. He would usually meet them at a gas station to fuel the trucks up. Then every two weeks they would have to collect time sheets. At no time during any of these meet ups did Petitioner report a work injury. Mr. Funk testified that he talked to Petitioner a couple of times a week on the phone during which time he never reported a work injury.

Mr. Funk testified that there is a drug testing policy in place and that they do require post-injury drug testing. His employees are aware of this policy as they fill out a sheet when they are hired and are given a yellow card to carry in their wallet that has all of the contact information for corporate resources who handles their worker's compensation claims.

Mr. Funk testified that Petitioner did not have any post-injury drug testing as the injury was first reported to him on May 30th and he was no longer an employee.

Mr. Funk testified that he saw Petitioner working for Jeremy Campbell doing shingling on a roof. He believes this was in April 2013, but is not specific about the date.

Mr. Funk denied being told by Petitioner of a work injury during their conversations about work at the Bodine factory. Petitioner helped perform some tree trimming there; although he most ran the bucket truck.

Mr. Funk testified that Derek Boxdorfer also was an employee for his company. Mr. Boxdorfer had his own work-related injury for which he completed an accident report and provided treatment. Mr. Boxdorfer also

participated in a post-injury drug test. Mr. Boxdorfer's wife also worked for Funk Pest Control & Tree Service. He testified that they were having some issues with her and they cut back her hours following which she quit her employment.

Petitioner's medical bills were admitted as PX 6 – 9. [1]

The Arbitrator concludes:

The crux of this case was probably best summed up during Dr. Bernardi's deposition when the doctor was asked if the primary question was "...do you believe him [Petitioner] or don't you believe him?" The Arbitrator has concluded that she does not believe Petitioner. The accident may have occurred but not necessarily on March 9, 2012. Furthermore, the Arbitrator does not buy into the chronicity of Petitioner's complaints allegedly stemming from any accident.

(1) (Issue C – Accident).

Petitioner failed to prove he sustained an accident on March 9, 2012 that arose out of and in the course of his employment with Respondent. The Arbitrator is not entirely convinced by a preponderance of the credible evidence that Petitioner actually had an accident on March 9, 2012. To begin with, neither Petitioner nor Mr. Boxdorfer were completely sure when the incident occurred. Petitioner told medical personnel at Passavant Hospital that it was early March. Petitioner told Dr. VanFleet his accident date was April 11, 2012. Mr. Boxdorfer's testimony is more suggestive of an April date since he believed they only continued to work for a few more weeks before Petitioner lost time due to an "incident' at work. This would correlate with his time off work in May. Mr. Funk also credibly testified that when he first learned of the alleged accident on May 30, 2012 Petitioner told him it had occurred about a month earlier.

Second, Petitioner's credibility is suspect as the Arbitrator notes discrepancies in the history provided to Dr. VanFleet (date of accident, denial of prior back problems, and the reason he stopped working in May). Petitioner denied any prior problems or difficulties with his back or neck when initially seen by Dr. VanFleet. However, at the arbitration hearing Petitioner testified that he has always had back pains due to the nature of his job and then he went on to describe how he would "pop" his back from the bottom to the top. Petitioner was not forthright with Dr. VanFleet when he told him he stopped working in late May due to neck pain, these statements suggesting that it was neck pain which prohibited Petitioner from continuing to work rather than a personnel issue. On cross-examination Petitioner testified that from March 9th to the end of May he had no communication with his supervisor (ie., Mr. Funk) regarding his job duties. However, he also acknowledged conversations with Mr. Funk in early April regarding the "Bodine" job.

In support of his testimony regarding accident, Petitioner presented Derek Boxdorfer; however, Mr. Boxdorfer's testimony is equally suspicious as he seemed more focused on supporting his former co-worker and undermining his former boss for whom he certainly felt some ill-will stemming from how he and his wife had been allegedly treated while employed by Respondent. The Arbitrator also notes Mr. Boxdorfer acknowledged he wasn't good with dates and his time line was not consistent with Petitioner's testimony thereby casting doubt as to when, and if, the accident occurred. If not good with dates, what else might he not be good at remembering? For example, while Mr. Boxdorfer testified that Petitioner was not the same worker after the accident as before, he further testified that after the accident he would trim the trees while Petitioner would drag the brush. Yet, Petitioner testified that when Mr. Funk spoke with him about whether he wanted to trim trees or

[1] PX 9 is not marked.

drag brush at the "Bodine" job, Petitioner testified that he declined to drag brush because that wasn't something he felt he should be doing after the limb had fallen on him at Pearl. Why would he decline to drag brush at Pearl when he had been doing that very activity instead of trimming trees, according to Mr. Boxdorfer? Their testimony is contradictory and suspect.

Petitioner also testified that he was aware of a company drug testing policy. Prior to this alleged accident, Petitioner refused to take a drug test at the request of Respondent. Petitioner was then terminated. He was, however, subsequently re-employed by Respondent. Petitioner testified that he was aware that he would be required to take a post-injury drug test following the alleged March 9, 2012 injury had he reported it to Mr. Funk. Petitioner also testified that "nobody else has ever taken a drug sample for Gary Funk.....Gary has never drug tested anybody straight up." This testimony by Petitioner is in direct contradiction to that of Mr. Boxdorfer who testified that he did, in fact, take a drug test after his own workers' compensation injury while employed by Respondent. Again, Petitioner's testimony is suspect.

Finally, the Arbitrator notes that Petitioner testified he lost a pole saw in the accident because it was smashed. Yet, no evidence of a broken/smashed pole saw was otherwise presented nor was there any testimony concerning the replacement of same or reporting of same – all of which could have corroborated Petitioner's testimony regarding an accident having occurred and when.

Petitioner's credibility and motivation is further undermined by his efforts to stay off work and to then return to work. Dr. VanFleet did not take Petitioner off of work or place him on light duty restrictions when he initially examined him. Furthermore, when Dr. VanFleet examined Petitioner on August 21, 2012 he made no mention of Petitioner needing to be off work. It was not until Petitioner telephoned Dr. VanFleet's office on August 28, 2012, stating he needed a work excuse that Dr. VanFleet issued same.

Petitioner also testified that he tried to return to some type of restricted work a month or so after he last saw Dr. VanFleet. Petitioner testified that he called Dr. VanFleet's office after his last evaluation in August of 2012 to go back to work, specifically requesting an excuse "so I could go back to work." That is not documented in Dr. VanFleet's records. Petitioner als testified that he made no other attempts to find employment despite his desire to return to work. This testimony is inconsistent with Mr. Funk's testimony that Petitioner was observed working on a roof during the time of his alleged entitlement to temporary total disability benefits. Under these circumstances Petitioner's motivation for seeking a work excuse and a return to work slip is suspicious. Again, Petitioner's credibility is suspect.

(2) Issue F – Causal Connection).

Even assuming, arguendo, that Petitioner sustained an accident on March 9, 2012, Petitioner failed to prove a causal connection between his current condition of ill-being in his neck and low back and his accident of March 9, 2012. This conclusion is based upon Petitioner's lack of credibility concerning the ongoing chronic nature of his injury and symptoms, and the testimony and opinions of Dr. Bernardi which are deemed more persuasive than those of Dr. VanFleet.

Petitioner continued to work full duty as a tree trimmer after his March 9, 2012. He testified that his job required the use of chain saws, ropes, and saddles. The chain saws weighed anywhere from 15 to 50 pounds. Petitioner was required to climb trees and work in and around a boom truck. While his former co-worker, Derek Boxdorfer testified that Petitioner was not the worker he used to be, that testimony is not entirely believable to this Arbitrator. Mr. Boxdorfer candidly admitted he wasn't real good with dates and details. He also appeared to

have an axe to grind with Respondent stemming from the manner in which he was treated by Respondent after his own workers' compensation claim as well as how his wife was treated by Respondent when she worked there. Petitioner did not seek any medical treatment, complete an accident report, or undergo a post-injury drug test. In light of the heavy physical nature of Petitioner's job and his lack of medical treatment (or need for any pain medication) during the several months he continued to work for Respondent the Arbitrator is unable to conclude that Petitioner's accident resulted in chronic ongoing complaints and symptoms.

It was not until Petitioner was suspended and terminated by Respondent that he began treating for injuries he claimed stemmed from his accident. Even then, inconsistencies appeared, especially as Petitioner began treating with Dr. VanFleet. First, Petitioner told Dr. VanFleet he stopped working in May on account of his injuries. As discussed above, that is not true. He was suspended and then terminated. Second, when Petitioner was seen by Dr. VanFleet he referenced an accident in April of 2012. When asked to explain why he gave that date to the doctor, Petitioner had no real explanation other than to say he had been confused or "something" that day and didn't know why he put it down. Petitioner also led Dr. VanFleet to believe he had never had any problems with his back or neck before March 9, 2012. However, his testimony at arbitration was to the contrary. Dr. VanFleet relied upon these representations in providing certain opinions. Those opinions are not persuasive in light of the inaccuracies upon which they were based.

Additionally, there is a question as to the extent of any injuries Petitioner might have sustained in the accident. Petitioner testified to a massive headache at the time of the accident and nothing more. He further testified that he then began to notice his back would not pop (as it would before the accident) when doing his circuits. He also testified that he started having problems with his right arm. However, medical records and therapy records from Petitioner's early treatment visits indicate Petitioner had left arm complaints. They then switched to the right arm. Again, Petitioner's testimony is not consistent with the objective medical records.

Both Dr. VanFleet and Dr. Bernardi agreed that Petitioner's condition of ill-being in his neck was degenerative in nature. Both testified that there was no evidence of any acute injury to Petitioner's cervical spine. Petitioner's current condition of ill-being is bilateral foraminal stenosis at C5-6 with some mild central stenosis or narrowing secondary to disc osteophyte, a degenerative condition. Dr. VanFleet has recommended surgery to address Petitioner's subjective complaints, but admitted that Petitioner's condition could have become symptomatic absent any trauma or injury. In addition, Dr. VanFleet admitted that it was not even possible to determine if Petitioner's right arm complaints of numbness were, in fact, related to the degenerative condition in his neck or to his un-related heart attack in 2009 that led to ongoing upper extremity complaints of numbness, which Petitioner does not dispute. Both Dr. VanFleet and Dr. Bernardi identified non-organic findings during physical examination that include give-way weakness, inconsistent effort in physical therapy which calls into question the reliability of Petitioner's subjective complaints. In addition, Dr. Bernardi found no objective evidence of any abnormalities on neurological or physical examination. Finally, the Arbitrator notes that Dr. VanFleet's opinions are based upon inaccuracies in Petitioner's history.

Based upon the foregoing, the Arbitrator concludes the testimony of Dr. Bernardi is more credible than that of Dr. VanFleet and Petitioner has failed to prove that his current condition of ill-being is causally connected to his alleged work accident of March 9, 2012.

Petitioner's claim for compensation is denied. No benefits are awarded. All other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Ronald Giddens,

Petitioner,

14IWCC0379

vs. NO: 11 WC 37109

Konica Minolta,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, prospective medical care, and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: MAY 2 1 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:bjg
0-4/21/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0379

GIDDENS, RONALD
Employee/Petitioner

Case# **11WC037109**

KONICA MINOLTA
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0724 JANSSEN LAW CENTER
JAY H JANSSEN
333 MAIN ST
PEORIA, IL 61602

1685 KOPKA PINKUS DOLIN & EADS PC
BRIAN J KAPLAN
100 LEXINGTON DR SUITE 100
BUFFALO GROVE, IL 60089

STATE OF ILLINOIS)
)SS.
COUNTY OF **PEORIA**)

- [ ] 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)

RONALD GIDDENS
Employee/Petitioner

v.

KONICA MINOLTA
Employer/Respondent

Case # **11** WC **37109**

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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Peoria**, on **6/24/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **5/2/11**, 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 $; the average weekly wage was $**595.00**.

On the date of accident, Petitioner was **52** years of age, *married* with **0** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**10,606.94** for TTD, $ for TPD, $ for maintenance, and $**6,986.82** for other benefits, for a total credit of $**17,593.76**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent is liable for the C5-C6 and C6-C7 ACDF (Anterior cervical discectomy with interbody arthrodesis) recommended by Dr. O'Leary. Further, Respondent should pay all related medical expenses for the anterior interbody fusion recommended by Dr. Patrick O'Leary.

Respondent shall pay Petitioner temporary total disability benefits of $396.66/week for 81 5/7 weeks, commencing 11/28/11 through 6/24/13, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $10,606.94 for TTD benefits paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for the following medical bills, as provided in Sections 8(a) and 8.2 of the Act:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
Bruns Chiropractic Office, #1001725	$48,391.81
IL Regional Pain Institute, #7419	$8,729.00
IWP #133754	$753.60
Midwest Orthopaedic Center, #310682	$1,050.00
IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

Respondent shall be given a credit of $6,986.82 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of $0 as provided in Section 19(k) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

S J Maths

Signature of Arbitrator

8-22-13

Date

ICArbDec19(b)

AUG 2 9 2013

IN SUPPORT OF THE ARBITRATOR'S MEMORANDUM OF DECISION, THE ARBITRATOR MAKES FINDINGS REGARDING THE FOLLOWING ISSUES:

-(F) - Is Petitioner's current condition of ill-being causally related to the injury?

-(J) - Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

-(K) - Is Petitioner entitled to any prospective medical care?

-(L) - What temporary benefits are in dispute?

☐TPD ☐Maintenance ☒ TTD

-(M) - Should penalties or fees be imposed upon Respondent?

STATEMENT OF FACTS

Direct Examination of Petitioner

Petitioner testified he worked for Konica Minolta as a service technician for copying machines. Petitioner testified he was coming from OSF to the Human Service Center on Fayette St. to service a copy machine at the time of the accident. Petitioner testified he was driving on Glen Oak Ave. when a vehicle turned left in front of him.

Petitioner testified he had to be extricated from the vehicle after the accident. Petitioner testified he was taken by ambulance to Methodist Medical Center with a laceration to his head.

Petitioner testified he followed up his care with his family physician, Dr. Lovell. Petitioner testified he continued to have pain and sought treatment with Dr. Michael Bruns. Petitioner testified that Dr. Bruns performed x-rays, therapy, adjustment, ultrasound and continues with this treatment through the present. Petitioner testified Dr. Bruns referred him to Dr. Russo and Dr. Kevin Henry.

Petitioner testified Dr. Henry prescribed medications and did several nerve injections. Petitioner testified he was seen by Dr. Patrick O'Leary due to continued complaints of pain, who recommended C5-C6 and C6-C7 anterior cervical diskectomy with interbody arthrodesis. Petitioner testified he had not had the surgery, as it has not been approved by work comp, but that he would like to proceed with the surgery.

Petitioner did testify that he received temporary total disability benefits through 11/28/11. Petitioner testified that he was informed by his employer on 9/27/11 that his employment was terminated due to the Respondent's inability to accommodate the Petitioner's restrictions due to "business necessity".
Petitioner further testified he has not been employed since 9/27/11.

Petitioner testified his current symptoms are chronic pain in his neck all the time.

Cross-exam of Petitioner

On cross-examination, Petitioner testified he had pain in his neck and shoulders. Petitioner further testified that his treatment with Dr. Bruns hadn't changed much and his symptoms remained about the same.

Petitioner testified he was diagnosed with degenerative disc disease prior to the motor vehicle accident, but was never diagnosed with spondylosis.

Petitioner further testified that Dr. Bruns kept him off work, as well as Dr. Henry and Dr. O'Leary. Petitioner further testified that his employment was terminated due to work restrictions. Petitioner testified that he only worked a couple of days after the accident, was unable to continue and has not worked since May 2011. Petitioner testified he was given work restrictions of 4 hours per day, but could not work within those restrictions.

Petitioner testified he applied for unemployment benefits, but was denied. Petitioner further testified he has not sought employment since November 2011.

Petitioner testified that Dr. Bruns' treatment did not improve his condition, but provided only temporary pain relief.

Petitioner testified he had no prior injuries prior to the motor vehicle accident of 5/2/11.

Direct examination of Dr. Henry

Dr. Kevin Henry testified he was a physician in anesthesia pain management and licensed since 2006. Dr. Henry testified he performed his residency at John Hopkins in Maryland.

Dr. Henry testified that he treated the Petitioner with medications, facet blocks, de-nervating nerves, and temperization until he could be seen by the surgeon. Dr. Henry further testified that he performed median branch blocks and burned his nerve, which did not provide complete relief. Dr. Henry referred Petitioner to Dr. Patrick O'Leary, a spinal surgeon.

Dr. Henry testified the Petitioner had been treated conservatively from the date of the accident through the present time with complaints of right-sided neck pain, inability to turn his head, and shoulder pain.

Dr. Henry testified that his treatment and charges are reasonable and necessary for treatment of injuries sustained as a result of the motor vehicle accident of 5/2/11 involving the Petitioner.

Cross-examination of Dr. Henry

Dr. Henry was questioned regarding his billing charges and the fee schedule. Dr. Henry testified that his charges are probably higher than the fee schedule, but they take what they get paid. Dr. Henry testified that he does not review charges for other medical providers in his profession.

Dr. Henry testified he first saw Petitioner on 10/4/11 as a referral from Dr. Bruns. He testified Petitioner suffered herniated discs at C5-C6 & C6-C7. Dr. Henry testified there are many causes of herniated discs, which could include **trauma**, wear and tear, sneezing & aging. Dr. Henry also testified that a person could have a herniated disc their whole life without symptoms. Dr. Henry testified that Petitioner was asymptomatic before the accident.

Dr. Henry testified that his initial diagnoses were cervical spondylosis, degenerative disc disease, and cervical facet strain.

Dr. Henry testified that the Petitioner was unable to work.

Dr. Henry testified that Petitioner had pre-existing degenerative disc disease, but he never complained of pain before the accident.

Direct examination of Dr. Bruns

Dr. Bruns testified that he was a licensed chiropractor in Illinois since 1985. Dr. Bruns testified that he saw Petitioner after the accident and was given a history of Petitioner being involved a motor vehicle accident on 5/2/11 when a car turned left in front of Petitioner.

Dr. Bruns testified Petitioner had pain in his neck shoulders and back and diagnosed Petitioner with muscle spasm of the neck and shoulder, nerve root compression in the neck and back, cervicalgia, acute trauma hyperflexion, headache, and lumbar muscle spasms.

Dr. Bruns testified that Petitioner had no prior problems prior to the motor vehicle accident.

Dr. Bruns testified that he treated Petitioner with physical therapy, hot moist packs, muscle stimulator, ultrasound, massage therapy, chiropractic adjustments, and neuromuscular rehabilitation.

Dr. Bruns testified he continues to treat Petitioner through the present time. Dr. Bruns testified his treatment has reduced some of the pain, but Petitioner still has chronic pain.

Dr. Bruns testified that he has kept Petitioner off work.

Dr. Bruns testified Petitioner has severe loss of movement in his neck, severe pain and headaches.
Dr. Bruns testified this his treatment rendered was reasonable and necessary as a result of the motor vehicle accident.

Dr. Bruns testified that his charges were reasonable in like and similar communities.

Dr. Bruns testified that his considerable amount of treatment was necessary due to Petitioner's amount of pain, the injury and Petitioner's inability to function daily. Dr. Bruns testified his treatment was intensive chiropractic treatment.

Cross-examination of Dr. Bruns

Dr. Bruns testified he knew what the Medical Fee Schedule was. Dr. Bruns testified he would be paid per the Fee Schedule and adjust the charges accordingly. Dr. Bruns testified his office manager was responsible for billing for services performed.

Dr. Bruns testified he attended chiropractic school.

Dr. Bruns testified he has hospital privileges to order MRI's, x-rays or bloodwork at Proctor Hospital, Pekin Hospital and Methodist Medical Center. Dr. Bruns testified he could not prescribe any medication or admit someone to the hospital.

Dr. Bruns testified he has a diplomate in physical therapy.

Dr. Bruns testified he is a certified chiropractic radiologist.

Dr. Bruns testified he first saw Petitioner on 5/11/11 and he was given a history of the motor vehicle accident being a work-related injury. Dr. Bruns further testified that Petitioner gave a history that the auto accident was not his fault.

Dr. Bruns testified he continued to treat Petitioner and that Petitioner's condition was better than it would have been without his treatment.

Dr. Bruns testified he made recommendations on what would benefit Petitioner's treatment.

Dr. Bruns testified that he initially said Petitioner could go back to restricted work, however that only lasted a few weeks and he was taken completely off work through the present time.

ADDITIONAL FINDINGS OF FACTS:

Petitioner was referred to Dr. Patrick O'Leary at Midwest Orthopaedic Center by Dr. Kevin Henry. Petitioner has been under the care of Dr. Parick T. O'Leary for his serious cervical injury. The record reflects in Exhibit 4 (the medical records of Dr. Patrick T. O'Leary, admitted into evidence) the following:

> HPI: He returns today. He is a 54-year old right-hand dominant male. He was previously employed at Konica Minolta Business Solutions. His job was to repair copiers. On May 2, 2011, he was driving; he was working at the time; he was on his way to a job site. He was hit head-on by another vehicle. He had to be extracted from the vehicle. He was taken to the ER. Basically, since that time, he has had chiropractic care, injections and other care for his neck, including a CT scan, an MRI and ultimately x-rays. He was initially referred to see me last August of 2012. He denies ever having any significant symptoms with his neck or arms since that time. I initially recommended a C5-C6 and C6-C7 ACDF. (Anterior cervical diskectomy with interbody arthrodesis).

Midwest Orthopaedic requested the workers' compensation carrier to approve the surgery and the workers' compensation insurance company refused approval for the surgery.

Dr. O'Leary, in his medical records of January 15, 2013, points out:

> "On the MRI, it appears that he has disk herniations at C5-C6, left of center, and right of center at C6-C7. These do abut the spinal cord."

Exhibit 4 further states:

> "IMPRESSION:
> 1. Cervical disk herniation, C5-C6 and C6-C7.
> 2. Neck and arm pain."

> PLAN: "I think he would be a reasonable candidate for a 2-level ACDF (Anterior cervical diskectomy with interbody arthrodesis.). . . I do not expect him to be pain free after an operation like this as a reasonable outcome. I think I can improve his pain by removing the disk herniations and stabilizing that portion of his neck, which presumably limits his upward cervical extension and causes the arm pain at present today – that is, his positive Spurling maneuver."

Dr. O'Leary addresses causation and clearly points out that, inasmuch as Ronald Giddens never had any prior injury to his cervical area and had no prior complaints of pain in his cervical area, the following was concluded:

> "Most of the events of his current symptoms seem to point to the auto accident from nearly 2 years ago now. He has had extensive care for this, and it is my feeling that he would benefit from a surgery.
> The patient denies having any symptoms prior to the accident. Certainly, this kind of mechanism, a head-on collision where he would have to be forcibly extricated from a car could be a high enough impact to cause and/or exacerbate an underlying cervical spine condition."

The analysis of Dr. Patrick T. O'Leary, orthopedic surgeon, is credible to a reasonable degree of medical certainty and is based upon his physical examination of Ronald Giddens, as well as the verification on the MRI that Mr. Giddens has disk herniations at C5-C6, left of center, and right of center at C6-C7. The fact that Mr. Giddens had no prior neck pain or prior injury before the motor vehicle crash of May 2, 2011, further verifies causation and the mechanism of the head-on crash where Mr. Giddens had to be forcibly extricated from the vehicle indicates a significant impact likely to have caused the cervical spine condition found on the MRI.

RESPONDENT'S REQUESTED MEDICAL EXAMS

Respondent requested a medical examination of Mr. Ronald Giddens, and Mr. Giddens made himself available for an out-of-town evaluation by Dr. Michael D. Watson on September 12, 2011. The medical examination requested by Respondent through Dr. Michael D. Watson revealed, on September 12, 2011, per the physical examination, as follows:

> "The patient (Ronald Giddens) has obvious muscle spasms in his paracervical musculature. He is tender posteriorly. There is pain with all motion including flexion, extension, and lateral bending. He has a limited rotation of the cervical spine because of the pain. . . He is tender in the trapezius bilaterally."

Dr. Watson reviewed the MRI scan and reported as follows (Respondent's Exhibit No. 6 and contained in Petitioner's Exhibit 6). "His MRI scan reveals mild disk degeneration especially at the C5-6 and C6-C7 level with straightening of the cervical spine. There is also some canal and foraminal stenosis which is worse at the C5-C6 level and is asymmetric to the left and at C6-7 level it is asymmetric to the right."

Dr. Watson concluded with regard to his exam as follows:

> "I do believe that there is a causal relatedness to the diagnosis and to the injury as described. . . I do believe that further treatment is necessary. I would recommend that he be evaluated by a cervical spine specialist either in the Orthopedic or Neurosurgery field. I also believe that continued chiropractic treatment may be

beneficial as he is getting some temporary pain relief from these treatments. I do not believe that there are any pre-existing conditions."

Dr. Watson, with regard to Respondent's requested medical exam, further stated his opinion on September 12, 2011:

"I do not feel that he has reached maximum medical improvement."

The IME by Dr. Watson supported Petitioner's claim in diagnosis, causation and approval of treatment and a recommendation of additional treatment by either orthopedic or neurosurgery. This is the course of treatment that occurred with the referral to orthopedic physician, Dr. Patrick T. O'Leary, who requested approval of workers' compensation for the ACDF surgery. The Respondent's IME also recommended that "continued chiropractic treatment may be beneficial as he is getting some temporary pain relief from these treatments." This again is the course of treatment followed and recommended by the physician chosen by Respondent.

The Respondent, after receiving the IME report of Dr. Watson, scheduled the Petitioner for a second exam with Dr. Stephen Delheimer. The letter regarding this appointment was dated October 20, 2011, and the appointment with Dr. Delheimer was scheduled for November 28, 2011

Dr. Delheimer noted on exam that Petitioner does complain of pain in his neck with extension. Dr. Delheimer's opinion was Petitioner suffered a cervical strain/soft tissue injury as a result of the vehicle accident. Further, Dr. Delheimer's opinion was that there was no causal relationship between the motor vehicle accident and injury related cervical strain. Dr. Delheimer further gave the opinion that no further treatment was needed and placed Petitioner at maximum medical improvement eight weeks after the motor vehicle accident.

Dr. Delheimer's opinion contradicts those of Dr. Watson, the Respondent's first independent medical examiner.

On September 27, 2011, Konica Minolta, by letter to Mr. Ronald Giddens, stated "your employment with Konica Minolta will be terminated effective today, September 27, 2011." Konica Minolta is aware of the restrictions at that time involving Mr. Giddens imposed by Dr. Michael A. Bruns indicating "Patient is restricted to 4 hour work days, light duty restriction: no lifting over 20 lbs." (Petitioner's Exhibit 6).

Konical Minolta, in their letter to Mr. Giddens of September 27, 2011, stated:

> "Based on a review of all of the information that has been provided to us, to include your physician's indication that you will be unable to perform the necessary functions of your position for an undetermined period of time, Konica Minolta is unable to grant a further accommodation due to business necessity. Therefore, your employment with Konica Minolta will be terminated effective today, September 27, 2011."

Konica Minolta terminated Mr. Giddens' employment on September 27, 2011, due to "business necessity" and he has not worked at any gainful employment since September 27, 2011.

On November 28, 2011, Konica Minolta stopped payment of temporary total disability checks to Mr. Giddens and except for a payment of $2,500, Respondent has made no further payments of workers' compensation to Mr. Giddens since November 28, 2011. Temporary total disability payments are owed to Mr. Giddens since November 28, 2011, to the present date at the rate of $396.66 per week. This totals 81 5/7 weeks before giving Respondent credit for all payments made to date.

MEDICAL BILLS

Petitioner submitted the following medical bills as Petitioner's Exhibit 3:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
Bruns Chiropractic Office, #1001725	$48,391.81
IL Regional Pain Institute, #7419	$8,729.00
IWP #133754	$753.60
Midwest Orthopaedic Center, #310682	$1,050.00
IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

CONCLUSIONS OF LAW

After reviewing the evidence and Petitioner's testimony, the Arbitrator finds the following:

1. The Arbitrator finds the Petitioner sustained a motor vehicle accident during the course of his employment on 5/2/11.

2. The Arbitrator finds a causal connection between the motor vehicle accident and Petitioner's current condition of ill-being. The Arbitrator further finds a causal connection between the motor vehicle accident and the need for the C5-C6 and C6-C7 ACDF (Anterior cervical diskectomy with interbody arthrodesis) recommended by Dr. Patrick O'Leary.

3. The Arbitrator orders the Respondent is liable for the C5-C6 and C6-C7 ACDF (Anterior cervical diskectomy with interbody arthrodesis) recommended by Dr. O'Leary. Further, Respondent should pay all related medical expenses for the anterior interbody fusion recommended by Dr. Patrick O'Leary.

4. The Arbitrator finds the opinions of Dr. Stephen Delheimer not credible.

5. Respondent shall be given a credit for $10,606.94 for TTD benefits paid.

6. Respondent shall be given a credit of $6,986.82 for medial 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.

7. Respondent shall pay Petitioner temporary total disability benefits of $396.66/week for 81 5/7 weeks, commencing 11/28/11 through 6/24/13, as provided in Section 8(b) of the Act.

8. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for the following medical bills, as provided in Sections 8(a) and 8.2 of the Act:

Advanced Medical Transport, #11-19428	$827.00
Methodist Medical Center, #11122-00412	$571.00
Dr. John Lovell, #6934	$110.00
Bruns Chiropractic Office, #1001725	$48,391.81
IL Regional Pain Institute, #7419	$8,729.00
IWP #133754	$753.60
Midwest Orthopaedic Center, #310682	$1,050.00
IPMR, #332520	$1,742.00
Peoria Day Surgery Center, #425029	$5,514.00
TOTAL:	**$67,688.41**

9.The Arbitrator does not award penalties.

In no instance shall this award be a bar to subsequent hearing and determination of additional amount of temporary total disability, medical benefits or compensation for a permanent injury, if any.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Durham,

Petitioner,

vs. NO: 12 WC 41182

Olin Winchester,

14IWCC0380

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 15, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 27 2014
TJT:yl
o 3/25/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

BURHAM, SCOTT
Employee/Petitioner

Case# **12WC041182**

OLIN WINCHESTER
Employer/Respondent

14IWCC0380

On 4/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% 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:

0895 MORMINO VELLOFF EDMONDS SNIDER
J ROBERTS EDMONDS
3517 COLLEGE AVE
ALTON, IL 62002

0299 KEEFE & DEPAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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)

Scott Durham
Employee/Petitioner

v.

Olin Winchester
Employer/Respondent

Case # 12 WC 041182

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 22, 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **10/31/2012**, 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.

The parties stipulated that the average weekly wage calculated pursuant to Section 10 was $**1,153.85**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

Respondent is entitled to a credit of $**All paid by group** under Section 8(j) of the Act.

ORDER

SEE ATTACHED DECISION

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

April 9, 2013
Date

ICArbDec19(b)

APR 15 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SCOTT DURHAM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 12 WC 41182**
	)	
OLIN WINCHESTER,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Section 19(b) of the Act.

STATEMENT OF FACTS

The claimant, 42 years old on the date of trial, had worked as a bullet tumbler and forklift operator for the respondent at its ammunition manufacturing plant from May 2008 through October 2012. The claimant described having to maneuver barrels full of bullet jackets (the hollow piece into which lead is pressed to produce the projectile). The barrels are approximately three feet tall, two feet in diameter, and weigh about 75 pounds when empty. When full, the barrels weigh between four to five hundred pounds. The petitioner testified that as part of his job, he would physically move the barrels from a holding area to the assembly area as needed. This would be accomplished by tilting the barrel so that one side of the base would be approximately 10-12" off the ground and then rolling the barrel on the edge. The claimant testified that this was a routine activity.

The petitioner testified that he arrived for his usual midnight shift at 11 PM on October 30, 2012. At approximately 12:50 AM on October 31, he was tilting a barrel back to move it and it pulled him forward. He asserted feeling immediate low back pain radiating down his leg. This accident was apparently unwitnessed. He reported it to his supervisor, Dave Plough, at that time and went to the medical clinic.

The Olin clinic notes were introduced as PX13. They demonstrate a history consistent with the claimant's description of events. They note prior low back in 2009 and a history of lumbar and cervical fractures following a 2011 motor vehicle accident. The clinic sent him to St. Anthony's Hospital in Alton for evaluation.

The records of St. Anthony's Hospital emergency room (PX3) note a similar history of accident and recitation of symptoms. They provided an injection and medication at that time and he was transported back to the respondent's facility.

The petitioner thereafter began treatment with Dr. Jeffery Pfeifer, a chiropractor, on November 5, 2012. See PX1, PX2, PX11. The petitioner related a similar history of accident. Dr. Pfeifer assessed sciatica, prescribed the claimant off work and ordered an MRI. The MRI was performed on November 9, 2012. See PX4. It noted degenerative disk disease with disk bulges at two levels, but no herniation was observed. Dr. Pfeifer thereafter referred the claimant to a spine surgeon. In deposition, Dr. Pfeifer testified that believed the treatment was medically necessary and was related to the workplace accident as described by the claimant.

The petitioner saw Dr. Matthew Gornet on January 7, 2013. See PX9-10. He provided a similar history of accident to Dr. Gornet. Following examination, Dr. Gornet prescribed oral steroids and advised he would need to review the actual films of the MRI. On January 10, Dr. Gornet reviewed the films and recommended epidural injection. He opined the current symptoms and need for treatment were causally related to the accident as described by the petitioner.

The petitioner testified that epidural injections had been done (those records were apparently not available at the time of trial) and was scheduled to see Dr. Gornet on February 25, 2013 for further evaluation. He further testified that he continued to have low back pain with radiation into his left leg which interfered with his daily activities.

After the petitioner had returned from St. Anthony's ER, he was brought to the conference room, met with a representative from Labor Relations, and was terminated. The petitioner admitted that there had been an allegation in which he had threatened a co-worker on or about October 19, 2012, as well as at least one other disciplinary problem. The petitioner denied prior knowledge of his pending termination. The petitioner admitted that he had in fact called off the prior shift (Oct. 29-30) and asserted this was for family reasons. The respondent called Mr. David Plough to testify. Mr. Plough confirmed that the petitioner was under investigation and was scheduled to be terminated. He testified that the termination meeting was originally scheduled for the October 29 shift, but had not personally discussed that issue with the claimant.

OPINION AND ORDER

Accident and Causal Relationship

Given the close relationship between these issues in this matter, the Arbitrator will address them jointly. A claimant has the burden of proving by the preponderance of credible evidence all elements of the claim, including that the alleged injury arose out of and in the course of employment. The respondent submits the claimant has contrived or manufactured a claim of accident, or at least has not credibly demonstrated the occurrence of a legitimate one. The respondent points toward a highly coincidental sense of timing – and indeed, from the claimant's perspective, it would indeed be a fortuitous one. The claimant was under investigation for misbehavior, calls off of work for

allegedly unrelated reasons on the day he was originally supposed to be either disciplined or terminated, and then on his very next working day suffers an unwitnessed accident shortly before the termination meeting can occur.

The question of timing aside, the petitioner describes an incident that is certainly within the bounds of what could be expected at his job. Moreover, this incident, presuming it did in fact occur, is consistent with the injury related by the claimant.

The respondent's suspicions are certainly understandable, and may well be true. Having reviewed the evidence as a whole, however, the Arbitrator concludes that the petitioner has met the threshold of proving accident.

His treating physicians have assessed causation presuming accident and while the petitioner did have prior back complaints, there is a lack of evidence of ongoing symptoms or treatment prior to October 30. Accordingly, the Arbitrator concludes that causal connection has thus far been demonstrated.

Medical Treatment (Past and Prospective)

The petitioner has submitted medical bills of $726 for Dr. Gornet, $2,466.50 for the emergency room visit, $3,073.00 for the MRI, and $3,847.00 for Dr. Pfeifer. These bills appear medically necessary. The respondent shall accordingly satisfy these expenses within the limits of Section 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

The respondent shall further pay for the February 25, 2013 appointment with Dr. Gornet. Whatever further treatment may be recommended at that appointment is speculative and therefore not appropriately addressed at this time.

Temporary Total Disability

The dispute as to TTD was based on liability. In accordance with the above findings, the Arbitrator orders TTD from November 1, 2012, through February 22, 2013. The respondent shall pay the petitioner $769.23 per week for 16 & 2/7 weeks, a total liability of $12,527.46.

Penalties and Fees

The Illinois Supreme Court has long recognized the imposition of penalties is a question to be considered in terms of reasonableness. *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 297 (1980); *Smith v. Industrial Commission*, 170 Ill.App.3d 626 (3rd Dist. 1988). In the *Avon* case, the Court looked to Larson on Workmen's

Compensation for guidance, noting that penalties for delayed payment are not intended to inhibit contests of liability or appeals by employers who honestly believe an employee not entitled to compensation. 3 A. Larson, Workmen's Compensation sec 83.40 (1980). Moreover, the Commission need not award compensation even if the claimant's version of relevant events is undisputed. *Smith v. Industrial Commission*, 98 Ill.2d 20 (1983).

The Arbitrator believes that the fact that coincidences do occur does not impose a requirement that people should trust them. The respondent's skepticism was articulated, reasonable and supported by the evidence. Penalties and fees are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Monroe,

Petitioner,

vs. NO: 11 WC 46174

Department of Transportation/ State of Illinois,

14IWCC0381

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

The Commission finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment.

Petitioner testified that he was an accountant for the Illinois Department of Transportation. His job consisted of making payments for all the contracts that come in on that particular day. These contracts are split up between him and other accountants. He would also look at and break down award notices making sure they are proper. He would also look at the contracts and make sure everything was proper on them. (Transcript Pgs. 8-11)

He further testified that he uses both his hands all day long while at work. He is always flipping through pages and typing on the computer. On slow days he works with around 30 contracts and busy days he works on up to 65. A typical contract would be 30 to 60 pages. (Transcript Pgs.11-14)

Petitioner also claimed that his keyboard was at the very back of his desk and that he had his elbows on the desk toward the very edge. The contracts and award notices were between him and the keyboard. Petitioner testified that he would flip the pages of the contracts with his elbows resting against the edge of his desk. (Transcript Pgs. 14-15)

However, the Commission finds the Petitioner's testimony less than credible.

On cross examination Petitioner admitted that when he reviewed award notices he would go from computer screen to computer screen. He did not input into the computer. He also testified that he does the same with contracts. He does fill in the blanks on the computer and every contract has at least two blanks. Sometimes with certain road contracts he has to type in a whole sentence. Sometimes with new contracts he has to input the actual pin numbers and take out the punctuation. He has to input at least 3-5 words. (Transcript Pgs. 30-32)

In regards to COD's he would just print them out using the mouse. He doesn't write them but just checks them to make sure all the information is correct. He works on about 30 COD's a day. (Transcript Pgs. 33-35)

Petitioner, during his Independent Medical Exam with Dr. Williams on April 25, 2012, told the doctor that his keyboard was two feet from the front of his desk. The Respondent's attorney placed a keyboard two feet away from Petitioner and Petitioner admitted he may have been wrong with the distance he told Dr. Williams. Petitioner then placed the keyboard where he believed it should have been and it was about one foot away from his desk. (Transcript Pgs.38-40)

Dr. Williams testified if Petitioner has his wrist resting on the table and he is typing, that could potentially aggravate the condition. However, it is impossible to do that and have your forearm resting against the table. Petitioner never stated to him or any other doctors that he ever rested his wrists on the table. It is possible, with the keyboard 2 feet away from him that he could rest his wrists and type. However, if he does that he is not putting pressure on his forearms. He is not resting his forearms on the edge. It is very important that it is the edge and not just the table which is flat and smooth. (Respondent Exhibit 3 Pgs. 75-81)

In Dr. Borowiecki's, Petitioner's treating doctor, September 16, 2011, office note he states "He is pretty adamant about the fact that he does not spend a lot of time with the arm resting against any type of arm rest, table or desk edges, et cetera." However, this has no impact on his opinion that the carpal or cubital tunnel was caused by the use of an arm rest. (Petitioner Exhibit 2 Pg. 42-43)

In Dr. Borowiecki September 20, 2011, letter he indicates that Petitioner faxed a list of activities that he does that tend to worsen his numbness and paresthesias. According to the fax Petitioner does a fair amount of typing, turning pages and contract writing. He lifts stacks of contracts and papers, uses an adding machine, types emails and generally does most of his work on a computer keyboard. This aggravates his symptoms. He positions his keyboard on the back of his desk and has no place to get the keyboard lower to avoid pressure on the ulnar aspects of his forearm. The purpose of the letter was to document Petitioner's work activities do aggravate his cubital tunnel symptoms. (Petitioner Exhibit 1)

The Commission finds that Dr. Borowiecki's testimony is flawed because the Petitioner did not give him accurate information regarding his job duties.

Melissa Doedtman, the Contact Administration Manager in the Bureau of Construction, testified she oversees various units, one of which the Petitioner is a member of. The information contained on the contracts comes from someplace else. Petitioner is just verifying the information. In some instances there will be changes like the name of the company or an address, but typically most of the information is there. The changes that are made are minimal. There are some contracts that are still in paper form and the quantities have to be inputted into the database. These are numerical and are normally done with a keypad. Each contract could have 10 -80 payments but these are made during the life of the contract. If it is a new item Petitioner would be typing a short description of those items into the database. The database field for these new items is 18 characters long. The text of the contracts is not generated in her office and the pay estimates are also generated offsite. (Transcript Pgs. 66-70)

Ms. Doedtman indicated that Petitioner would review 30 contracts per day and in the summer it could be up to 300. However, Petitioner would not have to turn every page of the 200-300 page contracts. There may be only 4 to 5 places within a contract that Petitioner will have pieces of information he has to verify. (Transcript Pgs. 72-73)

The Commission finds the testimony of Ms. Doedtman credible.

The Petitioner's job duties at work were not repetitive and did not exacerbate or aggravate his bi-lateral carpal and cubital tunnel condition. Therefore, Petitioner has failed to show that he sustained injuries arising out of and in the scope of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision filed with the Commission on May 7, 2013, is reversed and a finding that Petitioner failed to prove he sustained accidental injuries that arose out of and in the course of his employment with Respondent be substituted in its place.

DATED: MAY 27 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

CJD/hf
O: 3/26/14
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MONROE, ROBERT
Employee/Petitioner

Case# **11WC046174**

14IWCC0381

ST OF IL/DEPT OF TRANSPORTATION
Employer/Respondent

On 5/7/2013, 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 0.07% 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:

4553 JACK DAVIS LAW OFFICES LLC
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WORKERS COMPENSATION MANAGER
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SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 7 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT MONROE
Employee/Petitioner

v.

STATE OF ILLINOIS – DEPT. OF TRANSPORTATION
Employer/Respondent

Case # 11 WC 46174

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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **March 8, 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. [ ] 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 **June 8, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$42,685.76**; the average weekly wage was **$820.88**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$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 all medical bills paid by it pursuant to Section 8(j) of the Act.

ORDER

Respondent is liable for payment of medical bills relating only to Petitioner's bilateral cubital tunnel and left carpal tunnel treatment from June 14, 2011 through January 24, 2013, as contained in Petitioner's Exhibit 3, subject to the medical fee schedule, Section 8.2 of the Act. Respondent shall have any and all appropriate credit for any amounts paid by it or its group insurance carrier.

Respondent shall pay Petitioner permanent partial disability benefits of $492.53/week for 71.1 weeks, because the injuries sustained caused the 10% loss of both arms, and the 10% loss of the left hand, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

05/02/2013
Date

MAY - 7 2013

STATE OF ILLINOIS)
)SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT MONROE
Employee/Petitioner

v. Case # 11 WC 46174

STATE OF ILLINOIS – DEPT. OF TRANSPORTATION
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Robert Monroe, testified that he has been employed with Respondent, the State of Illinois Department of Transportation, for three years. He has been employed by the State of Illinois for a total of eight years. During that time period he has held the position of an accountant. Petitioner described his duties in his testimony. Petitioner testified that he works 7.5 hour days, 5 days per week. He testified that he "handles" all incoming road construction contracts in the State of Illinois. In the mornings, he makes payments on all the contracts for that day. He then breaks down the award notices and makes sure they are proper. He then reviews all contracts to make sure they are in proper order. If time permits in a day, he then makes final preparations on the contracts to be sent to the Comptroller's office. He also testified that his job intensifies with more contracts needing reviewed, especially during the summer months. He testified that he processes about 30 contracts per day on a "slow" day, and up to 65 contracts per day on a busy day in the summer. He explained that the summer months are busier because that is when most road construction is being performed.

Petitioner testified concerning the ergonomic configuration of his work station. He testified that his keyboard was placed on top of his desk for the entire period of his employment. He testified that he uses a keyboard for data entry, which is placed far enough away from the edge of the desk to allow a contract to rest between the edge of the desk and his keyboard. Petitioner testified that as he enters data, his left and right elbows are resting on the edge of the desk. He also described using his left hand for "turning the pages" of contracts while reviewing the same for accuracy. He testified that he engages in this document review and data entry regularly and that he turns pages and enters data the majority of the work day. Petitioner testified that during his typing activities and turning pages, he has his wrists/hands "flexed" in an upward position. Petitioner's Exhibit 4 is a document which sets forth Petitioner's job duties. This exhibit comports with Petitioner's description of his job duties. (See Petitioner's Exhibit (PX) 4). Of note is the fact that the job description (called a "Demands of the Job" form) indicates that

Petitioner's job requires him to use his hands for "fine manipulation" and "gross manipulation" six to eight hours per day. Petitioner's direct supervisor, Karen Higdon, signed and initialed this document.

Petitioner testified that on and before June 8, 2011, he began to experience pain, numbness and tingling in his left hand, left arm and right arm. He testified that prior to this time, while he did have a right carpal tunnel release that was settled with Respondent, he had not experienced any injury or trauma to his left hand, left arm, or right arm. Petitioner testified that he was in good health, and continued to be in good health with respect to his left wrist, left arm and right arm prior to experiencing these symptoms. While the issue of "notice" is not in dispute in this claim, the Arbitrator notes that Petitioner submitted a "Notice of Injury" form which contains a description of Petitioner's condition and onset of symptoms that comports with Petitioner's testimony at trial in this claim. (See PX 5).

On June 14, 2011, Petitioner sought treatment from Dr. Tomasz Borowiecki at Springfield Clinic as a result of experiencing pain, numbness and tingling in his left wrist and bilateral elbows. On that date, Petitioner described his symptoms of pain, numbness and tingling to Dr. Borowiecki. Specifically, it was reported that Petitioner "notices this mainly when he is working on a computer or at a desk, resting his forearms on the edge of the counter or table." (PX 1). Dr. Borowiecki's evaluation of Petitioner on June 14, 2011 concluded with findings and complaints consistent with cubital tunnel syndrome and left carpal tunnel syndrome. (PX 2, p. 16). At this time, Dr. Borowiecki ordered a nerve conduction study. (PX 1).

On August 8, 2011, Petitioner underwent an EMG conducted by Dr. Cecile Becker at Springfield Clinic. The results of that EMG were negative. (PX 1).

Petitioner saw Dr. Borowiecki again on August 18, 2011 for a follow up evaluation. At this visit, Petitioner's symptoms of numbness, tingling and pain in his left hand and bilateral arms had persisted. Despite the negative EMG findings, Dr. Borowiecki diagnosed left carpal tunnel syndrome and cubital tunnel syndrome. He based this diagnosis, in part, on positive examination findings (Tinel's and compression tests). (PX 1). His note states as follows:

> "Dr. Becker had done nerve studies on the patient, and she did not find any abnormalities at all on either side, which I am a little bit perplexed by, as clinically the patient certainly has evidence of carpal tunnel on the left and cubital tunnel-type symptoms on the right."

(PX 1).

In light of the foregoing opinions, Dr. Borowiecki recommended repeat electrodiagnostic studies to be performed by a different neurologist. On November 4, 2011, Dr. David Gelber at Springfield Clinic administered an updated EMG nerve conduction study, which confirmed Dr. Borowiecki's clinical diagnosis of bilateral cubital tunnel syndrome/ulnar neuropathy at the elbow. (PX 1; PX 2, p. 18). The EMG revealed no evidence of carpal tunnel syndrome. (PX 1). On November 8, 2011, Dr. Borowiecki discussed with Petitioner that surgery was an option for both arms. At that time, Petitioner elected to continue with observation. (PX 2, p. 24).

On February 2, 2012, Petitioner was referred to Dr. Mark Greatting, who is an upper extremity specialist at Springfield Clinic. Dr. Greatting began treatment for a left shoulder rotator cuff tear issue Petitioner experienced, which is not a part of the present claim. (See PX 1). Petitioner also underwent

treatment for right carpal tunnel syndrome (see PX 1), which is not a part of this claim and in fact was settled with Respondent, as mentioned *supra*.

Petitioner presented to Dr. Borowiecki on August 16, 2012, reporting hand numbness and bilateral elbow numbness and tingling. Dr. Borowiecki's impression was as follows: "Left carpal and cubital tunnel syndrome, failing conservative management as well as right cubital tunnel syndrome." Petitioner reported to Dr. Borowiecki on this date that he wanted to proceed with the bilateral cubital tunnel and left carpal tunnel surgeries. (PX 1).

On October 3, 2012, Dr. Borowiecki performed a left carpal tunnel release and a left ulnar nerve submuscular transposition for cubital tunnel syndrome. On December 5, 2012, Dr. Borowiecki performed a right ulnar nerve exploration and submuscular transposition for Petitioner's right cubital tunnel. (PX 1).

Petitioner presented for a post-operative follow-up evaluation concerning his left cubital and carpal tunnel surgeries with Dr. Borowiecki on October 25, 2012. On that date, it was reported concerning Petitioner's left arm/wrist that "the numbness has resolved except at the very tips of the middle and ring fingers where he still feels a little numbness persisting but things continue to improve." (PX 1).

Petitioner testified that he had been diagnosed and treated for other conditions prior to June 8, 2011, including psoriasis approximately 20 years ago when he presented at a VA Hospital. In addition, Petitioner testified that he has been diagnosed with sleep apnea, plantar fasciitis, and torn cartilage in his knee.

On November 20, 2011, Dr. Borowiecki opined as to causation of Petitioners symptoms in a letter, stating:

> "[Petitioner] does a fair amount of typing, turning pages and contracts writing, lifting stacks of contracts and papers, using an adding machine, typing emails and generally doing most of his work on a computer keyboard. He states all of these activities aggravate his symptoms. He does position the keyboard on the back of his desk so that he has space to work. He has no place to really get the keyboard a little bit lower to avoid pressure on the ulnar aspects of his forearms, according to patient. Again, this is simply to document that the patient's work activities do aggravate his cubital tunnel symptoms."

(PX 1; PX 2, pp. 28-29).

Dr. Borowiecki's deposition testimony was taken on February 16, 2012. Dr. Borowiecki is a board certified orthopedic surgeon. (PX 2, Dep. Exh. 1). Dr. Borowiecki testified, to a reasonable degree of medical certainty, that Petitioner's bilateral cubital tunnel syndrome and left carpal tunnel syndrome could cause to become symptomatic or be aggravated by his duties of employment as an accountant with Respondent. (PX 2, pp. 30-32). The following exchange took place between Petitioner's counsel and Dr. Borowiecki during the doctor's deposition:

Q. Can we agree that any opinions you render will be given to a reasonable degree of medical and surgical certainty?

A. Yes.

Q. Do you believe Mr. Monroe's bilateral cubital tunnel syndrome was caused to become symptomatic or aggravated by his duties of employment as an accountant with the State?

A. I believe that his duties he describes and the way he performs them certainly can aggravate cubital tunnel symptoms.

(PX 2, pp. 30-31).

****

Q. With regard to the left carpal tunnel syndrome, for which you have diagnosed Mr. Monroe, do you believe that his work duties at the State of Illinois caused or contributed to cause that condition to become symptomatic, sir?

A. ....He has it on the right side. I think it is very feasible that he has a subclinical, i.e., not diagnostic by nerve studies, but clinically causing symptoms and reproducible left carpal tunnel that are aggravated by his work activities.

(PX 2, p. 32).

Petitioner presented for an examination at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act") with Dr. James Williams on April 25, 2012. Dr. Williams reviewed Petitioner's medical records, including his right carpal tunnel syndrome records which are not a part of the claim at bar. Dr. Williams also reviewed various forms listing Petitioner's written job description and duties. Dr. Williams further conducted a physical examination of Petitioner. Dr. Williams' impression on the date of his examination was that of bilateral cubital tunnel syndrome and left carpal tunnel syndrome "despite negative EMG and nerve condition velocity testing or left median nerve neuritis." (RX 3, Dep. Exh. 2).

Dr. Williams reported that he did not believe Petitioner's job duties were aggravating or causative factors of his medical condition at issue. Dr. Williams' report further states: "The question is though if the patient truly rests his forearms around the elbow area on the medial aspect on the table as he states, this could obviously apply pressure over the ulnar nerve and could be an aggravating type issue to this problem." The doctor believed that Petitioner's bowling activities could at least be contributory and/or aggravating to his right-sided cubital tunnel syndrome. (RX 3, Dep. Exh. 2).

Concerning Petitioner's left carpal tunnel syndrome, Dr. Williams did not think it was aggravated by his work activities, and rather believed that condition could have been caused by "riding a motorcycle" and/or Petitioner's condition of psoriasis. Dr. Williams further reported the following: "At this point, I did find the patient to be honest and forthcoming. I did not find him to exhibit any evidence of symptom magnification or malingering." (RX 3, Dep. Exh. 2).

Dr. Williams' deposition testimony was taken on January 3, 2013. (RX 3). The following exchange occurred between Petitioner's counsel and Dr. Williams during the deposition regarding Petitioner's bowling activities:

Q. ...the illness or the injury of the left carpal tunnel, that wouldn't have anything do to with the bowling because he's right hand dominant, correct?

A. I agree with you, sir.

(RX 3 pg. 57).

Petitioner testified that he is an avid and very good bowler. Petitioner bowls in a league two to three nights per week. Three games are bowled on league nights. Petitioner testified that he throws a lot less than a bad bowler. His average is 235. At most, he will throw 16 balls in one game. As noted, *supra*, Petitioner is right hand dominant. When bowling, Petitioner's left hand is only used to help lift the ball. With his right hand, he testified that the act of bowling involves normal underhand movement, like that of a softball player. Petitioner testified that he does not ride a motorcycle, but rather rides a scooter. He has owned the scooter for three years, but testified he does not ride often. It is hard for him to ride it much due to his knee injuries, which are not a part of the claim at bar. Petitioner testified that when riding the scooter, his wrists are not in a flexed or extended position as he is "dead even" with the handle bars. He further testified that there is very little vibration when riding the scooter. A photograph of Petitioner's model of scooter that he identified at trial was entered into evidence as Petitioner's Exhibit 6.

Petitioner presented for a post-operative follow-up evaluation with Dr. Borowiecki on January 24, 2013. Dr. Borowiecki noted that Petitioner was "doing very well." The report also stated that Petitioner's "numbness is completely resolved" and that he had "regained full elbow motion." Dr. Borowiecki released Petitioner concerning the bilateral cubital tunnel and left carpal tunnel injuries on this date with no restrictions, and noted Petitioner could return on an as-needed basis.

Petitioner testified that following his bilateral cubital tunnel surgeries and left carpal tunnel surgery that he is "pain free."

Petitioner offered a series of medical bills into evidence as Petitioner's Exhibit 3. However, some of the charges in that exhibit are for treatment unrelated to the claim at bar. Further, that exhibit indicates that several payments were made from an insurance carrier.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; and

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Based on Petitioner's Demands of the Job form (which was not impeached as inaccurate by Respondent), Petitioner's credible testimony concerning his job duties and onset of symptoms that led to a diagnosis of bilateral cubital tunnel syndrome and left carpal tunnel syndrome that further led to surgeries to correct the same, and the causation opinions of treating orthopedic surgeon Dr. Borowiecki, the Arbitrator finds that Petitioner has proven that he sustained an accident that arose out of and in the course

of his employment with Respondent, and that his current condition of ill-being is causally related to that injury.

Respondent's examining physician, Dr. Williams, did not dispute the diagnoses of bilateral cubital tunnel syndrome, and in fact believed that it could have been aggravated by Petitioner's description of how he worked at his desk. Petitioner's testimony regarding his ergonomic situation at work was consistent with how he reported it to his treating physician and Respondent's examining physician. Dr. Williams believed Petitioner's hobby of bowling could have contributed to his cubital tunnel syndrome, but admitted that hobby would not affect the aggravation of his left carpal tunnel syndrome because Petitioner is right hand dominant. The Arbitrator also notes that no repetitive use of the left hand or left arm is required in bowling for a right hand dominant bowler like Petitioner, as per the testimony of Petitioner. Based on the evidence in the record, Petitioner's job duties were more likely to aggravate Petitioner's bilateral cubital tunnel syndrome than his bowling hobby.

Further, Dr. Williams did not believe that Petitioner's left carpal tunnel syndrome was aggravated by his work duties, but rather believed that condition was aggravated by Petitioner's "motorcycle" riding and psoriasis. However, Petitioner credibly testified that he does not ride a motorcycle, but in fact rides a scooter. Moreover, he rarely rides this scooter, and said his wrists are not in a flexed or extended position when he rides it. Further, Petitioner testified that the scooter does not cause much vibration. The evidence also indicates that Petitioner was diagnoses with psoriasis 20 years ago, and no real medical evidence was established to show that this condition aggravated Petitioner's cubital and carpal symptoms to the point where it negated his work duties as being causative factors thereof.

Petitioner testified that he has been diagnosed with sleep apnea, plantar fasciitis, and torn cartilage in his knee. However, the evidence does not indicate that any of those foregoing conditions would be considered aggravating factors of his bilateral cubital tunnel syndrome and left carpal tunnel syndrome.

The Arbitrator further finds that Petitioner was a very credible witness. His testimony was corroborated by the medical records in evidence. The Arbitrator notes that Petitioner consistently reported his symptoms and gave consistent reports of his work duties to his medical providers. Dr. Williams, Respondent's examining physician, even noted in his report that Petitioner was "honest and forthcoming." Petitioner openly testified in a forthcoming manner during cross-examination. He appeared to be endeavoring to tell the full truth during his entire testimony. The Arbitrator further finds Dr. Borowiecki's testimony to be credible, and adopts his causation opinions accordingly.

<u>Issue (J)</u>: Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for reasonable and necessary medical services?

The Arbitrator finds that all treatment rendered to Petitioner concerning his bilateral cubital tunnel and left carpal tunnel symptoms is reasonable and necessary. Accordingly, Respondent is liable for payment of those medical bills relating only to Petitioner's bilateral cubital tunnel and left carpal tunnel treatment from June 14, 2011 through January 24, 2013, as contained in Petitioner's Exhibit 3, subject to the medical fee schedule, Section 8.2 of the Act. Respondent shall have any and all appropriate credit for any amounts paid by it or its group insurance carrier.

Issue (L): What is the nature and extent of the injury?

Petitioner suffered bilateral cubital tunnel syndrome and left carpal tunnel syndrome as a result of his work duties with Respondent. He underwent surgeries for the foregoing conditions, and was released with no restrictions after the surgeries with good results noted. He in fact testified at trial that he is now "pain free." No further testimony was given in regard to permanency. Having considered the evidence, and in light of the foregoing, the Arbitrator notes that the permanency award in this case should be lower than traditional awards regarding the same injuries, as Petitioner was released with no restrictions, good results were noted from surgery, and the only testimony concerning Petitioner's resulting condition of said injuries given was that he is now "pain free." The Arbitrator has considered the recent Commission decision of *Purdom v. State of Illinois – Menard Correctional Center*, 12 IWCC 1419 (Dec. 19, 2012) when determining the permanency awards. Based on the foregoing, the Arbitrator finds Petitioner has suffered permanent partial disability (PPD) to the extent of 10% to each arm, and 10% to the left hand, pursuant to Section 8(e) of the Act, and should be awarded PPD benefits accordingly.

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

Michael Gunderson,

Petitioner,

vs. NO: 08 WC 38147

14IWCC0382

Weiss Memorial Hospital,

Respondent.

DECISION AND OPINION ON REVIEW UNDER SECTIONS 19(H) AND 8(A)

This claim comes before the Commission on a Petition for Review under Sections 19(h) and 8(a), filed by Petitioner on January 26, 2011. No question has been raised concerning the timeliness of Petitioner's 19(h) Petition. Commissioner White conducted a hearing in this matter on July 25, 2013. Petitioner and Respondent were represented by counsel and a record was made.

After considering the issues and being advised of the facts and the law, the Commission grants Petitioner's Petition for Review under Sections 19(h) and 8(a), finding that Petitioner proved a material increase in his work-related disability since the date of Arbitration and is entitled to additional permanent partial disability and temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 61-year-old stationary engineer who is right-hand dominant, sustained an undisputed work-related accident on August 8, 2008. On that day, Petitioner fell off of a ladder, fracturing his left wrist. Two days later, Petitioner underwent an open reduction and internal fixation. (Arb. Dec., 8/24/10)

2. On August 28, 2008 Petitioner filed an Application for Adjustment of claim for

work-related injuries to his left upper extremity.

3. Arbitrator DeVriendt conducted a hearing in Petitioner's claim on August 2, 2010. Petitioner testified that he had no left wrist problems prior to the date of accident. Following surgery, Petitioner returned to work with restrictions that were accommodated by Respondent. On October 21, 2008 he was released to return to full duty work and subsequently voluntarily left Respondent's employ to move to Arizona. He experienced ongoing pain in his left wrist, palm and back of the hand, made worse by driving, pushing and grasping. His last date of medical treatment was November 18, 2008 and he occasionally took Vicodin for pain. (Arb. Dec., 8/24/10)

4. The Arbitrator issued a decision on August 24, 2010, finding that Petitioner was entitled to temporary total disability benefits, unpaid medical expenses and permanent partial disability benefits of $664.72 per week for a period of 76.875 weeks, representing 37.5% loss of use of the left hand. (Arb. Dec., 8/24/10)

5. Neither party filed a Petition for Review within the statutory time limit and the decision of the Arbitrator became final.

6. At the §19(h) and §8(a) hearing on July 25, 2013, Petitioner offered medical records from Dr. Mahoney of the Brown Hand Center.

On September 28, 2010, less than two months after the arbitration hearing, Petitioner sought treatment with Dr. Stephen Mahoney at the Brown Hand Center in Phoenix, Arizona. Petitioner complained of left wrist pain that was as severe as it had been prior to surgery. Dr. Mahoney diagnosed left wrist osteoarthritis and opined that this was causally related to Petitioner's prior left wrist injury. Dr. Mahoney offered a course of steroid injections to decrease Petitioner's pain. Petitioner declined to have injections and wished to proceed with a left wrist fusion despite the expected outcome of a loss of range of motion. (PX 5) In order to ascertain the extent of the osteoarthritis Dr. Mahoney performed a diagnostic arthroscopy and partial synovectomy on December 3, 2010 at St. Michael's Surgery Center in Scottsdale, Arizona. (PX 6)

7. The parties appeared before Commissioner Lindsay on June 29, 2011. Petitioner sought authorization for left wrist fusion surgery, as well as penalties and fees under Sec. 19(k), 19(l) and Sec. 16 for Respondent's failure to authorize the surgery recommended by Dr. Mahoney. Respondent requested to have Petitioner examined pursuant to §12 by Dr. Bednar at Loyola Medical Center for an opinion on reasonableness, necessity and causal connection. No record was made. Commissioner White issued an order dated March 15, 2012. Commissioner White found that Respondent's was entitled to the §12 examination and ordered Respondent to pay to Petitioner the reasonable and necessary travel costs incurred after he arrives in Illinois from Arizona. (Order, 3/15/12)

8. Petitioner also offered the §12 examination report dated May 29, 2012 by Dr. Michael Bednar of Loyola University Medical Center's Department of Orthopaedic Surgery and Rehabilitation. The report states Dr. Bednar's opinion that Petitioner's current condition of left

wrist arthritis is causally connected to the August 8, 2008 work accident. Dr. Bednar agreed with the treatment recommendations of Dr. Mahoney. (PX 7) Respondent authorized the left wrist fusion. At the §19(h) and §8(a) hearing on July 25, 2013, Petitioner testified that he did not receive reimbursement for his travel costs. (T. 23-25)

9. Petitioner returned to Dr. Mahoney on August 7, 2012. Petitioner continued to have pain with flexion and extension and wanted to proceed with the fusion. Petitioner's pre-operative x-ray showed severe osteoarthritic changes involving both the proximal and distal carpal joints as well as the distal radiolunar joint. (PX 5)

10. On October 17, 2012, Dr. Mahoney performed a left wrist arthrodesis with matched resection of the distal ulnar head and removal of prior hardware. The surgery took place at the St. Michael's Surgery Center in Scottsdale, Arizona. (PX 8)

11. Petitioner declined to undergo formal post-operative physical therapy and performed exercises at home and utilized a bone growth stimulator prescribed by Dr. Mahoney. On December 13, 2012, Dr. Mahoney noted that Petitioner complained of some slight soreness and stiffness but had made exceptional gains performing his own physical therapy exercises. On exam, he was found to have a slightly decreased ability to pronate and supinate his left wrist as compared to his right wrist. His bilateral wrist strength was tested with a Jamar dynamometer at 40 kilograms on the left and 95 kilograms on the right. Dr. Mahoney recommended that Petitioner continue using the bone growth stimulator and performing exercises for active pronation and supination and to increase his grip strength. (PX 5)

12. On January 17, 2013, Petitioner was not having much pain and was now able to touch the tip of his thumb to the base of his small finger. Dr. Mahoney released Petitioner to right-hand duty on January 25, 2013. (PX 5)

13. On February 19, 2013 Petitioner complained that he was having pain with pronation and supination of his left wrist. On exam, Dr. Mahoney found 45 degrees of supination past neutral on the left and full pronation on the left. His grip strength test results were 55 kilograms on the left and 85 kilograms on the right. Dr. Mahoney stated that he would continue to follow Petitioner until his range of motion and strength numbers reached a plateau indicating maximum medical improvement. (PX 5)

14. On April 2, 2013, Petitioner reported to Dr. Mahoney that he had intermittent pain and that he was no longer actively trying to rotate his wrist due to pain. On exam, Petitioner's left wrist pronation was again full and symmetrical with the right and he was again at 45 degrees of supination past neutral. His left wrist strength was 45 kilograms on the left and 95 kilograms on the right. Dr. Mahoney noted that Petitioner was happy with his level of function and did not wish to undergo additional therapy. Dr. Mahoney released Petitioner from care. A Work Status Report was issued by Dr. Mahoney on April 16, 2013. The form indicates that Petitioner was restricted from lifting over ten pounds with his left hand. (PX 5)

15. At the 19(h) and 8(a) hearing on July 25, 2013, Petitioner testified that he notices he is unable to rotate his wrist and that he has difficulty buttoning his pants and is unable to use a

drive-up ATM machine with his left hand. He testified that at the time of the August 2, 2010 arbitration, these activities were not a problem for him. (T. 22-23) Petitioner voluntarily resigned his employment effective October 26, 2009 and moved to Arizona. (T. 31-32) He currently has no treatment recommendations pending for his left hand and takes no prescription medications. (T. 33-34)

ANALYSIS

After consideration of the facts in this case, the Commission finds that Petitioner proved a material increase in his work-related physical disability since the arbitration hearing on August 2, 2010. His left hand disability is causally related to his original work-related accident on August 8, 2008. Petitioner is entitled to temporary total disability benefits from the date of surgery, October 17, 2012, through January 25, 2013. As previously ordered by the Commission, Petitioner is entitled to any unpaid reasonable and necessary travel costs incurred in Illinois as related to Respondent's §12 examination by Dr. Bednar. The Commission finds that Petitioner sustained additional permanent disability to his left hand with respect to his range of motion and grip strength, but we do not find that Petitioner has sustained a loss of occupation and we do not find an award under §8(d)2 for the person-as-a-whole to be appropriate. Petitioner voluntarily resigned from his job in October of 2009 and moved to Arizona. No physician has opined that Petitioner cannot pursue his former occupation and Petitioner has not attempted to find work as an operating engineer. Therefore, the Commission finds that Petitioner has incurred a further loss of 17.5% of the left hand since the prior arbitration award.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petitioner under Sections 19(h) and 8(a) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $819.22 per week from December 3, 2010 through December 9, 2010 and from October 17, 2012 through January 25, 2013, 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 $664.72 per week for a further period of 35.875 weeks, as provided in §8(a) of the Act, for the reason that the Petitioner's has sustained a material increase of his work related disability representing 17.5% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner $165.00 for travel expenses related to Respondent's §12 examination by Dr. Bednar at Loyola University Medical Center on May 29, 2012, minus any amounts paid by Respondent to date.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 7 2014
RWW/plv
o-2/19/14
46

Ruth W. White

Michael J. Brennan

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF DEKALB)

☒ 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

David Syverson,
Petitioner,

vs. NO: 10WC 31874

14IWCC0383

The Weitz Company,
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, causation, notice, temporary total disability, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 23, 2013, is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 27 2014
o052114
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SYVERSON, DAVID
Employee/Petitioner

Case# **10WC031874**

14IWCC0383

THE WEITZ COMPANY
Employer/Respondent

On 4/23/2013, 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:

0190 LAW OFFICES OF PETER F FERRACUTI PC
JENNIFER L KIESEWETTER
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

1120 BRADY CONNOLLY & MASUDA PC
PAUL PASCHE
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DEKALB)

- [ ] 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)

DAVID SYVERSON
Employee/Petitioner

v.

THE WEITZ COMPANY
Employer/Respondent

Case # **10** WC **31874**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the cities of **New Lenox and Geneva**, on **January 10, 2013, and March 11, 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the alleged date of accident, **7/23/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did 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 **$4,692.76**; the average weekly wage was **$1,173.19**.

On the alleged date of accident, Petitioner was **33** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent has paid no benefits to Petitioner.

ORDER

The arbitrator finds that no compensable accident occurred, therefore no benefits are awarded. The petitioner's Application for Adjustment of Claim and subsequent petitions for benefits and penalties are hereby denied. This matter is dismissed.

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.

O/ George Andros
Signature of Arbitrator

Apr 19, 2013
Date

ICArbDec19(b)

APR 23 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID SYVERSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.: 10 WC 31874
	)	
WEITZ INDUSTRIAL,	)	
	)	
Respondent.	)	

ATTACHMENT TO ARBITRATION DECISION

STATEMENT OF FACTS

The arbitrator finds that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by Respondent on July 23, 2010, or at any time while he worked for Respondent. The petitioner only worked a short period of time for the respondent and the medical records prior to this employment contained evidence of carpal tunnel syndrome. Specifically, the petitioner received treatment for right carpal tunnel syndrome in June through August 2008, and for bilateral wrist pain during March, April and early June 2010. He began working for Respondent on June 23, 2010. In addition, the petitioner's own testimony established that his job duties for Respondent involved a variety of tasks, none of which were individually performed throughout the day. None of the duties specifically involved force combined with static posturing or with repetitive grasping. This evidence supported Dr. Carroll's opinion that Petitioner's employment by Respondent was not a cause of his bilateral carpal tunnel syndrome or his bilateral lateral epicondylitis.

Petitioner testified that in 2008, he sustained a work-related injury to his right hand, for which he obtained a settlement. He received treatment from Dr. Speca until October 2008. According to the records of Dr. Speca (RX2 and PX5), Dr. Garg performed an EMG/NCV on July 31, 2008, that demonstrated carpal tunnel syndrome of the right arm. Dr. Speca noted paresthesias and wrist pain (RX3), but Petitioner denied feeling any numbness at that time. On August 25, 2008, Dr. Speca recommended surgery to release the right carpal tunnel. (RX3, PX5). Dr. Speca also noted that Petitioner had a torn cartilage that might be putting pressure on the median nerve, and he recommended surgical excision. (RX3, PX5).

Petitioner testified that he worked on eleven different jobs between October 2008 and May 2010, and he prepared a written summary of each job. (RX 1, Dep. Ex.3). According to his job summary, Petitioner worked for following

employers in Iowa: 1) Day & Zimmerman in the Quad Cities from March 8, 2010, to April 9, 2010; at Newell in Cedar Rapids from April 26, 2010, to May 1, 2010, and then for Hayes Mechanical in Muscatine from May 13, 2010, to May 15, 2010. (RX1, Dep. Ex. 3). According to the records of Petitioner's union, he worked 132 hours for Day & Zimmerman, 69.25 hours for Newell, and 43 hours for Hayes Mechanical. (RX1, Dep. Ex. 4).

On March 18, 2010, Petitioner complained of bilateral wrist pain to Dr. Beck, and noted that he had been "working in Iowa." (PX 2). Dr. Beck prescribed a Medrol Dosepak. (PX2). Petitioner called back on March 30, 2010, stating that he "would like something for the pain from carpal tunnel. In Iowa working." (PX2). Dr. Beck prescribed another Medrol Dosepak and Anaprox. (RX2). On April 27, 2010, Petitioner called back and stated he "would like something stronger than Vicoprofen, in Iowa using hands a lot." (RX2). Petitioner was prescribed Norco. (RX2). On June 4, 2010, Dr. Beck switched Petitioner from Norco to Tramadol. (RX2). On June 10, 2010, she changed Petitioner's prescription from Tramadol to Tylenol No. 3; and on June 14, 2010, she was changed it from Tylenol No. 3 to Mobic. (RX2).

At trial, Petitioner testified on direct examination that he had "no problems" with his hands or arms prior to working for Respondent. Later, he conceded that he had nagging pain in one wrist. On cross-examination, he admitted the nagging pain was in both wrists. The arbitrator finds Petitioner's credibility questionable in light of his own contradictory admissions, as well as the undisputed medical records of treatment prior to June 23, 2010.

According to his written work history, when Petitioner worked for Respondent, he performed rigging and welding, installing structures and welding one to four hours per day. (RX1, Dep. Ex. No. 3). At trial, he testified that the installations included moving heavy beams, beating them into place with hammers, using chain falls and comealongs to move beams, welding, and using other tools. On cross-examination, he stated that some days he spent the entire shift moving objects, and some days he only did minimal welding. Petitioner worked for Respondent from June 23, 2010, until July 23, 2010, a total of 184.5 hours. (RX1, Dep. Ex. 3, 4; RX4).

On August 9, 2010, Dr. Beck referred Petitioner to Dr. Perona. (PX2). Petitioner filed his Application for Adjustment of Claim on August 19, 2010. (Arb. Ex. No. 2). On December 30, 2010, Petitioner requested Dr. Beck to refer him to Dr. Urbanosky, and his first visit with Dr. Urbanosky was on January 14, 2011. PX2, PX6. Dr. Urbanosky initially diagnosed only bilateral lateral epicondylitis and medial epicondylitis. (PX6). She prescribed physical therapy. (PX6).

Petitioner continued working full time without any medical restrictions during the rest of 2010. (RX1, Dep. Ex. No. 4; PX2.)

In 2011, Petitioner worked every month except January and July, amassing 1,261.75 hours on ten job sites with four different employers. (RX1, Dep. Ex. 4). This was his highest annual total hours since he joined the millwrights union in 2005, by more than 400 hours. (RX1, Dep. Ex. No. 4).

On February 18, 2011, Petitioner underwent an EMG/NCV that revealed bilateral carpal tunnel syndrome. PX6. Dr. Urbanosky injected Petitioner's right carpal tunnel on February 25, 2011, and his left carpal tunnel on April 25, 2011. (PX6). On June 28, 2011, Dr. Urbanosky performed a right carpal tunnel release surgery, and on August 30, 2011, she performed a left carpal tunnel release surgery. (PX6). In the interim, on July 15, 2011, Dr. Urbanosky had recommended plasma-rich protein (PRP) injections to treat the bilateral lateral epicondylitis. (PX6).

Although Dr. Urbanosky restricted Petitioner from working from June 28, 2011, until October 14, 2011(PX6)(and Petitioner is claiming temporary total disability for that period (Arb. Ex. No. 1)), Petitioner's union records show that he worked 185 hours during August 2011, and he worked 191 hours during September 2011. (RX1, Dep. Ex. No. 4). The arbitrator questions petitioner's credibility in light of his non-compliance with his physician's restrictions.

Dr. Charles Carroll IV examined Petitioner at Respondent's request on November 16, 2011. (RX1, p. 7). Dr. Carroll is a board-certified orthopaedic surgeon with a sub-specialty certification in hand surgery, a professor at Northwestern University Medical School, and frequent lecturer and author on diagnosis and treatment of conditions of the hand. (RX1, Dep. Ex. No. 1). He devotes about 20% of his practice to treatment of either carpal tunnel syndrome or medial or lateral epicondylitis. (RX1, pp. 6-7.) He reviewed the records from Dr. Beck, Dr. Speca and Dr. Bednar, as well as the written work history prepared by the petitioner and the certified records from Petitioner's union. (RX1, pp. 7-9).

Dr. Carroll noted that Petitioner reported he was working 10 hours per day, six days per week for Respondent in June 2010. (RX1, p. 13; Dep. Ex. No. 2). Petitioner testified at trial that he answered Dr. Carroll's questions truthfully. However, the wage records show Petitioner worked an average of 42.9 weeks between June 23, 2010, and July 23, 2010. (RX4). The arbitrator questions the petitioner's credibility with regard to his testimony about the amount of work he performed for Respondent.

On examination, Dr. Carroll noted the petitioner was obese (weighing 315 pounds with a height of six feet, two inches.) (RX1, Dep. Ex. No. 2). Petitioner confirmed his height and weight at trial. Dr. Carroll noted no symptoms of carpal tunnel syndrome, but evidence of bilateral lateral epicondylar pain with slight radial nerve pain and lack of sensation in the ulnar nerve distribution on the right. (RX1, Dep. Ex. No. 2). Dr. Carroll found no physical findings consistent with bilateral medial epicondylitis. (RX1, p. 17.) Dr. Carroll explained that lateral

epicondylitis is a disease process that causes pain in the elbow radiating to the wrist, and it is typically manifested when cocking the wrist away from the palm. (RX1, pp. 17-18.) Medial epicondylitis, or "golfer's elbow," is on the inner side of the elbow (toward the "baby finger") and typically causes pain with grasping and with flexion of the wrist, such as with hitting a golf ball. (RX1, p. 18). Petitioner's examination showed full grip strength. (RX1, Dep. Ex. No. 2.)

Based on his examination findings and review of Petitioner's work history, Dr. Carroll opined that Petitioner's bilateral carpal tunnel syndrome and epicondylitis was a degenerative condition, and he did not find any evidence of an industrial injury. (RX1, Dep. Ex. No. 6). At his deposition, he testified to a reasonable degree of medical and surgical certainty that he was not able to attribute the development of the epicondylitis or carpal tunnel problems to one employer or to Petitioner's work activities in July 2010. (RX1, p. 24.) Dr. Carroll stated that although Petitioner's work was hard, due to the number of hours worked, and due to the fact that the disease is degenerative in nature, he could not attribute it to one particular employer. (RX1, p. 24.)

Dr. Carroll was then presented with a hypothetical question that included the same work history provided by the petitioner (RX1, Dep. Ex. No. 3), the same medical history as contained in the records of Dr. Beck (PX2) and Dr. Speca (RX2; PX5), and Dr. Urbanosky (PX6). Based on these facts, Dr. Carroll opined that Petitioner's carpal tunnel syndrome developed prior to his employment by Respondent and did not believe it came from the occupational activities performed while working for Respondent. (RX1, pp. 25-28). Dr. Carroll opined that Petitioner's bilateral lateral epicondylitis would not be attributed to any one employer in the hypothetical. (RX1, p. 28.) If the hypothetical was changed to add precision welding duties while working for Respondent, Dr. Carroll's opinions still would not change. (RX1, p. 29.) If the petitioner worked up to 53.5 hours per week, Dr. Carroll would not change his opinion, as he believed Petitioner's epicondylitis developed over time. (RX1, p. 29). Given the petitioner's prior treatment, and the development and time of development of symptoms, Dr. Carroll felt that the petitioner's problems occurred or manifested prior to his employment with Respondent. RX1, p. 33).

In her testimony, Dr. Urbanosky agreed that in order to render an accurate causation opinion, a complete and accurate history was required. (PX8, p. 27). In particular, Dr. Urbanosky conceded that the petitioner's prior physician, Dr. Speca, had recommended carpal tunnel surgery as early as August 25, 2008. (PX8, p. 32). Dr. Urbanosky admitted she never reviewed any records regarding Petitioner's medical treatment by Dr. Beck in 2010. (PX8, pp. 38-39.) She was also unaware of how many different employers Petitioner worked for in 2008, 2009 or 2010. (PX8, p. 39). In fact she had no knowledge of any other jobs or symptoms. (PX8, p. 40). Depending on what Petitioner was doing at any other employers during that period, Dr. Urbanosky stated it could contribute to his symptoms for which she saw him. (PX8, pp. 39, 41). Dr. Urbanosky had no

knowledge of how much time the petitioner had spent working for Respondent in comparison with the amount of time he worked for other companies. (PX8, p. 40). Dr. Urbanosky testified that it was her understanding that he performed the same type of work while working full duty for Respondent in July 2010, and this continued until the date of her first surgery on June 28, 2011. (PX8, p. 46). Dr. Urbanosky agreed that Petitioner was initially determined to have only mild, or minimal, left carpal tunnel syndrome at the time of the EMG on February 18, 2011. (PX8, p. 48). On August 15, 2011, she noted the left hand symptoms had increased due to gripping activities. (PX8, p. 49.) This was the first time she recommended surgery for the left wrist. (PX8, p. 50). Dr. Urbanosky wrote on August 22, 2011, that Petitioner had sustained "an acute exacerbation" of pain symptoms at work at that time. (PX8, p. 50). She also agreed that his diagnostic signs worsened at that time. (PX8, p. 51). Dr. Urbanosky agreed that Petitioner's obesity was a risk factor for carpal tunnel syndrome. (PX8, p. 52). Lastly, Dr. Urbanosky conceded that her causation opinion was limited to the specific history given to her by the petitioner, and she eventually admitted that if she was presented with a different history or specific facts, she would potentially render a different opinion. (PX8, p. 59-60).

Because Dr. Urbanosky did not have Petitioner's complete medical history and work history, and because the history she relied on was not consistent with the work records and medical records in evidence, the arbitrator finds Dr. Carroll's opinions to be more credible and persuasive on the issue of causation.

Furthermore, the arbitrator notes that Dr. Urbanosky testified that the treatment she had recommended for treatment of Petitioner's elbows, protein rich plasma injections, is still considered to be an experimental procedure. (PX8, p. 51). Dr. Carroll agreed that "there's some question as to the science, ...and further research is being done to see if it's truly effective." (RX1, p. 21).

CONCLUSIONS OF LAW

With regard to the issue of (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the arbitrator concludes:

The petitioner failed to meet his burden of proving by a preponderance of the credible evidence that his bilateral hand or arm injuries arose out of and in the course of his employment with the respondent. The petitioner failed to prove either a single incident causing a definable objective injury or an injury due to repetitive work activities. The crux of the matter is that although repetitive injuries can be compensable, the petitioner must prove that the injury is actually work-related, and not the result of normal, degenerative aging processes. *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, (1987). Even if the petitioner is seeking benefits for repetitive trauma, he must meet the same standard of proof as a petitioner alleging a single, definable accident.

Three "D" Discount Store v. Industrial Commission, 198 Ill.App.3d 43 (1990). Here, the petitioner failed to provide evidence of any objective medical condition or that any such condition was related to his employment activities while working for the respondent.

Petitioner's direct testimony was contradicted by his own later testimony, as well as the job description he prepared himself, with regard to his job duties, his dates of employment, his prior medical treatment, and his compliance with the recommendations of his treating physicians. Therefore, the arbitrator concludes that the documentary evidence is more reliable than Petitioner's testimony. Petitioner only worked for Respondent for a little over four weeks during June and July 2010. Prior to that, from June 2008 through May 2010, he worked for 14 other employers, and had reported pain and numbness symptoms in his hands and sought medical attention. In March 2010, and up through the week before he started working for Respondent, Petitioner had numerous encounters with Dr. Beck and received treatment for bilateral arm and wrist pain. Dr. Beck's records specifically mention Petitioner's work in Iowa during this period, and the records show Petitioner worked for three different employers in Iowa during those months. Petitioner's right carpal tunnel syndrome was clearly diagnosed by EMG on July 31, 2008. His left carpal tunnel syndrome was clearly "minimal" until August 2011, over a year after he last worked for Respondent. Even without expert testimony, the arbitrator concludes based on the evidence that Petitioner's bilateral carpal tunnel syndrome did not arise out of his employment, because it manifested itself at times when the petitioner was not employed by the respondent.

However, the expert testimony also leads to the same conclusion for both the bilateral carpal tunnel syndrome and the bilateral epicondylitis. Two experts testified—Dr. Carroll and Dr. Urbanosky. Only Dr. Carroll had reviewed the petitioner's correct work history and documentation of hours and duties. Only Dr. Carroll reviewed Petitioner's medical records with regard to his treatment for bilateral arm pain between March 2010 and June 2010. Dr. Urbanosky conceded that her causation opinion was dependent on an accurate history, but she did not have an accurate history. Therefore, the arbitrator concludes that Dr. Carroll's opinions carry more weight. Dr. Carroll concluded that Petitioner's bilateral carpal tunnel syndrome clearly occurred outside his dates of employment with Respondent. He also concluded that Petitioner's bilateral epicondylitis was degenerative in nature and developed over the course of time prior to Petitioner's employment by Respondent. As such, Petitioner has failed to prove a nexus between his employment or job duties while working for Respondent and his medical conditions in his bilateral arms.

Furthermore, the petitioner has failed to meet his burden of proving that his injuries occurred on a date while he was employed by the respondent. Part of that burden is that the petitioner in a repetitive-trauma claim must point to a date when the injury "manifested itself," that is, the date when a reasonable person

would have been aware of the fact of her injury and the causal connection between the injury and the employment. *Castaneda v. Industrial Comm'n*, 231 Ill.App.3d 734 (1992). In *Castaneda*, the claimant first sought medical attention for carpal tunnel syndrome in April 1985, and the physician's notes reflected that the claimant related her symptoms to her work. She continued to work until 1988, when her hands were hurting excessively and she returned for medical attention. She was restricted from work at that point, and ultimately underwent carpal tunnel surgery to both hands in 1989. She filed her application for benefits in September 1988. The Commission determined that her injury had manifested itself in 1985, when the petitioner first sought treatment and related the condition herself to her work duties. The court affirmed this decision, noting that in some cases the manifestation date may be the last day worked, but not in the case of a petitioner who had already shown that she was reasonably aware of both the fact of her injury and its relation to her work. *Castaneda*, 231 Ill.App.3d at 738-739.

In this case, the petitioner was clearly aware of the fact of his injury no later than March 18, 2010, when he complained of bilateral wrists pain to Dr. Beck and attributed it to "working in Iowa." PX2. Again, less than two weeks later, on March 30, 2010, he specified he had "the pain from carpal tunnel" while he was "in Iowa working." PX2. On April 27, 2010, he again related his symptoms to his work, telling Dr. Beck that he was "in Iowa using hands a lot." PX2. It is clear, therefore, that the petitioner was not only aware of the condition of his hands, but was also attributing it to his work for a different employer in Iowa over three months before he began working for the respondent. Under the holding in *Castaneda*, the petitioner's manifestation date was prior to his employment with the respondent, and thus he failed to prove the work for the respondent was responsible for the conditions in his upper extremities.

The only expert testimony offered by the petitioner was the opinion of Dr. Holtkamp. However, Dr. Holtkamp admitted she did not have any knowledge of the date of onset of the petitioner's symptoms or his job duties for the respondent, other than "precision welding." PX8, pp. 26,___. Dr. Urbanosky did not review any of the prior treatment records, including those of Dr. Beck, and Dr. Urbanosky had no knowledge of the petitioner's other jobs, including his job in Iowa in March and April 2010. PX8, pp. 38-39. Dr. Urbanosky admitted that if the petitioner had complaints of pain "after doing (another) job that he could refer to a job and then sought treatment, I would definitely thing that those activities contributed to his symptoms for which I saw him." PX8, pp. 40-41. In fact, the petitioner did complain of pain severe enough to warrant several medications, including Medrol, vicoprofen, and Mobic. He directly referred his complaints to his work in Iowa in March and April 2010. Dr. Holtkamp's testimony therefore supports the conclusion that the petitioner's conditions were not related to his work for the respondent, but to his activities elsewhere.

Dr. Carroll's testimony further supports this conclusion, and Dr. Carroll was the only physician with the benefit of having reviewed all of the records, including those of Dr. Speca and Dr. Beck. Dr. Carroll testified: "Given the

development and the time of development, it would indicate it occurred or manifested itself prior to his employment (by the respondent)." RX 1, p. 33.

The arbitrator therefore concludes that the petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment by the respondent. The arbitrator further concludes that the petitioner's condition of ill-being in his bilateral upper extremities manifested themselves prior to his employment by the respondent. As such, the petitioner has failed to prove his entitlement to any benefit under the Act, and his application for benefits is therefore denied and no benefits are awarded.

With regard to the issue of (F), whether the petitioner's current condition of ill-being is causally related to the alleged injury, the arbitrator concludes:

Given the arbitrator's decision with regard to the issue of accident, the arbitrator further finds the petitioner failed to prove that his current condition of ill-being is related to any compensable work injury attributable to the respondent.

With regard to the issues of (J), whether the medical services that were provided to Petitioner were reasonable and necessary, (K), whether Petitioner is entitled to any prospective medical care, and (L), whether Petitioner is entitled to any temporary total disability benefits, the arbitrator concludes:

Given the arbitrator's decision with regard to the issue of accident, the remaining issues are moot. The arbitrator further concludes the petitioner was not entitled to any medical treatment or disability benefits related to any compensable work injury. Petitioner's request for any workers' compensation benefits is therefore denied.

With regard to the issue of (M), whether penalties or fees should be imposed upon Respondent, the arbitrator concludes:

Given the evidence offered by Respondent, and the arbitrator's decision with regard to the issue of accident, the arbitrator concludes that Respondent had just cause for denying liability for benefits. The arbitrator therefore denies Petitioner's requests for penalties or attorney's fees.

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

Joshua W. Hoback,
Petitioner,

vs. NO: 11WC 24324

14IWCC0384

Tri-County Coal,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, temporary total disability, permanent partial disability, nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $66,200.00. 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.

DATE MAY 2 7 2014
o042214
CJD/jrc
049

Charles J. DeVriendt

Daniel R. Donohoo

DISSENT

I respectfully dissent from the majority. Petitioner failed to prove that his present condition of ill-being is causally connected to the accident of February 28, 2011.

I would find that Petitioner's herniated disc at L4-5 and the resulting low back surgery are not causally connected to the accident of February 28, 2011. Petitioner had a history of low back problems preceding February 28, 2011, most specifically the accident in November of 2010 while moving a lawn mower. That injury resulted in the herniated disc as shown by the December 2010 MRI. The serious nature of that November 2010 accident is evidenced by Petitioner's loss of considerable time from work and extensive treatment.

Petitioner had not returned to full duty as of the date of this accident. He had returned to work on light duty February 8, 2011, and had not been released to full duty. Dr. Pineda testified that the herniated disc at L4-5 was a result of the annular tear which occurred in November of 2010, not an annular tear as a result of this accident. He stated that further extrusions could occur with no trauma whatsoever.

Petitioner did not have left leg complaints following this accident. It was not until three weeks later that he first made those complaints. As noted by Dr. Pineda, further extrusion could have occurred at any time prior to the MRI taken nearly a month following this accident.

The opinions of Dr. DeGrange, Petitioner's treating surgeon, are to the effect that this accident did not cause the condition for which he operated.

For these reasons, I respectfully dissent.

Ruth W. White

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OBACK, JOSHUA W
Employee/Petitioner

Case# **11WC024324**

TRI-COUNTY COAL
Employer/Respondent

14IWCC0384

On 3/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2427 KANOSKI & ASSOCIATES
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SPRINGFIELD, IL 62704

0332 LIVINGSTONE MUELLER ET AL
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P O BOX 335
SPRINGFIELD, IL 62705

14IWCC0384

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Joshua W. Hoback
Employee/Petitioner

v.

Tri-County Coal
Employer/Respondent

Case # 11 WC 24324

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 Springfield, on January 9, 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 **February 28, 2011,** Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$49,975.12;** the average weekly wage was **$961.06.**

On the date of accident, Petitioner was **31** years of age, ***married*** with **2** dependent children.

Petitioner ***has received*** all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** in TTD, **$0.00** in TPD, **$0.00** in maintenance, **$6,628.58** in non-occupational indemnity disability benefits, and **$0.00** for other benefits, for a total credit of **$6,628.58**.

Respondent is entitled to a credit under Section 8(j) of the Act for medical bills paid through its group medical plan.

ORDER

• Respondent shall pay Petitioner temporary total disability benefits of **$640.74**/week for 18 6/7 weeks, from March 1, 2011 through July 10, 2011, as provided in Section 8(b) of the Act.

• Respondent shall pay Petitioner the sum of **$576.64**/week for a further period of 100 weeks as provided in Section 8(d)(2) of the Act, because the injuries sustained caused 20% loss of use of the person as a whole.

• Respondent shall pay Petitioner compensation that has accrued from February 28, 2011 through January 9, 2013, and shall pay the remainder of the award, if any, in weekly payments.

• Respondent shall pay the further sum of **$3,216.41** for necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act, and shall be given a credit for payments made by the group medical plan, and shall hold Petitioner harmless from any claims by any provider of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

RULES REGARDING APPEALS UNLESS a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

February 26, 2013
Date

MAR 1 - 2013

The Arbitrator finds:

Petitioner has been employed by Respondent since 2004 as a roof bolter. As a roof bolter, Petitioner drills holes into the ceilings of mines and puts six and eight foot pieces of rebar into the holes with glue. To perform his duties as a roof bolter, Petitioner is on his feet all day and engages in a lot of lifting, carrying, and twisting. Petitioner estimated that the weights of the items he lifted and handled ranged from 10-40 pounds.

Petitioner testified that prior to February 28, 2011, he had occasional complaints involving his lumbar spine but nothing like what he experienced on that day. Petitioner was born with scoliosis and has experienced some occasional mild soreness from his shoulders to his low back since he was about 20 years of age. Petitioner had treated with Dr. Wade of Carlinville Chiropractic Clinic for complaints he had in his lumbar spine in June of 2010, which Petitioner described as occasional soreness and a little bit of stiffness.

The records of Carlinville Chiropractic Clinic indicate that Petitioner was seen on June 16, 2010, with complaints of lower back pain after being hit on the shoulder with a rock in the coal mine and it was noted that a back brace was given (PX 1, p. 2). These records also indicate that by June 21, 2010, Petitioner was feeling better (PX 1, p. 3). These records further show that Petitioner continued to be seen for complaints of low back pain, including soreness and achiness (PX 1, p. 3-4). However, by August 31, 2010, it was reported that Petitioner's pain was 8/10, his low back pain had gotten worse at work, and Petitioner had been taken off work (PX 1, p. 4). Thereafter, the records show that Petitioner's low back pain was better but Petitioner was still sore (PX 1, p. 5-7). The diagnosis noted for Petitioner's condition of ill-being was low gluteal spasm (PX 1, p. 1-7). On cross-examination Petitioner acknowledged that his family physician, Dr. Schleeper, took him off work in August and September of 2010 for his low back pain.

On November 7, 2010, Petitioner sustained an injury to his low back when he tried to drag a lawn mower out of his garage. Petitioner initially noticed lower back pain but then the pain started to move down his right leg. Petitioner was seen on November 8, 2010, at Carlinville Chiropractic Clinic and reported that the day before he was pulling a lawn mower out of his garage and felt pain in his right lower back when he walked (PX 1, p. 8). It was noted that Petitioner was off work and that Petitioner continued to be off work as of November 24, 2010 (PX 1, p. 9). These records also show that Petitioner continued to complain of low back pain with soreness to the right calf, and on November 29, 2010, Dr. Wade referred Petitioner to Dr. Western (PX 1, p. 9-10). Petitioner did not think he used a cane after the accident with the lawn mower, but the records of Carlinville Chiropractic Clinic reported that he was doing so on November 8, 2010 and again on January 3, 2011 (PX 1, p. 8, 12).

Petitioner was initially seen by Dr. Western on December 13, 2010 for evaluation of back and leg pain which, by history, began in early November of 2010 when Petitioner was pulling a riding lawn mower out of his garage. Petitioner reported difficulty bending, walking, and lifting, the latter of which Petitioner described as "nearly impossible." Petitioner had been under the care of his chiropractor, Dr. Wade and he had been treating Petitioner's leg and back pain. Dr. Wade referred Petitioner to Dr. Western. Petitioner had difficulty getting up and standing and had an antalgic gait with a slightly forward flexed posture. Extending his back seemed to help a bit but forward flexing was definitely worse. Straight

leg raising caused pain in the back of both legs. There were no significant neurological deficits detected with both strength and sensation present in the lower extremities. Some tenderness across Petitioner's low back and SI joints was noted. X-rays were taken which showed very slight scoliosis (PX 3). An MRI was ordered. Dr. Western suspected a disc herniation with some nerve root irritation. Light duty restrictions were given. (PX 2)

A lumbar spine MRI was performed on December 28, 2010 due to low back pain radiating down Petitioner's right leg after a lifting injury two months earlier. It revealed a large right subarticular disc extrusion at L4/5 causing severe right lateral recess stenosis and effacement of the descending right L5 nerve root. (PX 3)

Petitioner continued receiving chiropractic treatment for his low back during this time. He did miss some work, limped on occasion, and used a cane. Petitioner was given two right L5/S1 transforaminal injections in January of 2011. (PX 1) Petitioner testified that his pain and discomfort improved with the injections and he was moving pretty well. (PX 1)

Dr. Western followed-up with Petitioner on February 16, 2011. In the interim, Petitioner had undergone two epidural injections and was doing very well (1/10 pain level). Occasionally, he reported a "little bit in his leg," but he described it as more of an ache and nothing of great significance. Petitioner's diagnosis was disc herniation with right lower leg radiculopathy. Petitioner was told to start a home exercise program and they anticipated getting Petitioner back to regular duty as a roof bolter within a couple of weeks. (PX 2) Petitioner testified that he believed he was to be released to full duty work as of March 1, 2011.

Petitioner was seen at Carlinville Physical Therapy on February 21, 2011, regarding his bulging disc and low back pain. Petitioner reported leg pain descending down to his right calf. Petitioner was noted to be grimacing and slow to change positions. Medications included Vicodin and Flexeril. Petitioner was reportedly working light duty.

Petitioner returned to his chiropractor on February 23, 2011. The notes are difficult to read but Dr. Wade noted an "exacerbation." (PX 1)

Petitioner was involved in an undisputed accident at work on February 28, 2011. He was dusting returns with a co-worker named "Brian." According to Petitioner, Brian was dragging a hose in a crosscut fashion when Petitioner tripped over the hose, turned, and landed on the ground on his hands and knees. Petitioner testified that while he was on the ground, his lower back felt sore and he was unable to get up because it was pretty painful. A passing mine examiner assisted him from the ground. When Petitioner stood up, he noticed he could not stand up straight as he was experiencing a pretty intense pain in his low back. Petitioner was taken out of the mine and transported to St. John's Hospital in Springfield by ambulance.

The records of St. John's Hospital show that Petitioner was seen at approximately noon with complaints of back pain after tripping on a hose in a coal mine and that Petitioner had fallen forward injuring his lower back, that Petitioner has a history of bulging discs, and that he rated his pain as 3/10 (PX 4, p. 2). It was noted that there was evidence of pain or distress and that Petitioner also complained of weakness (PX 4, p. 2, 3). Additional records of St. John's Hospital reported that Petitioner was a 36 year old female that was limping with complaints of right foot pain since a fall at school and that the onset was 5-6 days earlier (PX 4, p. 7). X-rays of Petitioner's lumbar spine showed no compression fracture of

subluxation but loss of the normal lumbar lordosis that may be related to patient positioning versus muscle spasm (PX 4, p. 9). The records also reported that Petitioner was given an injection in the left and right upper outer gluteal areas, that Petitioner's pain intensity was 7/10, that Petitioner was prescribed medications of Ibuprofen and Hydrocodone, and that Petitioner was referred to Springfield Clinic MOHA (PX 4, p. 4, 5). Petitioner thought that he reported to the medical personnel at St. John's Hospital that the pain he was experiencing in his low back was 9/10 and he had pretty sharp pain in his right foot that would also go numb. Petitioner denied telling anyone at the hospital that he fell at school. After his release from St. John's Hospital, Petitioner was taken by his wife to Dr. Western at Springfield Clinic.

Petitioner testified that he had to be taken by wheelchair to be seen by Dr. Western as he was unable to stand up or walk.

According to Dr. Western's notes, Petitioner was doing well on light duty at work and was scheduled to go back to regular duty on "Wednesday;" however, earlier in the day (the 28th) he was at work, tripped over a hose, fell and had re-injured his back. Petitioner was complaining of severe back pain and had to be taken out of the mine. Petitioner had been seen at St. John's Hospital earlier and undergone x-rays and given a couple of pain injections which didn't help much. Petitioner described his pain as being in the axial low back and not radiating down to his legs. Petitioner did report that he had significant enough pain that it felt uncomfortable to bear full weight on his right leg as he didn't think it would hold him up. Petitioner was able to get up and bear weight on his leg but couldn't ambulate or put much weight on his leg. Straight leg raising was negative although it caused some pulling and pain in his lower back. Dr. Western's diagnosis was a lumbar strain. Dr. Western also noted, "Thankfully, he is not having any radicular symptoms at this time." (PX 2, p. 40) Petitioner was given a week off of work. (PX 2)

Petitioner was also examined at MOHA on February 28, 2011. Petitioner's history of back problems was noted, including a back injury occurring three months earlier at home. Petitioner reported no disc herniations as a result of that injury but some right lower extremity radiculopathy. Petitioner had been treated with two disc injections and he had been making good progress with his injury. Petitioner was working light duty as a result of that accident (limited bending and no lifting over twenty lbs.) Petitioner was getting ready to return to full duty on March 2, 2011. Petitioner related a sudden recurrence of back pain with the Feb. 28th incident. He reported quite a bit of trouble walking afterwards and was taken to St. John's emergency room where x-rays were taken and reportedly within normal limits. Petitioner was given ibuprofen and Norco and told to follow up with MOHA. Petitioner's visit with Dr. Western on the 28th was also noted. He was taken off work for one week and given prednisone and a prescription for Skelaxin. Petitioner described his pain level as "8/10" and primarily located in the mid-line lumbar region. Petitioner was experiencing some right leg symptoms, especially weakness. Petitioner felt unable to walk on his leg. The records note that Petitioner arrived in a wheelchair and was in a great amount of discomfort. He had slight lateral curvature of the spine to the left but no tenderness to the vertebral processes. Straight leg raising was negative on the left and positive on the right. Petitioner was noted to have quite a bit of difficulty getting up from his wheelchair. The doctor's physical exam was consistent with Petitioner's complaints, including Petitioner's problems standing on the leg. Dr. Bowers diagnosed Petitioner with a lumbar strain and exacerbation of his previous back injury. He was given instructions regarding medications and work. Petitioner was to return on March 2, 2011. (PX 5)

The records of Carlinville Chiropractic Clinic reported that Petitioner was seen on March 1, 2011, with complaints of pain that were noted to be 10/10 (PX 1, p. 15). On physical examination, Petitioner was found to have a positive Kemp test on the right and left, a positive patellar reflex on the right and left, a positive Eli test on the right and left, a positive leg raise on the right and left, and pain with flexion,

extension, lateral right flexion, and lateral left flexion of the dorsolumbar spine (PX 1, p. 17). The records of Carlinville Chiropractic Clinic reported that Petitioner continued to be seen there and it was noted that Petitioner was still walking with a cane as of March 4, 2011, and that it was sore to walk (PX 1, p. 15-16).

Petitioner returned to see Dr. Western on March 7, 2011. Petitioner was using a cane for walking and had not yet been back to therapy due to the most recent injury. Petitioner reported some aching pain in the right posterior leg similar to what he had experienced before. He described it as a "7/10." According to Petitioner the pain was not nearly as bad as it had been before he underwent the epidural injections which had helped him "very well." While Petitioner experienced some weakness in that leg, he denied any numbness, tingling, or sense of giving away. Dr. Western noted, "the last time I saw him, which was after he had fallen in the mine, I felt it was more of a muscular strain but, today, it is starting to appear more like his previous problem." Petitioner denied any leg pain. Dr. Western also noted, "...I advised him at this point that it does not appear work comp. will accept this as a worker's [sic] comp. injury because he did have that preexisting disc herniation, and it appears that it has been aggravated and somewhat of what it was before, so my recommendation is to go through his regular insurance because that appears to be the most appropriate way to go with this." Dr. Western observed bilateral positive straight leg raising and constant pain in Petitioner's back and right leg albeit with good mobility in the lower leg. Petitioner's strength was not significantly diminished. Petitioner was advised to remain off work unless sit down work was available. Another epidural injection and a referral to a spine surgeon were recommended. Dr. Western also completed an Attending Physician's Statement on March 7, 2011 that diagnosed Petitioner's condition as an aggravation of a disc herniation. In response to the question of whether Petitioner's condition was due to an injury or sickness arising out of Petitioner's employment, the doctor answered "yes." (PX 2)

Petitioner testified at arbitration that he was using a cane at the time of his March 7th visit with Dr. Western because he could not fully bear weight on his legs. Petitioner also testified that Dr. Western referred Petitioner to Dr. Pineda, an orthopedic surgeon, during that visit. Petitioner clarified that the complaints he had during the March 7th visit were in his right leg and not his left leg.

Petitioner underwent another epidural injection on March 10, 2011. (PX 2) Petitioner testified that this injection provided very little relief.

Petitioner was examined by Dr. Pineda on March 21, 2011. Petitioner's complaints included back pain and bilateral legal pain, the latter of which had begun in November of 2010. Petitioner's MRI showed a large L4-5 herniation, primarily off to the right. There was also a small left-sided component. Injections were reportedly helpful. Petitioner's right leg had improved and he went back to work only to have a fall with worsening back pain and left leg pain. To some degree Petitioner's right leg pain had worsened but now the real change was that he had bilateral pain with the left worse than the right. Petitioner had undergone three injections and was taking Vicodin. A new MRI was ordered. In an addendum, Dr. Pineda wrote, "Causality may be an issue here. Clearly the gentleman had pain before the work accident on the right side, but this now a more diffuse pain and it really incorporates not on the right, but more so the left, so I think we really need a new MRI to see what is going on to determine causal issues at this point." (PX 2)

Petitioner underwent a second MRI on March 25, 2011, at Carlinville Area Hospital. It was compared to the earlier MRI study of December 28, 2010 and showed an interval increase in the size of the disc protrusion as it was now broad-based and central with moderate canal stenosis and

displacement of both L5 nerve roots. Petitioner's history at that time included low back pain radiating down Petitioner's left leg. (PX 3)

After the MRI, Petitioner returned to see Dr. Pineda on March 29, 2011. Dr. Pineda read the MRI as showing the disc herniation at L4-5 but bilaterally. On physical examination, Dr. Pineda found that Petitioner was awake and alert, that Petitioner could stand, walk, and fire his hip, knee and ankle flexor and extensor. Dr. Pineda noted that he discussed the issues regarding surgical and non-surgical intervention with Petitioner, noting the treatment Petitioner had received to date, and that his only other recommendation would be a discectomy where both the right and left sides would be addressed, whether that be a laminectomy or laminotomy, but the concept of bilateral exposure was appropriate (PX 2, p. 45). Dr. Pineda noted that Petitioner was unsure if this was a work comp issue and that he was going to have to speak with his case manager, and that if not, Petitioner could use his health insurance to schedule the surgery, but Petitioner would have to make the decision (PX 2, p. 45).

At the request of Respondent, Petitioner underwent an independent medical examination with Dr. Donald deGrange on April 12, 2011. Petitioner explained that he had a history of scoliosis as a child and had experienced some back pain before the November of 2010 accident. Petitioner described both the November and February accidents for the doctor. Dr. deGrange reviewed Petitioner's medical records and the two MRIs from 2010 and 2011. He was of the opinion Petitioner sustained a herniated disc while cleaning out his garage in November of 2010. He also sustained an annular tear which was located in the same place (to the right of midline) on both MRIs. Dr. deGrange did not believe Petitioner had sustained a new injury simply because he had symptoms in the right leg and now had them in the left leg. The injury had remained the same and the symptoms have shifted from the right to the left. Dr. deGrange agreed with the need for surgery but did not believe it was due to a work-related injury. (RX 1)

Dr. deGrange prepared a report concerning his examination of Petitioner pursuant to Section 12 of the Act (RX 1). Dr. deGrange noted that Petitioner had informed him that he had experienced some back pain with a history of scoliosis he had as a child and before the incident in November of 2010, when Petitioner was clearing out his garage and trying to move an oversized lawn mower, that in picking the lawn mower up and dragging it out of the garage Petitioner had the onset of a sharp and severe low back pain. Dr. deGrange noted the treatment Petitioner had received after the incident in November of 2010, and that on February 28, 2011, Petitioner tripped over a hose he was carrying and fell landing on his outstretched hands and had the recurrence of back pain of a severe nature. Dr. deGrange noted that the November 2010 incident was the first time Petitioner had back pain with leg symptoms of any degree of severity. Dr. deGrange noted that at the time of his examination of Petitioner, Petitioner was complaining of low back pain radiating into the sacrum and buttocks on the left side, and on occasion into the calf of the left leg, that he had also experienced some numbness on the dorsum of the left leg and has occasional milder symptoms in the right foot. On physical examination, Dr. deGrange noted that Petitioner was using a cane for ambulation, that Petitioner arises from sit to stand with hesitation, there was mild to moderate tenderness at the S1 joints bilaterally and then at the lumbosacral junction with mild spasm, Petitioner stood with a slight list to the right side, straight leg raise on both sides provoked back pain at approximately 60 degrees, there were no radicular symptoms prompted by the straight-leg raising test, and there was mild decrease to light touch over the dorsum of the left foot.

Dr. deGrange reviewed the MRI studies performed on Petitioner on December 28, 2010 and March 25, 2011, and interpreted the first MRI as showing a large disc herniation at L4/5 just off to the right at midline and the annular defect is seen in the right paracentral region, and interpreted the second MRI as showing the presence of the same annular disruption at the same anatomic location, which is in the right

paracentral region, but the disc material now had spread across the midline and was occupying both sides of the spinal canal symmetrically, and causing a mild to moderate degree of stenosis bilaterally (RX 1). Dr. deGrange diagnosed Petitioner with L4/5 herniated nucleus pulposus.

Dr. deGrange opined that Petitioner sustained his initial disc herniation while he was cleaning out his garage at home in November of 2010, and then noted that Petitioner had seen Dr. Western on December 28, 2011 and March 7, 2011, who noted that Petitioner did not have any numbness, tingling or giving out of either leg, and he concluded by saying that Petitioner's symptoms appeared to be more like his previous problem. Dr. deGrange then noted that the annular defect is in the exact same spot, just to the right of the midline and that there was no new breach or rupture of the annulus but the disc material is now extravasated across the midline to occupy both sides of the spinal canal and place a mild degree of central canal stenosis on the thecal sac. Dr. deGrange concluded that given Petitioner's similar subjective complaints and the same anatomic lesion present on both MRIs that he did not sustain an injury arising out of and in the course of Petitioner's employment activities. Dr. deGrange went on to state that the fact that Petitioner was now experiencing symptoms in his left leg, whereas previously they were only in the right leg, did not imply that this was a new injury, but that the injury was the same and the symptoms had shifted from right to left, but the MRI was quite clear and unequivocal, revealing as it did the same source of the extruded material, which was in the right paracentral region of the annulus (RX 1).

Petitioner filed his Application for Adjustment of Claim on April 29, 2011. (AX 2)

Petitioner testified that he liked Dr. deGrange and elected to proceed with him regarding surgery. Dr. deGrange performed surgery on Petitioner on May 10, 2011, in Creve Coeur, Missouri. Petitioner underwent a microdiskectomy on the left at L4-5. (PX 3)

Petitioner was re-examined by Dr. deGrange on May 23, 2011. Petitioner advised the doctor he was doing quite well and his leg felt "great." Physical therapy was ordered and Petitioner was advised to remain off work. (PX 7)

Petitioner presented to Jersey Community Hospital for a physical therapy evaluation as requested by Dr. deGrange on May 25, 2011. Petitioner was reporting muscle tightness, postural problems, weakness, and pain. Petitioner described two accidents – one on November 6, 2010 when he was picking up a lawn mower and another one in February of 2011 when he fell at work. Petitioner reported general low back soreness and random left leg give-away. Petitioner was using a cane and reporting some difficulty sleeping in bed.

Dr. deGrange re-examined Petitioner on June 27, 2011 noting complete resolution of Petitioner's leg pain with only back pain continuing to be a problem. Petitioner's activities of daily living were becoming much easier to perform, that Petitioner's lower extremity radicular symptoms had resolved, and that Petitioner now only had back pain (PX 7, p. 8) Dr. deGrange noted that Petitioner still had some functional deficits and needed extended physical therapy before Petitioner can return to his very heavy lifting demand in the coal mines, but gave Petitioner a restricted work slip of 25 pound lifting limit, intermittent sit, stand, and walk, and no repetitive bending or twisting at the waist (PX 7, p. 8, 13. PX 3)

Respondent was able to accommodate Petitioner's restrictions and Petitioner returned to modified duty on July 11, 2011.

Petitioner attended regular therapy sessions through July 14, 2011. Petitioner reported he had returned to light duty work and was doing "fine." He believed he would be returning to full duty on July 25, 2011. He denied any difficulty with activities at home although he had not yet tried pushing his lawn mower to mow the lawn. Petitioner experienced occasional stiffness but was otherwise "okay" and denied any problems with sleep, exiting or entering his car, or driving. Petitioner had met all therapy goals and was discharged to an independent home exercise program. (PX 7)

At the July 25, 2011 visit Dr. deGrange noted Petitioner had returned to work with modifications and was doing well. Respondent was honoring his restrictions and Petitioner's leg was completely better and his mechanical back pain "improved." Petitioner still had symptoms with certain activities and assignments; however, Petitioner was not taking any medications. Petitioner was recovering from a bad spider bite on his right ankle and needed to keep his ankle elevated. Dr. deGrange believed Petitioner would be ready to return to his regular job on August 8, 2011. In the interim he could return to restricted duty on July 28, 2011 (25 lb. lifting limit). (PX 3)

Petitioner returned to regular duty on August 8, 2011 and has continued to work in that capacity. Petitioner also testified that he has worked overtime and often does so six days per week.

Petitioner returned to see Dr. deGrange on September 12, 2011. Petitioner's spider bite had completely resolved and Petitioner had returned to work but wasn't yet back to what he normally did. Petitioner was still noting occasional mild back ache and admitted he wasn't being diligent and consistent in his home exercise program. Petitioner reported that his radicular symptoms had completely resolved and he was not having any "significant" problems. Except for a rare Vicodin once every two weeks, Petitioner was medicine free. Petitioner's exam was good. He was advised he could safely return to his regular duties and was discharged from care with instructions to return if needed. He was also encouraged to be consistent with his exercises in light of his young age and expected work life. (PX 7)

Petitioner acknowledged that Dr. deGrange told him to return if he had any problems and Petitioner has not returned to see him since September 12, 2011.

Petitioner testified that he is earning his same rate of pay plus any negotiated increases. He occasionally experiences some soreness and discomfort in his back for which he exercises, uses ice or takes ibuprofen. He denied any ongoing soreness or stiffness in his legs. Petitioner also testified that he does some things "differently" and doesn't lift as much "heavy stuff." He performs his roof bolting activities "pretty okay."

Dr. Pineda's deposition was taken on October 3, 2012. Dr. Pineda is an orthopedic surgeon licensed to practice medicine in the State of Illinois and has board certifications in general orthopedic surgery and then spine surgery (PX 8, p. 4-5). Dr. Pineda saw Petitioner initially on March 21, 2011, and had the films of the MRI taken in December of 2010 available to him, which Dr. Pineda interpreted as showing a large herniation at L4/5 that was off to the right with a small left-sided component but with no specific effacement of any nerve root on either side (PX 8, p. 6-8, 31). Dr. Pineda did not expect there to be any or minimal left-sided lower extremity complaints by Petitioner given what he saw on the MRI of December of 2010 (PX 8, p. 8).

Dr. Pineda explained that given the herniation that was present on the MRI of December of 2010, there was going to be an annular tear, because in order to have a herniation, there must be an annular tear, and that the annular tear had to be on the posterior margin of the annulus but could not say for

certain if the tear was right of center or central (PX 8, p. 9-10). Dr. Pineda further explained that there is a correlation between the size of the annular tear and the herniated disc material that is present, in that the larger the annular tear, the higher the risk of herniation and the higher the risk of recurrent herniation (PX 8, p. 10-11). Dr. Pineda explained that there is also a correlation between the size of the disc material that herniates and the size of the annular tear (PX 9, p. 12). Dr. Pineda opined that based on the findings of the MRI of December of 2010, and assuming that a surgeon had recommended surgery to the individual with those findings as shown on the MRI of December of 2010, he would not have recommended a left-sided discectomy for several reasons, including that the disc material was primarily on the right, the pain experienced by the individual was primarily on the right, and then because the individual had a new symptom postdate the MRI of December of 2010 (PX 8, p.12). Dr. Pineda opined that given the findings on the MRI of December of 2010, the appropriate conservative treatment would have been medications, including Prednisone, exercises, and possibly epidural injections (PX 8, p. 14). Dr. Pineda explained that the purpose of Prednisone and the epidural injections is to shrink any inflammation off the nerve and eliminate the leg pain and that the steroid does not alter or change the annular tear but may insubstantially shrink the herniated disc material (PX 8, p. 15-17).

Dr. Pineda was aware at the time he initially examined Petitioner that there had been two accidents, one in November of 2010 and one in February of 2011, that the MRI of December of 2010 had occurred after the accident in November of 2010, and that Petitioner had received treatment after the accident of November of 2010, that significantly improved his right leg pain (PX 8, p. 17-18). Dr. Pineda was also aware that at the time of his initial examination of Petitioner, Petitioner was experiencing pain in both his legs (with the left leg being more involved) and worsening pain in his low back (PX 8, p. 18-19). On physical examination of Petitioner, Dr. Pineda found no nerve deficits and good muscle strength and sensation in Petitioner's legs. He explained that there can be nerve root compression that causes a symptom of pain, but may not necessarily cause enough irritation to block function in the sense of loss of movement of the extremity or that may have been initially and then it may have improved after a day or two (PX 8, p. 20). Dr. Pineda explained that he ordered a repeat MRI of the lumbar spine because there was a changed symptom set (PX 8, p. 20).

Dr. Pineda reviewed the actual films from the MRI that was performed on March 25, 2011, and interpreted it as showing a very large herniation that was bilateral causing root impingement on both the right and left sides (PX 8, p. 20). Dr. Pineda did not really compare the annular tears that were shown on the two MRIs but the two MRIs were different in that the lesion appearing on the MRI of March 25, 2011, was now incorporating a significant problem on both sides (PX 8, p. 22). Dr. Pineda also thought that the radiologist who compared the two MRIs was noting a change or an increase in the size of the herniation (PX 8, p. 24). Dr. Pineda opined that the increase in the size of the herniation as shown on the MRI of March 25, 2011, was related to the fall Petitioner had on February 28, 2011, because of Petitioner's increased symptoms and the nature of the symptoms being bilateral (PX 8, p. 24-25). Dr. Pineda recommended that Petitioner undergo a discectomy on both sides since the lesion was large and not amenable to a single-sided exposure (PX 8, p. 25).

Dr. Pineda diagnosed Petitioner with an L4/5 left-sided herniated disc and again opined that the work accident of February 28, 2011, aggravated the herniated disc material present at L4/5 as shown on the MRI of December of 2010 (PX 8, p. 26-27). The basis for this opinion was the change in Petitioner's subjective complaints as well as the change in the two MRIs (PX 8, p. 27). Dr. Pineda also opined that the work accident of February 28, 2011, was a contributing cause in the medical services that were rendered to Petitioner by himself and Dr. Western after February 28, 2011 (PX 8, p. 27). Dr. Pineda also opined that assuming no change in Petitioner's condition of ill-being after he last saw Petitioner, the surgery

Petitioner underwent on May 10, 2011, was related to the work accident of February 28, 2011 (PX 8, p. 29-30).

Dr. Pineda acknowledged that Dr. Western's clinic note of February 28, 2011, noted that Petitioner complained of right leg symptoms of pain and weakness but no numbness or tingling and that it was difficult to bear weight particularly on the right leg (PX 8, p. 32). Dr. Pineda also acknowledged the clinic note of MOHA for February 28, 2011, noted Petitioner had right leg symptoms but that there was something that had an L circled in a handwritten note and that the straight leg raising test on the left was negative and positive on the right (PX 8, p. 32-33). Dr. Pineda acknowledged that he did not review any records of Petitioner's primary physician, Dr. Schleeper, or the chiropractor (PX 8, p. 35). Dr. Pineda also acknowledged that in his clinic note of March 21, 2011, he advised Petitioner that he could not tell him who would be responsible for his condition at that point in time and that he wrote an addendum that causality may be an issue here, but he noted that Petitioner now had more diffuse pain that really incorporated not only the right side but more so the left side (PX 8, p. 36-37).

Dr. Pineda acknowledged that microdiscectomies do less physical damage or cause less instability than foraminotomies or laminectomies because less bone is taken out and there is a small amount of tissue that is interrupted (PX 8, p. 38). Dr. Pineda also acknowledged that he did not know if Petitioner's disc herniation became larger because the MRIs were not tied around the accidents, and then acknowledged that the herniation could have happened at any time between the first and second MRIs (PX 8, p. 39). Dr. Pineda did think that there was only one annular tear where all the herniation was occurring and acknowledged that once there is a tear and disc material has extruded, then it is much easier for additional disc material to be extruded and that can actually occur by bending over to your shoes or sneezing or having a bowel movement (PX 8, p. 39-30). Dr. Pineda noted that an individual would experience pain with the extruded material depending on the size of the extrusion and opined that given the degree of herniation as shown on the MRI of March of 2011, he would expect that there would be pain experienced by Petitioner (PX 8, p. 44-45). Dr. Pineda did not recall seeing anything in any of the medical records where Petitioner described tying his shoes, sneezing, or having a bowel movement when he noticed increased pain in his lumbar spine and/or right or left legs (PX 8, p. 45).

Dr. Pineda further explained that the reason for surgeries on the disc is to free the nerve root and make the patient comfortable (PX 8, p. 40-41). Dr. Pineda acknowledged that there are a select group of people who advocate annular repair but that is an inordinately difficult task as the annulus will usually scar down and heal itself once whatever was pushing it open is gone (PX 8, p. 41-42).

Dr. Pineda further explained that the pain table involved with a herniated disc is that it starts with back pain and then the disc material extrudes or comes out and this process can occur over a 24 hour period when the material hits the nerve root and then the nerve root becomes inflamed (PX 8, p. 48). Dr. Pineda further noted that when Dr. Western examined Petitioner on March 7, 2011, the physical examination showed a positive straight leg raise on both sides (PX 8, p. 49). Dr. Pineda also opined that he expected Petitioner's complaints to go back and forth between both extremities given the findings as shown on the MRI of March of 2011, depending on how much favoring Petitioner did of one side or the other (PX 8, p. 50).

Dr. Pineda acknowledged that the disc extrusion can be a very gradual process but that usually the pain is going to follow the gradation (PX 8, p. 53-54). Dr. Pineda also acknowledged that the disc extrusion may well have increased in size between February 28, 2011 and the date of the MRI in March of 2011, but he would have expected there to be a progressive worsening of complaints in that situation (PX

8, p. 55). Dr. Pineda also acknowledged that if additional material had extruded between the work accident on February 28, 2011, and when the MRI was performed in March of 2011, then he would have expected a change in the symptoms (PX 8, p. 55-56).

Respondent's Exhibit 2 contained an Accident & Sickness Claim Group Insurance form dated September 7, 2010, an Attending Physician's Statement dated September 3, 2010, an Attending Physician's Statement dated November 19, 2010, an Accident & Sickness Claim Group Insurance form dated April 24, 2011, and an Attending Physician's Statement dated May 10, 2011. The Accident & Sickness Claim Group Insurance form completed by Petitioner and dated September 7, 2010, noted that Petitioner had low back pain, that the claim was related to other accident, the date of onset was August 29, 2010. The Attending Physician's Statement dated September 3, 2010, was completed by Dr. Schleeper and noted the diagnosis was lumbosacral strain and the condition was not due to injury or sickness arising out of patient's employment. The Attending Physician's Statement dated November 19, 2010, was also completed by Dr. Schleeper and noted that the diagnosis was LS muscle strain with radiculopathy right leg and the condition was not due to injury or sickness arising out of patient's employment. The Accident & Sickness Claim Group Insurance form completed by Petitioner and dated April 24, 2011, noted that Petitioner had lower back pain, that the claim was related to a work accident and another accident, and that the dates of onset were November 6, 2010 and February 28, 2011. The Attending Physician's Statement dated May 10, 2011, was completed by Dr. deGrange and noted that the diagnosis was HNP L4/5 and the condition was not due to injury or sickness arising out of patient's employment. Respondent's Exhibit 3 contained attendance calendars for Petitioner for the years 2005-2013.

The Arbitrator concludes:

1. Petitioner's condition of ill-being is causally related to the work accident of February 28, 2011. The sequence of events supports this as does the credible medical evidence. The undisputed evidence shows that whatever low back pain Petitioner had experienced since he was about 20 years of age, had been either diagnosed as scoliosis, low gluteal spasm, or lumbosacral strain. The diagnosis of lumbosacral strain had been made by Dr. Schleeper as late as September 3, 2010, when she completed the Attending Physician's Statement for Petitioner to be off work at that time (RX 2). Petitioner sustained a non-work-related accident in November of 2010 when he was pulling a lawn mower out of his garage, and subsequent to that accident, Petitioner had complaints of low back pain and right leg pain. Neither the medical records of Carlinville Chiropractic Clinic nor Dr. Western, with whom Petitioner treated for his condition of ill-being following the accident in November of 2010, describe the nature of the right leg pain to be numbness, tingling, or weakness -- only pain. There was no specific location of the pain in Petitioner's right leg. Petitioner underwent an MRI of the lumbar spine on December 28, 2010, that revealed a large right subarticular disc extrusion at L4/5 causing severe right lateral recess stenosis and effacement of the descending right L5 nerve root, but no displacement of the nerve root (PX 3, p. 7). The undisputed evidence further shows that Petitioner underwent a course of conservative treatment, including epidural injections and a one-time evaluation by physical therapy, that caused Petitioner's complaints of low back pain and right leg pain to significantly improve, and that Petitioner returned to light duty work that required him to be on his feet all day and perform a lot of bending and twisting without any difficulties. Petitioner was intending to be released to full duty work as of March 1, 2011, when Petitioner sustained the work accident of February 28, 2011.

Immediately following the undisputed February 28, 2011 work accident, Petitioner had severe low back pain, weakness of his right leg, and right foot pain that Petitioner described as numbness (PX 4, p. 2,3, 7). X-rays taken at that time showed loss of the normal lordosis that may have been related to patient positioning or muscle spasm, and Petitioner received injections in the left and right upper gluteal areas. The severity of the pain Petitioner experienced after the work accident of February 28, 2011, was also noted by Dr. Western and Springfield MOHA, who examined Petitioner after he had been to St. John's Hospital and had been administered the injections into his left and right upper gluteal areas. The undisputed evidence also shows that Petitioner was not even able to ambulate at the time of these visits without the use of a wheelchair. The medical records of Carlinville Chiropractic Clinic showed that Petitioner was seen the day after the accident of February 28, 2011, and had bilateral findings on physical examination. (PX 1, p. 17). The record of Dr. Western for March 7, 2011, also showed that Petitioner had a positive straight leg raise test on both the right and left sides at the time of that examination. When Petitioner initially saw Dr. Pineda on March 21, 2011, Petitioner was experiencing back pain and bilateral leg pain and that the back pain Petitioner experienced after the work accident was even more diffuse than what Petitioner had experienced before. The MRI performed on Petitioner on March 25, 2011, now showed a large central disc extrusion that had increased in size when compared to the study of December 28, 2010, that was now more broad-based and central, there was now moderate circumferential canal stenosis and displacement of both L5 nerve roots at the lateral recesses, and mild foraminal stenosis asymmetric to the right (PX 3, p. 20). Even Dr. deGrange, who initially examined Petitioner pursuant to Section 12 of the Act, noted that the second MRI showed that the disc material had now spread across the midline and was occupying both sides of the spinal canal symmetrically, despite the fact that the annular tear had not changed in location or size (RX 1).

The records of Springfield MOHA diagnosed Petitioner with a lumbar strain with exacerbation of a previous back injury when Petitioner was seen on the date of the work accident (PX 5, p. 11). Dr. Western, who saw Petitioner before and after the work accident of February 28, 2011, commented in his medical record of March 7, 2011, that while Petitioner did have a pre-existing disc herniation, it appeared to have been aggravated by the work accident. Dr. Western also completed an Attending Physician's Statement on March 7, 2011, that diagnosed Petitioner's condition of ill-being to be aggravation of disc herniation and answered affirmatively the question whether this condition was due to injury or sickness arising out of the patient's employment (PX 2, p. 59). In addition, Dr. Pineda's record of March 21, 2011, while noting that causality might be an issue here, commented that Petitioner's pain presentation was different after the work accident of February 28, 2011, and a reasonable inference from this statement is that the work accident was a factor in Petitioner's current pain presentation. Finally, at the time Dr. deGrange performed surgery on Petitioner on May 10, 2011, he noted in his operative report that a reason for the surgery was that the MRI revealed the presence for large disc herniations on the left at L4/5 (PX 7, p. 6). The only MRI that revealed such a finding was the one taken after the work accident and performed on March 25, 2011. While there must be an annular tear for there to be a herniation, it is the disc material that is addressed at the time of surgery and not the annular tear (PX 8, p. 40-42).

In addition, Dr. Pineda credibly explained and opined that the increase in the size of the herniation as shown on the second MRI was related to the work accident Petitioner sustained (PX 8, p. 24-25). Dr. Pineda also opined that the work accident of February 28, 2011, aggravated the herniated disc material present at L4/5 as shown on the MRI of December of 2010 (PX 8, p. 26-

~~27). The opinion of Dr. deGrange that the work accident was not an injury arising out of and in the course of Petitioner's employment because there was no new breach or rupture of the annulus~~ was not persuasive regardless of the fact Petitioner chose to have Dr. deGrange perform his surgery. Dr. deGrange contradicted himself when he concluded that Petitioner had similar subjective complaints but then went on to acknowledge that Petitioner had symptoms now in his left leg, whereas previously they were only in the right leg. In addition, Dr. deGrange acknowledged that the disc material as shown on the second MRI had changed from the first MRI, even though the annular tear had not.

2. Medical bills incurred by Petitioner in treatment of his condition of ill-being and found in Petitioner's Exhibit 9 were reasonable and necessary as Respondent's only objection to these bills was on liability grounds. Given the finding on causation, Respondent is liable for these bills.

3. Petitioner was temporarily totally disabled from March 1, 2011 through July 10, 2011, representing 18 6/7 weeks. Respondent agreed to this period of temporary total disability, but disputed liability for it. Given the finding on causation, Respondent is liable for the period of temporary total disability.

4. Petitioner's condition of ill-being was diagnosed as an L4/5 left-sided herniated disc and Petitioner initially underwent an epidural injection for his condition of ill-being, and then ultimately, an L4/5 lumbar microdiscectomy on the left. Surgery provided Petitioner with resolution of his lower extremity pain and near resolution of his low back pain and Petitioner was able to return to his job as a roof bolter for Respondent. However, even Dr. deGrange expressed concern for Petitioner's condition of ill-being, recommending that Petitioner continue with his home exercise program, at least four times per week, given Petitioner's young age and amount of work left in his adult life. Petitioner is permanently partially disabled to the extent of 20% person as a whole.

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14IWCC0384

14IWCC0384

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ 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

Meridee Bitler,

Petitioner,

vs. NO: 06 WC 06637

14IWCC0385

River Band School District,

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 average weekly wage, prospective medical treatment, temporary total disability benefits and penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator on the issue of prospective medical treatment 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 found that Petitioner failed to prove by a preponderance of the credible evidence that the prospective treatment, an exploratory arthroscopy by Dr. Bach, is causally related to Petitioner's left knee injury. Dr. Bach deferred a causal connection opinion until after the arthroscopy. Dr. Bach testified that he believes scar tissue has developed within the knee as a result of the accident and subsequent surgical treatment. In Dr. Bach's opinion, scar tissue is most likely responsible for Petitioner's ongoing symptoms. He believes an arthroscopic evaluation is appropriate where conservative measures have failed and Petitioner continues to

complain of significant symptoms and functional difficulties. When questioned whether radiologic evidence shows the presence of scar tissue within the knee, Dr. Bach testified that diagnostic films do not show the scar tissue. He testified that because he cannot be certain in advance of surgery whether it definitively exists, he does not know whether any ameliorative procedures will be performed during the arthroscopy or whether the arthroscopy will merely allow him to ascertain what, if any, progression of Petitioner's underlying degenerative condition has occurred since the last surgery he performed.

We find the diagnostic surgery recommended by Dr. Bach to be reasonable and necessary treatment intended to cure or relieve the effects of the September 1, 2004 accident and we do not agree that it may not be authorized merely because it is exploratory. Respondent's Section 12 examiner, Dr. Raab, opined that the treatment rendered to Petitioner by Dr. Bach has been excellent. He agrees that an exploratory arthroscopy is a reasonable option, although he has already reached the opinion that Petitioner's ongoing symptoms are the result of degenerative changes in the patellofemoral joint. Clearly some degree of left knee arthritis pre-dated the September 1, 2004 accidental injury; Petitioner has a history of arthroscopies in 1991 and 1994. There are no records from these procedures in evidence and Petitioner's testimony that she sought no treatment for her left knee between 1994 and the date of accident was not contradicted. Respondent accepted the September 1, 2004 accident as compensable and authorized treatment including a chondroplasty and Fulkerson osteotomy performed by Dr. Bach. We rely on Dr. Bach's opinion that additional treatment is necessary and offers a reasonable expectation of improving Petitioner's condition whether by removing scar tissue related to Petitioner's injury that may be generating pain or by allowing Dr. Bach to assess Petitioner's degenerative condition.

All else is otherwise affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed September 4, 2012 is modified as stated above and otherwise affirmed and adopted; specifically the Arbitrator's findings with respect to the disputed issues of average weekly wage, temporary total disability benefits and penalties and fees.

IT IS FURTHER ORDERED BY THE COMMISSION shall pay to the Petitioner the sum of $201.61 per week for a period of 26 and 5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services, including the prospective treatment recommended by Dr. Bach, pursuant §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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: MAY 2 7 2014
RWW/plv
o-3/25/14
46

Ruth W. White

Ruth W. White

Charles J. DeVriendt

Charles J. DeVriendt

Daniel R. Donohoo

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

BITLER, MERIDEE
Employee/Petitioner

Case# **06WC006637**

RIVER BAND SCHOOL DISTRICT UNIT DISTRICT #2
Employer/Respondent

14IWCC0385

On 9/4/2012, 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:

2028 RIDGE & ASSOC PC
JOHN E MITCHELL
415 NE JEFFERSON AVE
PEORIA, IL 61603

1120 BRADY CONNOLLY & MASUDA PC
PETER J STAUROPOULOS
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- [ ] 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)

MERIDEE BITLER,
Employee/Petitioner

v.

RIVER BEND SCHOOL DISTRICT UNIT DISTRICT #2,
Employer/Respondent

Case # **06** WC **06637**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Peoria**, on **4/19/12, 6/11/12 and 8/7/12**. 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. [x] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **9/1/04**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident through 1/7/10.

In the year preceding the injury, Petitioner earned $**15,120.48**; the average weekly wage was $**302.41**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**33,102.32** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**33,102.32**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $201.61/week for 26-5/7 weeks, commencing 12/14/04 through 1/25/05, and 9/9/08 through 1/30/09, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services outlined in Section J of this decision, as provided in Sections 8(a) and 8.2 of the Act.

Petitioner's claim for prospective medical expenses is denied.

Respondent shall pay to Petitioner penalties of $**00.00**, as provided in Section 16 of the Act; $**00.00**, as provided in Section 19(k) of the Act; and $**00.00**, as provided in Section 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/31/12
Date

ICArbDec19(b)

SEP - 4 2012

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 47 year old school secretary sustained an accidental injury that arose out of and in the course of her employment by respondent on 9/1/04. Petitioner testified that at the end of the school day there was a kindergarten student that had missed the bus. Petitioner contacted the driver and took the student by the hand and headed towards the bus. As she got to the grassy edge of the ground she thought her left knee hit a gopher hole and she felt her left knee pop. Prior to this accident petitioner had two prior arthroscopic surgeries to her left knee, with the most recent being 10 years ago.

On 9/17/04 petitioner presented to Dr. Tuvi Mendel for evaluation of her left knee. She noted an increase in pain and discomfort since 9/1/04 when she was running over a patch of grass after school and twisted her left knee and felt pain. Since then she has complained of left knee pain of a 6 to 7 on a scale of 10. She denied any major locking, catching, or giving way but complained of moderate tenderness medially. Petitioner gave a history of her two prior surgeries to her left knee and stated that before 9/1/04 she had not had any significant difficulties since the last surgery in 1994. She reported difficulty going up and down stairs, squatting, and kneeling. She stated that her symptoms had slightly improved but she still has discomfort and pain. Following an examination and x-rays Dr. Mendel assessed a left knee twisting injury and possible medial compartment pathology. Dr. Mendel instructed her on appropriate quad strengthening exercises, anti-inflammatories, and possible bracing. Dr. Mendel injected her left knee joint.

On 10/6/04 petitioner followed-up with Dr. Mendel. She reported that the injection did not significantly improve her symptoms. Following an examination and x-rays Dr. Mendel noted that petitioner was somewhat young for a total knee replacement, but will require one. He indicated that other types of management include arthroscopy evaluation and management of possible articular damage with the ability to stage the knee and evaluate the knee for possible future management. Petitioner chose to proceed with the arthroscopy. On 10/20/04 Dr. Mendel recommended an aggressive course of physical therapy and a Palumbo brace to help with her symptoms until she had an evaluation by workers' compensation and decided on a further course of management.

On 11/24/04 petitioner underwent a Section 12 examination performed by Dr. Stephen Weiss at the request of the respondent. In addition to an examination, Dr. Weiss performed a record review. Petitioner noted that she underwent 2 arthroscopies of her left knee in 1991 and 1994, and did excellently after the 2nd operation. She gave a consistent history of her accident on 9/1/04 and her treatment to date. She stated that she wanted to undergo surgery because her knee was painful. She reported pain most of

the time and especially when weightbearing, twisting and bending or squatting. A physical examination revealed slight thigh atrophy and a small but definite effusion in the left knee. Dr. Weiss diagnosed status post prior arthroscopies of the left knee, 1991 and 1994; early post-traumatic/degenerative arthritic changes of the left knee; and aggravation of above secondary to incident on 9/1/04. Dr. Weiss was of the opinion that petitioner suffered some degree of intraarticular injury as a result of the injury on 9/1/04. Dr. Weiss was not as certain as Dr. Mendel that petitioner would definitely require a total knee replacement. He agreed with the arthroscopy recommended by Dr. Mendel. He opined that this surgery is related to the injury on 9/1/04, and that the injury on 9/1/04 caused a permanent aggravation of her preexisting condition. He was of the opinion that petitioner could perform full work activities until she undergoes the arthroscopy. He further indicated that she should try and avoid kneeling or squatting where possible.

On 12/1/04 petitioner returned to Dr. Mendel. He was of the opinion that a lot of her pain was the result of probable wear or possible articular cartilage injury of the medial compartment status post two knee scopes in the past with a probable meniscectomy. It was decided that petitioner would proceed with surgical intervention.

On 12/14/04 petitioner underwent a left knee arthroscopy with patellofemoral compartment chondroplasty. This procedure was performed by Dr. Mendel. Petitioner followed up post-operatively with Dr. Mendel. Her treatment included a course of physical therapy.

On 12/22/04 Dr. Mendel continued petitioner in physical therapy and released her to light duty work with restrictions on sit-down duty only work with no heavy lifting. On 1/12/05 Dr. Mendel noted that petitioner was doing well. She complained of occasional aches and pains as it relates to her patellofemoral joint. Dr. Mendel noted petitioner was back working full duty and was doing well. He released petitioner from his care. He instructed petitioner to continue to use care as it relates to her knee, avoid squatting and kneeling, avoid impact activity and concentrate on quad strengthening, bracing and anti-inflammatories as needed, and swimming and biking type activities.

Petitioner testified that she returned to work in January of 2005. She stated that she worked until 6/20/05. She further testified that she received sick pay for the time she was off, and did not receive any temporary total disability benefits.

On 1/12/05 petitioner followed up with Dr. Mendel. She was doing well with complaints of occasional aches and pain as it related to her patellofemoral joint. She stated that she was back performing her full duties and overall was doing well. Dr. Mendel released her from his care and to full

duty work. He recommended that she continue to use care as it relates to her knee, avoid squatting, kneeling, and impact activity and concentrate on quad strength, bracing, anti-inflammatories as needed, and swimming and biking type activities.

On 6/27/05 petitioner returned to Dr. Mendel. Petitioner reported difficulties mainly as it relates to patellar tendonitis, mild patellofemoral discomfort and irritation over the medial portal site. She also complained of occasional tightness and swelling throughout the day. Dr. Mendel examined petitioner and took some x-rays. He noted that they showed moderate wear on the undersurface of the patella. He fitted petitioner for a Palumbo brace and prescribed anti-inflammatories. He also injected the portal side of the left knee. He fitted her with a patellar tendon strap per physical therapy.

On 11/18/05 petitioner returned to Dr. Mendel. She reported about 50% improvement for a month following the injection on 6/27/05. She was also using the brace as needed. She complained of difficulties as it relates to patellofemoral type problems, squatting, kneeling, and bowling. An examination revealed pain, patellofemoral in nature with crepitus and discomfort. X-rays were taken that revealed left knee patellofemoral wear. Dr. Mendel recommended continued conservative management including bracing, anti-inflammatories, and chondroitin sulfate. He was also of the opinion that a Hyalgen injection would not be unreasonable. Operative management was discussed that could include a Maquet type tibial osteotomy. Dr. Mendel settled on a Hyalgen injection after approval was received.

On 5/31/06 petitioner returned to Dr. Mendel. Petitioner complained of patellofemoral pain and discomfort that affects her daily activities. She was unable to walk or do any type of recreational activities like she was able to do in the past. She reported difficulty going up and down the stairs. She reported occasional pain worse than what she had before surgery. Following an examination Dr. Mendel recommended another Hyalgen injection. Petitioner underwent the repeat Hyalgen injection. She reported 40% relief with the series of injections. On 7/5/06, 7/12/06 and 7/19/06 Dr. Mendel performed additional Hyalgen injections into the left knee joint. On 7/19/06 petitioner was still having some difficulties with regards to squatting and kneeling. The scope pictures revealed slight wear on the undersurface of the patella. She stated that she continues to use the brace and do aggressive quad strengthening. Petitioner reported that she had a new job as a bank teller and noted an increase in pain since she started doing a lot more standing.

On 8/30/06 petitioner followed-up with Dr. Mendel. She reported no significant improvement. She continued to complain mainly of patellofemoral type discomfort and pain. Dr. Mendel noted that petitioner was somewhat young and still active but was getting to the point that she is not even able to get

in and out of a chair secondary to pain and discomfort. An examination revealed that most of her symptoms were related to the patellofemoral joint. The patellofemoral joint on the x-ray revealed significant wear of the undersurface. Dr. Mendel assessed left knee residual patellofemoral pain secondary to wear. Continued conservative treatment versus operative intervention was discussed. Petitioner indicated that she would think about it.

On 4/18/07 petitioner returned to Dr. Mendel complaining of moderate discomfort and pain, difficulties with daily activities and moderate irritability as it relates specifically to her patellofemoral joint. Dr. Mendel was of the opinion that conservative treatment had not resolved her complaints and recommended a patellofemoral replacement. He did not recommend a full knee replacement, cartilage replacement, or tibial tubercle transfer. Dr. Mendel noted that petitioner's case was submitted to Dr. Gause who did not agree with his recommendation. Dr. Mendel took offense with Dr. Gause's remark that he was not available to discuss petitioner's case. He noted that he had made arrangements through his office staff to contact Dr. Gause to discuss petitioner's case. He further noted that at that time he was told by Dr. Gause's staff that he was not available. Dr. Mendel indicated that at that point he addressed his staff to call him back, which they tried to do to make another appointment, and Dr. Gause's office did not follow through. Dr. Mendel indicated that he did not necessarily disagree with Dr. Gause that although there are not a lot of indications for patellofemoral replacement, there have been reasonable results and the procedure is becoming more popular, but it is only reserved for a few patients that meet the strict criteria after failure of extensive attempts or other modalities. Dr. Mendel indicated that he would continue to treat the petitioner conservatively.

On 5/14/08 petitioner underwent a Section 12 examination performed by Dr. Bernard Bach, at the request of the respondent. In addition to an examination, Dr. Bach performed a record review. Petitioner reported patellofemoral symptoms with pain she described as a "needle type sensation" in the kneecap area. She reported discomfort with prolonged sitting and pain with stairs. She stated that she takes 6-8 Advil a day. Dr. Bach noted that Dr. Mendel was recommending a McKay osteotomy. Following an examination and x-rays, Dr. Bach assessed recalcitrant petallar pain of the left knee status post arthroscopy. Dr. Bach noted an increased Q-angle which was preexistent and which is a risk factor for patellofemoral symptoms. He was of the opinion that her treatment to date was reasonable. He was further of the opinion that petitioner was a candidate for a Fulkerson anteromedialization proximal tibial osteotomy over a McKay type tibial osteotomy. He was of the opinion that a McKay type tibial osteotomy can realign the extensor mechanism as well as off load the patellofemoral mechanism. He

noted no symptom magnification or malingering and was of the opinion she would benefit from a Fulkerson anteromedialization. He further opined a causal connection between her symptoms and the injury on 9/1/04. What Dr. Bach could not elicit from the injury mechanism was whether the meniscal tear itself was a solo injury or in fact she had had some mild component of a patellar subluxation with preexistent chondromalacia. He was of the opinion that the chondromalacia of the patellofemoral compartment was most likely preexistent.

On 9/9/08 petitioner underwent a left knee arthroscopic lateral release and Fulkerson AMZ, proximal tibial osteotomy. This procedure was performed by Dr. Bach. The post-operative diagnosis was left knee patellar pain. Dr. Bach authorized petitioner off work. Petitioner followed up post-operatively with Dr. Bach on 9/10/08, 9/19/08, 10/6/08 and 10/20/08. On 10/20/08 petitioner was doing well. Dr. Bach's impression was status post left knee Fulkerson AMZ osteotomy and lateral release for patellofemoral malalignment syndrome. Dr. Bach was of the opinion that petitioner could discontinue her brace, and progress to weight bearing as tolerated using her crutches for safety. He prescribed physical therapy and released her to full duty work with restrictions of sedentary work only.

On 12/1/08 petitioner last followed-up with Dr. Bach. Petitioner reported that she was improving with physical therapy. She reported occasional pain in the mid to superior region of the left tibia. Petitioner had been walking with a cane but had not been able to return to work because there was no sedentary work available at her job. Following an assessment Dr. Bach was of the opinion that she was doing quite well and should continue to participate in physical therapy. He was further of the opinion that petitioner could return to work with sedentary duty, standing no longer than 15 minutes at a time, no kneeling, squatting or crawling and only occasional stairs.

On 1/12/09 Dr. Bach released petitioner to sedentary work only with no standing or walking for greater than 2 hours at a time, and no climbing stairs/ladders. On 1/20/09, 2/23/09 and 4/6/09 petitioner followed-up with Dr. Bach. On 1/30/09 Dr. Bach drafted a script indicating that petitioner could return to work full duty without restrictions. Petitioner testified that she did not see Dr. Bach on this date. On 2/23/09 Dr. Bach again released petitioner to return to full duty work without restrictions.

On 2/9/09 petitioner began work for an optometrist. She testified that the job was that of a receptionist and she thought all she had to do was sit and take phone calls and check patients in. Petitioner testified that the job was actually different than she thought. She testified that it involved alot standing, and she did filing in the record room that required squatting, and kneeling for records that were low, and climbing a ladder to get to records that were high. Petitioner testified that she also had to walk

patients to the examination room. She estimated that she had to stand 50% of the time. Petitioner quit this job on 2/27/09. When she left the job she testified that she had increased pain in her knee and it started affecting her ankle.

On 4/6/09 petitioner reported that she recently had to leave her job as a file clerk in an optometrist office due to significant pain she was having in her ankle and peroneal tendons. She stated that she had dramatically improved over the past 6 weeks. She stated that she did not have any significant complaints in regards to her knee and her Fulkerson osteotomy. She reported some mild pain at the distal portion of her incision. Following an examination Dr. Bach was of the opinion that petitioner should continue in physical therapy. Dr. Bach released her on an as needed basis.

Petitioner testified that she was in physical therapy from January of 2009 through 4/6/09. While in physical therapy petitioner had trouble balancing. She stated that she was treated with heat and ice and the therapists would use their hands to relax the muscles around her knee and the tendons in her ankle.

On 9/9/09 Dr. Bach drafted a letter to petitioner's attorney in response to his letter dated 8/31/09. He clarified that when he last saw her on 4/7/09 she was already working at a full duty capacity with no restrictions. He was of the opinion that she could continue to do so.

On 1/7/10 petitioner underwent a Section examination performed by Dr. Debra Zillmer, at the request of the respondent. Petitioner complained of pain over the anterior, anteromedial and anterolateral aspect of her left knee that occurs with activity such as standing for longer than three hours, sitting for a lengthy period of time in a car traveling (greater than an hour), descending stairs, rising from a sitting position and particularly rising from the floor. She also felt there was "something crawling" over the anterior aspect of her knee intermittently. She stated that the discomfort caused her to discontinue a recent job because of its significant effect on her. Following an examination and record review, Dr. Zillmer's impression was left knee patellofemoral pain and chondrosis, which does have a bearing on quality of the patient's activities of daily living and her ability to function in a work situation with frequent rising from a seated position and prolonged standing. Dr. Zillmer was of the opinion that petitioner's condition had improved since the patellar realignment, but she still remains symptomatic.

Dr. Zillmer was of the opinion that petitioner's prognosis was fair. She opined that a causal relationship of the condition to her injury exists, and her work-related injury did permanently exacerbate a pre-existing condition. She noted that because petitioner did not get back to pre-injury status, operative intervention was performed to improve function and comfort. She was further of the opinion that

petitioner had reached maximum medical improvement and could return to work. Dr. Zillmer recommended a FCE and the limitations of her abilities be worked into her next job description.

Petitioner testified that she followed-up with Dr. Bach on 2/14/10 and discussed her restrictions. She stated that they discussed standing no more than 15-30 minutes. Petitioner testified that she could not perform her regular work duties for respondent with these restrictions. The credible evidence does not include any records from Dr. Bach for this date. Additionally, the medical bills of Midwest Orthopedics At Rush do not include any bills for this visit.

On 6/14/10 petitioner returned to Dr. Bach. She reported that at times she still continues to have pain. She complained of pain along the anterior knee, and pain localized as peripatellar. She reported that her pain is brought on by standing for long periods of time or walking long distances. She still noted pain when kneeling or squatting position. She noted small amounts of swelling after standing for long periods of time, which is anteriorly over the mid portion of her incision. Following an examination and x-rays, Dr. Bach's impression was 21 months status post Fulkerson osteotomy for patellar instability with patellar pain. Dr. Bach was of the opinion that petitioner's knee was stable and the patella was stable. He was of the opinion that she likely suffered a flare up of patellofemoral pain. Dr. Bach performed an injection and recommended additional course of physical therapy. Dr. Bach was of the opinion that petitioner could work a job with sedentary type activity with the opportunities to both sit, stand, and walk, but not for extended periods of time. He released petitioner on an as needed basis.

On 8/30/10 petitioner returned to Dr. Bach. She stated that the injection of 6/14/10 provided her no relief. She continued to complain of some pain going down stairs and with walking anterolaterally. She noted that she was much better than she was, but was still having some feelings of instability and pain. Dr. Bach examined petitioner and assessed some mild residual pain. He ordered an MRI to further evaluate the cause of her problem. He was of the opinion that she may very well have some scar tissue that is painful.

On 10/12/10 petitioner underwent an MRI of the left knee that showed a torn posterior horn of the medial meniscus that extends to the inferior intraarticular surface; a torn posterior horn of the lateral meniscus also extending to the inferior articular surface; very diminutive anterior horn of the lateral meniscus; and postoperative changes.

On 11/15/10 petitioner returned to Dr. Bach after the MRI of the left knee. Petitioner reported pain directly on her kneecap and lateral and medial to it. She reported some swelling at night and an

occasional feeling of a locking sensation in her knee and stated that it is very stiff going down stairs. Dr. Bach noted that the MRI showed a small trochlear defect. He saw no scarring in the fat pad, and noted bilateral meniscal signal changes. He was not convinced that this represented a tear. Dr. Bach was of the opinion that her pain was likely due to some patellofemoral symptoms and possibly a medial plica. Petitioner requested some physical therapy to see if it would improve her pain prior to an arthroscopy. Dr. Bach released petitioner on an as needed basis.

On 12/27/10 petitioner followed-up with Dr. Bach. Petitioner stated that the physical therapy was not really helping. She reported a fall three weeks ago that exacerbated her previous medial pain. Dr. Bach continued her in physical therapy and told her to take Celebrex. Dr. Bach was of the opinion that if this did not work surgery would be scheduled.

On 3/21/11 petitioner followed-up with Dr. Bach. It was noted that petitioner had refractory anteromedial left knee pain status post an anterior medialization procedure Fulkerson done approximately 1 ½ years ago. Petitioner followed-up after a trial of anti-inflammatories to try and quiet her inflammation down and begin with some new therapy. Petitioner stated that this did not significantly change her symptoms. She complained of ongoing complaints of significant pain particularly on the anteromedial aspect of her left knee as well as under her kneecap, particularly with activities such as stairs. Following an examination Dr. Bach's impression was left knee refractory anteromedial pain despite conservative measures including Celebrex and therapy. Dr. Bach recommended that petitioner proceed with the left knee arthroscopy to evaluate the patellofemoral compartment as well as excise the medial plica which appeared to be the source of her symptoms. Petitioner indicated that she wanted to proceed with the surgery.

On 7/11/11 petitioner underwent a Section 12 examination performed by Dr. David Raab, at the request of the respondent. In addition to an examination, Dr. Raab performed a record review. Following his examination and record review, Dr. Raab's impression was anterior knee pain, patellofemoral with associated patellofemoral chondrosis status post Fulkerson osteotomy. In response to the questions posed by respondent, Dr. Raab believed petitioner has continued complaints of anterior knee pain, patellofemoral in nature, with associated patellofemoral chondrosis and early degenerative arthritis of the patellofemoral joint status post Fulkerson osteotomy. Dr. Raab was of the opinion that petitioner had preexisting problems with her left knee prior to the work related injury of 9/1/04. He was of the opinion that the prior surgeries were for issues regarding the patellofemoral joint based on the operative reports, especially of the initial arthroscopic procedure subsequent to the reported work related injury of 9/1/04.

Dr. Raab was of the opinion that the petitioner demonstrated preexisting problems with the patellofemoral joint. Dr. Raab opined that there is certainly a possibility that petitioner's work related injury may have aggravated her pre-existing knee complaints, although it appears that the report of the injury is quite trivial. Dr. Raab was of the opinion that petitioner's treatment had been reasonable and necessary. Dr. Raab was of the opinion that a knee arthroscopy is reasonable. However, he did not feel this would be a long-term solution to her problem due to the degenerative changes of the patellofemoral joint which he believed was the etiology of her pain. He was of the opinion that a scope may give her some symptomatic short-term relief of pain, but her prognosis was guarded. He believed that petitioner would continue to have complaints of anterior knee pain in the future, patellofemoral in nature.

Dr. Raab was of the opinion that it seemed reasonable for the petitioner to have had an initial knee arthroscopy, but the second procedure, an osteotomy, is more so indicated for her chronic longstanding issues regarding her patellofemoral joint that he believed more likely than not would have occurred with or without the work related injury. Dr. Raab opined that it is reasonable to consider the Fulkerson osteotomy as definitive treatment for the work related event that occurred on 9/1/04, and subsequent to that event she was working in a full duty capacity. He also noted that subsequent to the surgery petitioner had resolution of her pain and was doing well. He opined that future treatment would be attributed to the natural history of the degenerative changes in her knee and not specifically related to the one time event that occurred on 9/1/04. He opined that the arthroscopy is indicated, but is secondary to the natural history and progressive degenerative changes of her patellofemoral joint and not causally related to the one time event that occurred while walking/running on 9/1/04.

Dr. Raab was of the opinion that petitioner has reached maximum medical improvement and was capable of returning to the workplace. He noted that petitioner is limited by her patellofemoral complaints. He recommended an FCE to get the specific parameters within which she could work. He opined that secondary to the degenerative changes in her patellofemoral joint, repetitive bending, stooping and squatting may be difficult for petitioner.

On 9/21/11 Dr. Bach drafted a letter to petitioner's attorney in response to his letter dated 8/25/11 and after reviewing the report of Dr. Raab. He agreed with Dr. Raab that petitioner has patellofemoral arthritis. He was of the opinion that petitioner had all the findings to perform the previous surgical procedure, a left knee arthroscopic lateral release and proximal tibial realignment osteotomy, and had done quite well with regard to her patellar instability complaints. However she continued to have anteromedial knee pain. Based on failed conservative measures including an injection, anti-inflammatory

medications, and physical therapy Dr. Bach recommended an arthroscopic evaluation. His goal for the procedure was to address any scar tissue within the knee, particularly the anteromedial aspect of the knee in the region of the medial plica area. His goal was not to debride any preexisting patellofemoral articular cartilage abnormalities. He was of the opinion that this surgery could be attributed to a causal relation in that it is to address scar tissue from the arthroscopic surgery with realignment to address her work relates injury. Dr. Bach was of the opinion that petitioner has significant patellofemoral chondromalacia which is in fact preexisting. With respect to her work injury, Dr. Bach was of the opinion that petitioner was capable of returning to work in a sedentary position with opportunities to frequently stand to stretch her knee. He recommended that she avoid activities where she squats, kneels, crawling or climbing ladders. He was of the opinion that more likely than not these restrictions will be permanent.

On 12/8/11 the deposition of Dr. Bach was taken on behalf of the respondent. Dr. Bach was of the opinion that Dr. Raab's recommendations were reasonable, but he did not agree with them. Dr. Bach was of the opinion that there is scarred soft tissue that exists in petitioner's knee, that if cleaned out is going to further help decompress the patellofemoral compartment and would significantly reduce her symptoms, but not cure what wear she has. He agreed that an FCE would be appropriate to objectively clarify what petitioner's capable of doing. He believed petitioner was capable of working a sedentary or slightly more than sedentary type of job demands. Dr. Bach opined that the injury was a contributing factor to her current condition of ill-being.

On cross-examination Dr. Bach was of the opinion that there is a possibility that petitioner's left knee complaints could be solely the result of the preexisting arthritis of the patellofemoral joint. Dr. Bach did not believe the MRI of October 2010 was the definitive answer on whether petitioner has scar tissue in her knee. Dr. Bach opined that if he went in and did not find any scar tissue he would not perform any other type of surgery. He stated that if there is no scar tissue then he would opine that that would indirectly conclude that her pain symptoms are coming from the wear.

On 2/15/12 petitioner filed a petition for Assessment of Penalties pursuant to Sections 19(k) and 19(l) of the Act, and attorneys' fees pursuant to Section 16 of the Act. Petitioner claims that she sustained an accident and respondent has refused to pay medical benefits and/or temporary total disability benefits contrary to its obligation under the Act. The petitioner further claimed that respondent's actions are considered to be in bad faith and fall within the meaning of Section 19(k); that respondent has failed to pay benefits to petitioner or provide a written explanation for the delay of over 14 days after the

demand, and respondent's actions fall within the provisions of Section 19(l); and, the respondent has been guilty of unreasonable and vexatious delay within the meaning of Section 16.

On 3/19/12 the evidence deposition of Dr. Raab was taken on behalf of the respondent. Dr. Raab opined that petitioner had Grade II and III chondromalacia of the patella when Dr. Mendel did the surgery on 12/14/04. He was of the opinion that that reflects a significant amount of wear, or degenerative arthritis. Dr. Raab did not think the procedure recommended by Dr. Bach would show any scar tissue. He was of the opinion that it would show more wear and tear under the kneecap, and progression of the chondromalacia of the patellofemoral joint. Dr. Raab believed the progression of the problem is going to continue with or without the knee arthroscopy. Dr. Raab opined that he believed petitioner may have aggravated her preexisting chondromalacia of her patella as a result of the injury on 9/1/04, however, in his opinion it was only a temporary aggravation of a preexisting problem that received appropriate and excellent treatment.

Petitioner testified that she continued in physical therapy until recently because she hoped there would be some good outcomes and knee strengthening. Petitioner testified that between the surgery in 1994 and the accident on 9/1/04 she had no problems. She testified that she coached girls softball, participated in town activities, bowled, walked 3 miles a day 4-5 days a week, gardened and rode a bike. She stated that she was active in everything she did and had no pain or discomfort.

Petitioner testified that her job as a secretary for respondent was not sedentary. She testified that in addition to her secretarial duties she helped teachers, the principal, the cooks, helped with playground activities, and whatever else was needed since it was a small school. Petitioner testified that in the summer she would go in to work periodically to look over shipments and go through them. She would then deliver them to the appropriate rooms. In July of 2004 she worked 71 hours, consisting of full days, during the registration period. She testified that these 103 hours are not classified as overtime.

Petitioner testified that she received TTD payments totaling $33,102.32. She testified that the rate would vary. She reported receiving three different rates, and then reported that there were periods when she did not receive some checks. Petitioner testified that she requested that the respondent make payments more promptly.

Petitioner testified that she still has pain in her knee, and she believes it is not near where it should or could be. She also reported that the strength is not there. Petitioner testified that she cannot bear full weight on her left knee. She also stated that when she walks down stairs periodically her knee is stiff and

cracks. She testified that she cannot squat. She reported a pulling sensation and pain on her kneecap when she squats. She reported aching and pain on the inside of her left knee when standing in excess of 30 minutes. Petitioner testified that she has prescription medications that she does not take because of the side effects. She testified that she takes Advil for her pain. Petitioner testified that she wants to undergo the recommended surgery.

Petitioner testified that while recovering from her work injury she worked as a receptionist for an optometrist. Her duties included greeting patients and getting files and updating files. She performed this job for three weeks in February of 2009. While performing these duties she noticed an onset of pain and discomfort when bending and squatting and getting up and down frequently. Petitioner testified that she has looked for work within her restrictions, but had not found any other work. She testified that she had applied for secretarial, receptionist, bank and other sedentary jobs but was never given an interview. She continues to look for work.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Prior to the injury on 9/1/04 petitioner underwent two arthroscopic procedures on her left knee in 1991 and 1994. Petitioner testified that following her post-operative treatment after the surgery in 1994 she performed all her regular work duties, activities of daily living, and extracurricular activities without any problems until the accident on 9/1/04. Following the injury on 9/1/04 petitioner underwent conservative treatment that included injections, anti-inflammatories, and physical therapy.

On 11/24/04 Dr. Weiss, respondent's examining physician opined the arthroscopy surgery recommended by Dr. Mendel was related to the injury on 9/1/04, and that the injury on 9/1/04 caused a permanent aggravation of her preexisting condition. On 12/4/04 petitioner underwent a left knee arthroscopy with patellofemoral compartment chondroplasty. On 1/12/05 Dr. Mendel released petitioner to full duty and released her from his care.

On 6/27/05 petitioner returned to Dr. Mendel with complaints. Dr. Mendel was of the opinion that cause of these complaints was moderate wear on the undersurface of the patella. Petitioner was fitted with a brace and patellar tendon strap. She also underwent an injection.

On 11/18/05 petitioner returned to Dr. Mendel and reported about 50% improvement after the injection. Dr. Mendel recommended Hyalgen injections.

On 5/31/06 petitioner returned to Dr. Mendel with continued complaints of patellofemoral pain and discomfort that affected her daily activities. Dr. Mendel performed about 5 Hyalgen injections into

petitioner's left knee through 7/19/06. Once completed, petitioner was still having some difficulties with squatting and kneeling. Wear on the undersurface of the patella was still noted. On 8/30/06 Dr. Mendel noted that most of petitioner's symptoms were related to the patellofemoral joint. He assessed left knee residual patellofemoral pain secondary to wear.

On 4/18/07 petitioner still has complaints. Dr. Mendel recommended a patellofemoral replacement. Dr. Gause did not agree with this procedure. Dr. Mendel continued to treat petitioner conservatively.

On 5/14/08 petitioner was examined by Dr. Bach at the request of the respondent. He assessed recalcitrant patellar pain of the left knee status post arthroscopy. He also noted an increased Q-angle which was preexistent and which was a risk factor for patellofemoral symptoms. He opined that the treatment to date was reasonable. He recommended a Fulkerson anteromedialization proximal tibial osteotomy. Dr. Bach also opined a causal connection between petitioner's symptoms and the injury on 9/1/04. He opined that the chondromalacia of petitioner's patellofemoral compartment was most likely preexistent.

On 9/9/08 petitioner underwent a left knee arthroscopic lateral release and Fulkerson AMZ, proximal tibial osteotomy performed by Dr. Bach. Petitioner followed up post-operatively with Dr Bach. On 1/30/09 and 2/23/09 Dr. Bach released petitioner to return to work full duty without restrictions. Petitioner remained in physical therapy through April of 2009.

On 1/7/10 petitioner underwent a Section 12 examination by Dr. Zillmer at the request of the respondent. Dr. Zillmer opined that a causal relationship of the condition to petitioner's injury exists, and her work-related injury did permanently exacerbate a preexisting condition. Dr. Zillmer noted that because petitioner did not get back to pre-injury status, operative intervention was performed to improve her function and comfort.

On 6/14/10 petitioner followed-up with Dr. Bach for the first time since 4/6/09. Petitioner reported that she continued to have pain at times. Dr. Bach opined that petitioner's left knee was stable and the patella was stable. He was of the opinion that she likely suffered a flareup of patellofemoral pain. Dr. Bach resumed conservative treatment that included physical therapy and injections. On 10/12/10 Dr. Bach ordered an MRI of the left knee that he noted showed a small trochlear defect. Dr. Bach noted that the MRI showed no tear, and that petitioner's pain was likely due to some patellofemoral symptoms and possibly a medial plica. Petitioner continued undergoing conservative treatment.

On 3/21/11 Dr. Bach recommended a left knee arthroscopy to evaluate the patellofemoral compartment as well as excise the medial plica which appeared to be the source of petitioner's symptoms.

On 7/11/11 respondent had petitioner examined by a third Section 12 physician. Dr. Raab's impression was anterior knee pain, patellofemoral with associated patellofemoral chondrosis status post Fulkerson osteotomy. Dr. Raab was of the opinion that prior surgeries were for issues regarding the patellofemoral joint based on the operative reports, especially of the initial arthroscopic procedure subsequent to the reported work related injury of 9/1/04. Dr. Raab was further of the opinion that there is certainly a possibility that petitioner's work related injury may have aggravated her preexisting knee complaints, although the report of the injury was quite trivial. He opined that any further treatment would be attributed to the natural history and progressive degenerative changes of her patellofemoral joint and not causally related to the one-time event that occurred while walking/running on 9/1/04.

On 9/21/11 Dr. Bach drafted a letter to petitioner's attorney. Dr. Bach was of the opinion that petitioner has significant patellofemoral chondromalacia which is in fact preexisting. Dr. Bach was of the opinion that Dr. Raab's recommendations were reasonable, but he did not agree with them. Dr. Bach was of the opinion that there is scarred soft tissue that exists in petitioner's knee that if cleaned out is going to further help decompress the patellofemoral compartment and would significantly reduce her symptoms, but not cure what wear she has. Dr. Bach was of the opinion that there is a possibility that petitioner's left knee complaints could be solely the result of the preexisting arthritis of the patellofemoral joint. Dr. Bach did not believe the MRI of October 2010 was the definitive answer on whether petitioner has scar tissue in her knee. Dr. Bach opined that if he went in and did not find any scar tissue he would not perform any other type of surgery. He stated that if there is no scar tissue then he would opine that that would indirectly conclude that her pain symptoms are coming from the wear.

Based on the above, as well as the credible evidence, the arbitrator finds that it is unclear if petitioner's current condition of ill-being is causally related to the accident she sustained on 9/1/04. The arbitrator finds it unrebutted, based on the credible medical evidence that petitioner's current condition of ill-being as it relates to her left knee is causally connected to the accident she had on 9/1/04 through at least 1/7/10, the date Dr. Zillmer, respondent's examining physician, opined a causal relationship between petitioner's injury on 9/1/04 and her current condition of ill-being.

After that date even Dr. Bach, petitioner's treating physician, opined that he is not sure if petitioner's current condition of ill-being is causally related to the injury of 9/1/04. In his deposition on 12/8/11 Dr. Bach specifically opined that there is a possibility that petitioner's left knee complaints could

be solely the result of the preexisting arthritis of the patellofemoral joint. However, he indicated that the only way he would know if her current condition of ill-being is causally related to the injury on 9/1/04 or her preexisting condition was to perform the recommended arthroscopic surgery and if there was no scar tissue found he would opine that the petitioner's current complaints were coming from the natural wear of her patellofemoral joint. If in the alternative, scar tissue from the previous surgeries was found, a causal connection to the accident on 9/1/04 would exist.

Since the surgery that would determine what Dr. Bach's causal connection opinion would be has not yet occurred, the arbitrator finds the petitioner has not yet proven by a preponderance of the credible evidence that her current condition of ill-being after 1/7/10 is causally related to the accident of 9/1/04. This finding is not a determinative finding of whether or not petitioner's current condition of ill-being is causally related to the accident on 9/1/04. Should petitioner undergo the surgery recommended by Dr. Bach, the arbitrator would be open to readdressing the issue of causal connection as it pertains to the period after 1/7/10. However, at this point the arbitrator finds the petitioner has failed to prove by preponderance of the credible evidence that her current condition of ill-being after 1/7/10 is causally related to the accident on 9/1/04 and not her preexisting condition.

G. WHAT WERE PETITIONER'S EARNINGS?

Respondent offered into evidence petitioner's wage records from 9/1/03 through 9/1/04. Petitioner offered no objection to this evidence being offered. This evidence shows that from 9/1/03 through 9/1/04 petitioner worked 1744 hours at a rate of $8.67 per hour. Petitioner offered no credible evidence to support a finding that her overtime was regular and mandatory. In the 50 week period preceding the injury petitioner worked overtime in only 4 of the 25 pay periods.

Based on the above, the arbitrator finds the petitioner earned $15,120.48 in the 50 week period preceding the injury on 9/1/04, and earned an average weekly wage of $302.41.

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 her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

Having found petitioner's current condition of ill-being through 1/7/10 causally related to the accident on 9/1/04, the arbitrator finds all treatment petitioner received from 9/1/04-1/7/10 was reasonable and necessary to cure or relieve petitioner from the effects of the injury she sustained on 9/1/04. The arbitrator bases this finding on the opinions of Dr. Bach, Dr. Mendel and Dr. Zillmer.

Following her Section 12 examination by Dr. Bach at the request of the respondent, petitioner started treating with Dr. Bach. On 9/8/08 Dr. Bach performed surgery on petitioner. In General Tire & Rubber Co. v Industrial Commission, 221 Ill.App.3d 641, 582 N.E.2d 744, 164 Ill.Dec. 181 (5th Dist. 1991) the appellate court held that expenses for travel to petitioner's own physician in excess of 100 miles each way were proper under Section 8(a) of the Act. The court found it was not unreasonable to travel for treatment by a specialist. However, the decision did not seem to infer that local treatment for travel would be included. The court based this finding on the concept that the employer must provide all necessary medical expenses that are reasonably required to cure or relieve the effect of the injury. The respondent offered no evidence to support a finding that the treatment recommended by Dr. Bach could be performed by any doctor in Albany, IL.

Petitioner presented unrebutted testimony that she lives in Albany, Il and travelled to Chicago, IL for the surgery by Dr. Bach on 9/9/08. The distance from Albany, IL to Rush Medical Center in Chicago, IL is 146 miles. The arbitrator finds it reasonable and necessary that petitioner would spend the night before and after the surgery in a hotel given the distance from Albany, IL to Chicago, IL. Petitioner's lodging costs for the two nights was $188.76. Petitioner is also entitled to mileage reimbursement for 292 miles associated with the surgery. She is also entitled to parking reimbursement of $5.00, and $10.80 in tolls from Albany, IL to Chicago, IL .

Petitioner also travelled for follow-up to Dr. Bach on 9/19/08, 10/6/08, 10/20/08, 12/1/08, 1/20/09, 2/23/09, and 4/6/09 before being released to full duty work and released from his care. After that date petitioner has failed to prove by the preponderance of the credible evidence that the treatment she needed could not have been provided by a doctor in her area. Based on the above, the arbitrator finds the petitioner is entitled to reimbursement for an additional 2,044 miles. She is also entitled to parking reimbursement of $49.00 for these dates, and $37.80 in tolls from Albany, IL to Chicago, IL.

The arbitrator finds the petitioner is not entitled to mileage reimbursement for physical therapy performed 17 miles away from her home.

On 1/7/10 petitioner was examined by Dr. Zillmer at the request of the respondent. Dr. Zillmer's office is located in Lemont, IL. The distance from Albany to Dr. Zillmer's office is 134 miles each way, or a total of 268 miles. Petitioner is also entitled to $4.30 in tolls. Respondent has already paid petitioner $150.00 for this examination.

Petitioner offered into evidence a receipt for $17.61 from Walgreens for gauze and knee wrap. This receipt is undated, and therefore not reimbursable. Petitioner offered into evidence a pharmacy receipt dated 9/09/08 in the amount of $17.77 for Hydrocodone.

Petitioner offered into evidence the bill from Advanced Physical Therapy for services after 3/3/11. Since these services are after the date through which the arbitrator has found the petitioner's condition of ill-being is causally related to her injury on 9/1/04, the arbitrator defers any finding on these bills from Advanced Physical Therapy.

Petitioner also offered into evidence a meal receipt for 7/11/11 in the amount of $5.52. This was the day she underwent the Section 12 examination by Dr. Raab, at the request of the respondent. Petitioner is entitled to reimbursement of this meal given the long distance to and from the exam.

Based on the above, the arbitrator finds the petitioner is entitled to the following payments pursuant to Section 8 and Section 8.2 of the Act:

- 9/8/08-9/10/08 – lodging in the amount of $188.76; mileage reimbursement for 292 miles at the prevailing mileage reimbursement rate as of that date; $5.00 for parking, and $10.80 for tolls.
- 6 follow-up visits with Dr. Bach on 9/19/08, 10/6/08, 10/20/08, 12/1/08, 1/20/09 - reimbursement for 1,752 miles at the prevailing mileage rate on these dates; parking reimbursement of $49.00 for these dates; and $37.80 in tolls from Albany, IL to Chicago, IL
- 1/6/10 Section 12 examination with Dr. Zillmer – 268 mileage reimbursement at the prevailing mileage rate for that date; and $4.30 in tolls. Respondent shall have credit for the $150.00 it has already paid petitioner.
- Pharmacy receipt dated 9/09/08 in the amount of $17.77 for Hydrocodone.
- $5.52 lunch bill on date petitioner underwent a Section 12 examination with Dr. Raab, at the request of the respondent.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

Dr. Bach, the doctor that has recommended an arthroscopic evaluation, could not opine that the recommended surgery is related to injury on 9/1/04. He opined that such a finding could not be made until after the surgery was completed and the findings were known. Dr. Bach opined that if scarred soft tissue exists in the petitioner's knee then the surgery is related to the injury on 9/1/04. He further opined that if no scar tissue is found within the knee, particularly the anteromedial aspect of the knee in the region of the medial plica area, then petitioner's pain symptoms are coming from the normal wear and tear on her knee and not the accident on 9/1/04.

Based on these opinions the arbitrator finds that at this point the petitioner has failed to prove by a preponderance of the credible evidence that the surgery recommended by Dr. Bach is causally related to the accident on 9/1/04. Dr. Bach could not opine at this time whether or not the surgery he has recommended is causally related to the accident on 9/1/04.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that the arthroscopic evaluation recommended by Dr. Bach is reasonable or necessary at this point to cure or relieve petitioner from the effects of the injury on 9/1/04. The petitioner's claim for prospective medical treatment is denied.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

Petitioner alleges she was temporarily totally disabled from 12/14/04-1/25/05; 9/9/08-2/8/09, and 2/28/09-4/19/12. Respondent claims petitioner was not temporarily totally disabled after 1/30/09. Based on this stipulation, the arbitrator finds the period in dispute is only 1/31/09 through 8/7/12. For that reason the arbitrator will only address the period after 1/30/09.

On 1/30/09 and 2/23/09 Dr. Bach released petitioner to full duty work without restrictions. Following these releases petitioner worked for an optometrist from 2/9/09 through 2/27/09. On 4/6/09 Dr. Bach continued petitioner in physical therapy and released her from his care. He did not address her work status. However, on 9/9/09 Dr. Bach drafted a letter to petitioner's attorney stating that petitioner was working full duty without restrictions on 4/7/09 and could continue to do so.

On 6/14/10 when petitioner again started treating with Dr. Bach he did place her under restrictions. However, it is unclear whether or not petitioner's treatment after 1/17/10 is causally related to the

accident on 9/1/04 or her preexisting condition, and this finding cannot be determined until after petitioner undergoes the arthroscopic surgery recommended by Dr. Bach.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner was temporarily totally disabled from 12/14/04-1/25/05, 9/9/08-1/30/09, a period of 26-5/7 weeks. The arbitrator finds the petitioner was not temporarily totally disabled from 1/31/09 through 6/13/10 based on Dr. Bach's full duty releases on 1/30/09 and 2/23/09, and Dr. Bach's opinion on 9/9/09 that petitioner was working full duty without restrictions on 4/7/09 and could continue to do so. Following her appointment with Dr. Bach on 4/6/09 petitioner did not follow up with Dr. Bach until 6/14/10. The arbitrator will defer any finding on petitioner's claim for temporary total disability benefits after 6/14/10 until after petitioner undergoes the arthroscopic surgery recommended by Dr. Bach and the findings and opinions related to that surgery are presented. Respondent shall be given credit for temporary total disability benefits already paid in the amount of $33,102.32.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

The arbitrator finds a real controversy exists as to the issues herein. Therefore, the petitioner's claim for penalties and attorneys' fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lee Ammons,
Petitioner,

vs. NO: 12 WC 04568

Cook County,
Department of Corrections,
Respondent.

14IWCC0386

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical expenses, and the nature and extent of Petitioner's disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 16, 2013 is hereby affirmed and adopted.

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: MAY 27 2014

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

o-05/21/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

AMMONS, LEE
Employee/Petitioner

Case# **12WC004568**

COOK COUNTY DEPT OF CORRECTIONS
Employer/Respondent

14IWCC0386

On 5/16/2013, 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:

1315 DWORKIN AND MACIARIELLO
DAVID VanOVERLOOP
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0132 STATES ATTORNEY OF COOK COUNTY
JEREMY SCHWARTZ
500 RICHARD J DALEY CTR RM 509
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- X [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lee Ammons
Employee/Petitioner

v.

Cook County Department of Corrections
Employer/Respondent

Case # **12** WC **4568**

Consolidated cases: 14IWCC0386

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **4/26/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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 **1/24/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

For the reasons stated in the attached conclusions of law, the Arbitrator finds that some of Petitioner's testimony was not credible and that Petitioner failed to establish causation as to his claimed current cervical and lumbar spine conditions of ill-being as well as to his treatment and claimed lost time.

In the year preceding the injury, Petitioner earned $**53,661.92**; the average weekly wage was $**1,031.96**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

FOR THE REASONS STATED IN THE ATTACHED CONCLUSIONS OF LAW, THE ARBITRATOR FINDS THAT SOME OF PETITIONER'S TESTIMONY WAS NOT CREDIBLE AND THAT PETITIONER FAILED TO ESTABLISH CAUSATION AS TO HIS CLAIMED CURRENT CERVICAL AND LUMBAR SPINE CONDITIONS OF ILL-BEING AS WELL AS TO HIS TREATMENT AND CLAIMED LOST TIME. COMPENSATION IS DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

5/16/13
Date

MAY 16 2013

Lee Ammons v. Cook County Department of Corrections
12 WC 4568

Arbitrator's Findings of Fact

Petitioner testified he has worked as a correctional officer for Respondent since June of 1990. His job involves supervising inmates at Respondent's facility.

On direct examination, Petitioner testified he felt "fine" when he arrived at work on the morning of January 24, 2012. He denied having any tailbone pain when he arrived. At some point that day, he and two co-workers were working in a security office known as the "bubble." The office was about 20 feet by 20 feet in size. Petitioner testified that, immediately before the accident, he was sitting in a chair near a large "I.D." board. The board contained about fifty slots, with each slot containing an inmate's I.D. card. The board allowed Respondent to keep track of the inmates' whereabouts. The telephone rang. One of the two co-workers picked up the telephone. The incoming call had to do an inmate who was going to be leaving the facility. Since Petitioner was near the board, he reached over to remove the inmate's I.D. card. Petitioner testified he attempted to retrieve the card by putting his right arm across his chest and leaning forward, to his left, and down. The card was at a lower level on the board. As Petitioner did this, the chair in which he was sitting "flipped backward," causing Petitioner to fall, striking his tailbone on the concrete floor. When the chair landed, it struck the back of Petitioner's neck.

Petitioner testified he initially felt embarrassed and stunned. He noticed some pain in his tailbone. Later, he began to experience neck pain and "clicking" in his right ear. He notified his supervisor, Sergeant Brazelton, of the accident [notice is not in dispute], left Respondent's facility and went to Cermak Hospital. [The Cermak Hospital records are not in evidence.]

Petitioner retained counsel the day the accident occurred. Arb Exh 2.

On January 26, 2012, Petitioner went to Dr. Ogurkiewicz at Midwest Therapy Center. Petitioner acknowledged having previously undergone therapy at this facility. A "registration sheet" in the doctor's chart reflects that Petitioner injured his lower back, tailbone, shoulders and knees at work on January 24, 2012. The mechanism of injury is not described. The "registration sheet" also reflects that Petitioner sought Emergency Room care at Cermak Hospital after the injury. It also reflects that Petitioner injured his lower back in the past and did not fully recover from that injury. The sheet appears to bear Petitioner's signature and the date "1/26/12." PX 2. RX 2, A2.

Dr. Ogurkiewicz's typed note of January 26, 2012 reflects that Petitioner complained of pain in his neck, back, shoulders and knees. The note contains no mention of a work accident. The doctor described Petitioner's past history as "unremarkable for involved areas." The doctor examined Petitioner and diagnosed acute sprains/strains to the cervical spine, lumbar

spine and shoulders. The doctor also noted a left patella contusion and a right patella abrasion. He took Petitioner off work. PX 2. RX 2, p. A24.

On January 30, 2012, Petitioner underwent a cervical spine MRI at Southwest Hospitals MRI Center. The MRI report identifies Dr. Kelsey as the prescribing physician but there is no indication that Dr. Kelsey prescribed this MRI secondary to the claimed work accident. The MRI revealed multi-level degenerative changes with the most significant findings at C5-C6 and C6-C7. PX 1.

Petitioner returned to Dr. Ogurkiewicz for massage therapy on numerous occasions thereafter, through June 26, 2012, with the doctor continuing to keep him off work until April 10, 2012, at which point he indicated Petitioner was returning to work "due to financial hardship against medical advice." RX 2, p. A9.

On February 2, 2012, Petitioner saw Carla Bragg, a certified medical assistant working under Dr. Kelsey's supervision at Advocate Medical Group. The note of February 2, 2012 is labeled "PCP Chronic Care Note." Bragg's history reflects that Petitioner "fell on 1/24/12 at the job when the chair fell out from under him at the job." Bragg indicated that Petitioner struck his tailbone and that the "chair back lodged behind [Petitioner's] neck." Bragg noted that Petitioner initially underwent treatment at Cermak Health Services and had started a course of therapy. Bragg described Petitioner as 6 feet tall and weighing 341 pounds. She noted no abnormalities on examination. She described Petitioner's neck pain as "worse after accident 1/24/12, now with radiculopathy down right arm." She noted the MRI results. She indicated Petitioner planned to see an orthopedic surgeon.

Petitioner saw Dr. Schiappa, an orthopedic surgeon, on February 7, 2012. The doctor's handwritten note of that date is very difficult to read. It appears that he prescribed a cervical collar. PX 3.

Petitioner returned to Dr. Schiappa on February 13, 2012. The doctor's typed history sets forth the following history:

> "Apparently, the patient states he had been injured in an accident while at work on 1/24/12, when the patient fell off the chair. Apparently, the chair broke under him while sitting in it and sustained injury to his cervical lumbar spine."

On examination, Dr. Schiappa noted positive straight leg raising at 90 degrees and a limited range of cervical spine motion. He provided a cervical collar and recommended that Petitioner stay off work and continue therapy. PX 3. RX 3, p. 13.

Petitioner next saw Dr. Schiappa on February 21, 2012, with the doctor noting that Petitioner was continuing to undergo therapy. The doctor prescribed Naprosyn and instructed Petitioner to continue therapy. He released Petitioner to unrestricted duty as of February 23,

2012, noting that Petitioner was returning to work against his advice due to financial difficulties. RX 3, p. W4-W6. Petitioner returned to Dr. Schiappa on March 6, 2012. The doctor's brief handwritten note of that date is virtually impossible to read. PX 3, RX 4, p. W3.

On March 7, 2012, Petitioner saw another certified medical assistant, Kelly Lewis, at Advocate Medical Group. Lewis described Petitioner as "here for paperwork for his neck injury to be completed." She also noted that Petitioner complained of neck soreness and right hand numbness. She prescribed Tramadol and noted that Dr. Schiappa could be "on the case" since the case involved "work comp." On examination, she noted pain on range of cervical spine motion. She described Petitioner's back as "normal." She indicated Petitioner needed to see an orthopedic surgeon to evaluate a cyst shown on a recent MRI of the spine. RX 3, pp. 9-12.

Petitioner testified that he was taken off work again as of March 9, 2012 due to pain. At that point, he was experiencing pain in his low back and the right side of his neck. Dr. Ogurkiewicz's records reflect that he took Petitioner off work on March 9, 2012 due to "acute cervical and lumbosacral strain/spasm." RX 2, p. A6.

Petitioner testified he resumed working on April 10, 2012. As noted previously, Dr. Ogurkiewicz released Petitioner to full duty as of that date, indicating Petitioner was returning to work for financial reasons and against his advice.

On September 24, 2012, Petitioner returned to Advocate Health Centers. It appears he saw both Dr. Kelsey and the doctor's assistant, Kelly Lewis, CMA, on this date. The history states, in part:

> "He has a case with workman's comp for his neck and he wanted me to write that he will have problems with his neck for a long time. His other doctors (Dr. Orkiewicz [sic] and Dr. Schiappa) both say he will have problems with his neck according to Mr. Ammons so I quoted them in my note."

The examination findings reflect that Petitioner's neck and back were "normal." Another note states: "he is back to work now and neck seems better but ultimate prognosis will be with ortho." RX 3, pp. 5-8. There is no evidence indicating that Petitioner returned to Dr. Schiappa or saw a different "ortho" after September 24, 2012.

A subsequent Advocate Health Center note, dated November 5, 2012, describes Petitioner as having "stable neck and low back pain." RX 3, pp. 1-4.

Petitioner testified he received no temporary total disability benefits in connection with this claim.

Petitioner testified he feels about "85% good" now. He continues to experience low back pain and spasms. These symptoms increase in cool, rainy weather. If he turns his head rapidly, he sometimes feels neck pain.

Under cross-examination, Petitioner acknowledged pursuing quite a few other workers' compensation claims in the past. One of these prior claims involved a chair. He was diagnosed with degenerative disc disease before his claimed accident of January 24, 2012. He is still performing full duty for Respondent. The chair he was sitting in immediately prior to the accident of January 24, 2012 did not have wheels. He does not know whether the chair broke. He was not aware of anyone having inspected the chair after the accident. After the chair flipped, the chair flew high up in the air. When the chair came down, it "caught" his neck.

On redirect, Petitioner testified he is not sure when he was diagnosed with degenerative disc disease. He saw a doctor for this condition before January 24, 2012. As of about three weeks before January 24, 2012, he was undergoing therapy three or four times a week due to back spasms that would cause him to wake at night. As of January 24, 2012 he was no longer experiencing these spasms.

In addition to the exhibits previously discussed, Petitioner offered into evidence unpaid bills from Midwest Physical Therapy (Dr. Ogurkiewicz) and Dr. Schiappa. The parties stipulated that the Advocate Medical Group bill was paid. Arb Exh 1.

No witnesses testified on behalf of Respondent. Respondent offered into evidence a "Cook County Department of Corrections Memorandum" dated January 25, 2012, authored by an individual named S. Hensley. RX 6. The memorandum states: "I pulled the chair and found nothing broken/cracked. It works fine. Lee Ammons has a history of claims. Need to review!" Petitioner did not object to RX 6.

Respondent also offered into evidence records concerning pre-accident treatment (RX 5) and a report concerning Dr. Julie Wehner's Section 12 examination of January 18, 2013 (RX 1). The doctor's history reflects that, on January 24, 2012, Petitioner was "stretching to get a badge off a board when the chair came out from underneath him and caused him to fall and injured his neck, right knee and low back." The history also reflects that the chair landed on Petitioner's right shoulder and neck.

Dr. Wehner noted that Petitioner complained of pain in the right side of his neck, his low back and his right knee. She also noted that Petitioner "has at least 2-3 prior work-related injuries" and "would receive heat for his low back in the past."

Dr. Wehner reviewed a number of treatment records dating back to 2000. [These records are in RX 4. They include a Section 12 examination report dated June 9, 2005 reflecting that Petitioner underwent cervical and lumbar spine MRIs in 2005 in connection with a work accident of May 3, 2005. RX 4, pp. A81-85.] Dr. Wehner also reviewed summaries of eleven prior workers' compensation claims. Based on this review, she stated:

> "[Petitioner] is now complaining of neck, bilateral shoulder pain, low back pain and knee pain. All of these previous areas have been documented as problematic for him."

Dr. Wehner indicated she reviewed the report concerning the January 30, 2012 cervical spine MRI. She described the MRI findings as "consistent with degenerative changes." She found "no specific acute injury other than some subjective complaints of pain which have been present throughout many years." She found no need for any specific additional treatment. She indicated "the diagnosis would be some soft tissue sprains or contusions." She opined that these soft tissue injuries did not give rise to the need for chiropractic care or time off of work. She found Petitioner capable of full duty. She addressed permanency as follows:

> "Based on the AMA Guidelines for Disability Rating, he falls into the category of a lumbar spine strain with no significant clinical findings and the impairment rating would be zero."

RX 1.

Arbitrator's Credibility Assessment

Petitioner's testimony that he felt "fine" when he arrived at work on January 24, 2012 is questionable, given his history of back and neck complaints and his admission that he was undergoing therapy three or four times per week for back spasms as recently as three weeks before January 24, 2012.

Petitioner had a tendency to exaggerate. He testified that the chair "flew to the top" at the time of the accident. When he testified to this, he pointed to the ceiling of the Arbitrator's hearing room.

Petitioner testified that, after the chair flipped over, he fell to the concrete floor, landing on his tailbone. This described mechanism of injury is not consistent with the bilateral patellar abrasions/contusions Dr. Ogurkiewicz documented on January 26, 2012.

Did Petitioner sustain an accident on January 24, 2012 arising out of and in the course of his employment?

For an injury to be compensable, it must "arise out of" and "in the course of" one's employment. 820 ILCS 305/2. The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. The Arbitrator finds that Petitioner's accident of January 24, 2012 occurred in the course of his employment. Petitioner testified the accident occurred on Respondent's premises during his work shift. The "arising out of" prong

requires an injury's origin to be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. Nabisco Brands, Inc. v. Industrial Commission, 266 Ill.App.3d 1103, 1106 (1994). "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by the employer, acts which he or she had a common law or statutory duty to perform or acts which the employee might reasonably be expected to perform incident to his or her assigned duties," 266 Ill.App.3d at 1106. The Arbitrator finds that Petitioner's accident of January 24, 2012 arose out of his employment. Petitioner is a correctional officer whose job requires him to keep track of inmates at Respondent's facility. No one contradicted Petitioner's testimony concerning the underlying purpose of the inmate I.D. card board. Nor did anyone contradict Petitioner's testimony that he was reaching and leaning to remove an inmate's I.D. card from the lower portion of this board when the chair in which he was sitting "flipped backward," causing him to fall to the concrete floor. There is no indication that Petitioner was misusing the chair when this occurred. While there is no evidence indicating the chair broke, it is evident the chair either did not properly accommodate a person of Petitioner's size and/or did not function as anticipated.

Respondent cites Board of Trustees of University of Illinois v. Industrial Commission, 44 Ill.2d 207 (1969) in support of its argument that the accident did not arise out of Petitioner's employment. The Arbitrator views Board of Trustees as factually distinguishable from the instant case. In Board of Trustees, a teaching assistant was sitting at his desk when he heard a noise. He turned in his chair and felt his back "snap." Petitioner, in contrast, was performing a work-related task at the time of his injury.

Did Petitioner establish a causal connection between the accident of January 24, 2012 and his claimed current lower back and neck conditions of ill-being?

The Arbitrator finds that Petitioner failed to establish a causal connection between his January 24, 2012 accident and his claimed current lower back and neck conditions of ill-being.

There are some obvious gaps in the information available to the Arbitrator. On direct examination, Petitioner testified he felt "fine" and had no tailbone pain when he arrived at work on January 24, 2012. On redirect, Petitioner admitted he was undergoing therapy for back spasms three to four times weekly three weeks before that date. He denied that he was still experiencing spasms as of January 24, 2012. The Arbitrator finds this denial not credible. The records concerning the pre-accident therapy are not in evidence. When Petitioner saw Dr. Ogurkiewicz on January 26, 2012, he completed a form indicating he had not yet recovered from a previous lower back injury. PX 2. Petitioner testified he underwent emergency treatment at Cermak Hospital on the day of the accident. The hospital records are not in evidence. At Dr. Kelsey's direction, Petitioner underwent a cervical spine MRI on January 30, 2012, six days after the accident. The record does not contain any note indicating why or when Dr. Kelsey prescribed this MRI. The first note in evidence authored by Dr. Kelsey is a "PCP Chronic Care Note" dated February 2, 2012. PX 1. RX 3, pp. 14-17. The Arbitrator cannot assume that Dr. Kelsey prescribed the MRI in connection with the January 24, 2012 accident.

The report concerning the MRI reflects that the scan was being performed due to "cervical spine impingement." The MRI did not reveal any acute abnormalities.

While Petitioner's treating physicians made note of the accident, they did not specifically comment on causation or aggravation. The only specific causation opinion in evidence is Dr. Wehner's opinion that the accident resulted in "some soft tissue sprains or contusions" that did not warrant chiropractic care or time off from work. RX 1.

The Arbitrator finds that Petitioner failed to meet his burden of proving that the accident of January 24, 2012 caused, or contributed to, his claimed current cervical and lumbar spine conditions of ill-being. The Arbitrator further finds that Petitioner failed to establish causation as to the treatment he underwent with Drs. Ogurkiewicz, Kelsey and Schiappa and his claimed lost time and permanency. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Helmboldt,
Petitioner,

vs. NO: 12 WC 37216

Senior Lifestyle Corporation,
Respondent.

14IWCC0387

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident and temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 10, 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.

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: MAY 27 2014

Daniel R. Donohoo

o-05/21/14
drd/wj
68

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HELMBOLDT, ROBERT
Employee/Petitioner

Case# **12WC037216**

SENIOR LIFESTYLE CORP
Employer/Respondent

14IWCC0387

On 7/10/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

2356 FOHRMAN, DONALD W & ASSOC
ADAM J SCHOLL
101 W GRAND AVE SUITE 500
CHICAGO, IL 60610

1109 GAROFALO SCHREIBER HART ET AL
ANDREW RANE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Robert Hemboldt
Employee/Petitioner

v.

Senior Lifestyle Corp.
Employer/Respondent

Case # **12** WC **37216**

Consolidated cases: **N/A**

14IWCC0387

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **May 16, 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, **October 4, 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 not*** sustain an accident that arose out of and in the course of employment as explained *infra*.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident as explained *infra*.

In the year preceding the injury, Petitioner earned **$61,897.97**; the average weekly wage was **$1,190.35**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **no** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$1,587.14** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,587.14**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner failed to establish that a compensable accident arose out of and in the course of his employment as claimed. By extension, all requested compensation and benefits are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 9, 2013
Date

ICArbDec19(b) p.2

JUL 10 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b)

Robert Hemboldt
Employee/Petitioner

v.

Senior Lifestyle Corp.
Employer/Respondent

Case # **12** WC **37216**

Consolidated cases: **N/A**

14IWCC0387

FINDINGS OF FACT

The issues in dispute include accident, causal connection, and a period of temporary total disability commencing on October 10, 2012 through May 16, 2013. Arbitrator's Exhibit ("AX") 1. The parties have stipulated to all other issues or indicated their agreement to reserve their respective rights to dispute certain other issues after resolution of the issues of accident and causal connection. AX1; May 16, 2013 Arbitration Hearing Transcript.

Background

Petitioner testified that he was employed by Respondent as the director of plant operations on October 4, 2012 and had been so employed for two years and seven months, to the day. Petitioner testified that Respondent operated an assisted and independent living retirement community.

Petitioner testified that his responsibilities included acting as the head of housekeeping, maintenance, and laundry. He also testified that he procured various contracts for the buildings, held safety meetings, and performed a number of glorified maintenance tasks. His physical tasks included one hour of daily paperwork, daily stand up meetings with the department heads, ensuring that main tasks were done, and working with residents (i.e., swimming with residents two days per week, responding to miscellaneous household maintenance requests from residents). To perform certain physical tasks, Petitioner used hand tools ranging from a saw to a plunger. Petitioner is right hand dominant. He testified that he had to do everything with two hands including taking out the garbage, plumbing with a wrench, fixing/washing windows, etc.

Petitioner testified that he was a general contractor for 30 years and a carpenter by trade before becoming employed with Respondent. He testified that he always did side work while working for Respondent including building decks, basement remodeling, hanging drywall, and kitchen/bathroom remodeling. For example, the week before his claimed injury, Petitioner testified that he worked for Valspar Corporation installing drywall on a ceiling in their office on September 27 and 28, 2012 in the evening. He testified that he used his right arm for this job to hang drywall, insert screws, and reach overhead. He testified that he had no complaints of pain or symptoms at that time.

Petitioner further testified that he had no problems or symptoms in the right arm before the claimed date of accident other than "getting older" body aches. Petitioner testified that he noted no pain in shoulder before the claimed date of accident and that he had no medical treatment within two years of October 4, 2012. The medical records reflect that Petitioner's medical history was significant for a right rotator cuff repair in 1997 and reported right shoulder pain over one year prior to August 29, 2008 worsened with sleeping. RX1 at 24-26.

On cross examination Petitioner acknowledged that on August 29, 2008 Dr. Ahmad diagnosed him with probable right shoulder impingement and referred him to an orthopedic physician if his symptoms persisted noting that he may need an MRI. *Id.* The Arbitrator notes her observation that Petitioner seemed confused during his testimony on cross examination when confronted with the August 29, 2008 record and that he slowly iterated "ddx" or "sx" or "f.u." suggesting that he did not understand the medical shorthand contained therein. In contrast, Petitioner appeared to understand it immediately and without prompting on re-direct examination questioning from his attorney.

Petitioner also maintained, on cross examination, that he had no problems with his shoulder prior to the claimed date of accident and testified that he did not recall going in for shoulder treatment on August 3, 2010. When presented with a medical record of the same date, Petitioner testified that he saw a doctor in August of 2010 for rotator cuff pain and that he recalled walking out. *See* RX1 at 31. The medical records reflect that Petitioner arrived at 9:17 a.m. and "ROTATOR CUFF PAIN/NEW INS CIGNA / CLS/patient walked out at 9:58a, had been waiting for half hour…." *Id.* Petitioner testified that he was already working for Respondent at this time, but without any shoulder problems or accident occurring in 2010, and that he could not recall what he did to his shoulder prompting the visit.

On re-direct examination questioning, Petitioner testified that he did not see a doctor on this date, that he did not follow up with any doctor thereafter, and that, other than these two visits, he had no other right shoulder symptoms.

Accident

On October 4, 2012, a Thursday, Petitioner testified that he was in Fort Wayne, Indiana at the request of the regional director of operations who asked him to go there to ensure the facility met state regulations. Petitioner believed that his counterpart at that facility was terminated some weeks earlier.

Petitioner testified that he arrived late on Monday or early on Tuesday and met with the executive director, Sally Sharp ("Ms. Sharp"), on Tuesday. They toured the facility. Petitioner testified that he wrote a list and she asked him to perform various job duties off top of her head including repairing a skylight, drywall and ceiling area that had water damage. Petitioner testified that the skylight was 10-11' up running on the slope of the roof requiring him to elevate himself. He used a 6' ladder and his right arm to patch all the overhead work on October 3, 2012.

Also on October 3, 2012, Petitioner testified that the executive director of his facility and his boss, Ryan Carney ("Mr. Carney"), asked him to come back to Barrington. Petitioner testified that he could not recall the reason for Mr. Carney's request.

On October 4, 2012, Petitioner testified that he returned to sand the skylight. He testified that he put the ladder up and sanded certain areas smooth with his right arm. He also testified that he was improperly standing on and facing outward on the ladder and reaching over a wall that separated the two rooms that the skylight covered; as he was trying to reach too far, his heel slipped off the ladder and he fell down landing on his feet. He testified that he hurt his right shoulder by reaching across the wall and, as he slid, his arm caught the wall on the way down. On re-direct examination questioning, Petitioner testified that his right arm/elbow was hooked over the wall (an 8' high partition that did not go all the way up to the ceiling) over which he was reaching.

On cross examination, Petitioner testified that he dropped the sanding sponge when he fell, he did not yell out when his arm struck the wall, he did not know if there were any witnesses to the incident, he did not seek anyone out after the accident, he did not give notice to Ms. Sharp because she was not there that day, and he did not seek out any first aid or nursing care. Petitioner added that he did not see any of Respondent's staff at the time.

Petitioner testified that he moved the ladder to the other side and sanded the remaining area with his left arm because his right arm kind of stung. Petitioner added that the remaining task only took a couple of minutes after which he folded and took the ladder back to the closet. On cross examination, Petitioner testified that he dropped the sanding sponge when he fell and, after the incident, collected the drop cloth and disposed of it in a garbage can and placed the ladder in a closet. Petitioner further acknowledged that his last act of employment for Respondent was performing the duties that lead to this alleged and un-witnessed injury.

Petitioner testified that then he left Ft. Wayne to return to Barrington that day around 11:00 a.m. eastern standard time. He testified that he drove back to Barrington and that his right arm was a little sore. He testified that he had taken some naproxen 500 mg and that the drive from Ft. Wayne to Barrington was approximately 2:45 to 3 hours long because his brakes were failing and he stopped to drop off his truck with his nephew at a nearby car dealership and used another car to drive the remaining four miles to work. He testified that he did not notice anything in particular when he arrived at the Barrington facility.

On cross examination, Petitioner also acknowledged that he drove approximately 200 miles from the Indiana facility to a Ford dealership and then to his home office at Respondent's Barrington facility. He added that, on long trips, he drives with his left knee and that he had a cell phone, but he could not recall contacting anyone about his shoulder during the three hour drive back to Barrington. Petitioner also could not recall any bruising, stiffening or swelling in the right arm despite acknowledging a diagnosis of a traumatically torn rotator cuff.

When Petitioner finally arrived at Respondent's Barrington facility, he testified that he met with Mr. Carney and Janet Stender ("Ms. Stender"). Petitioner testified that he did not know what the meeting was about, but that Mr. Carney informed him that someone had raised an issue about his hiring practices and that he was going to be placed on suspension. Petitioner testified that he did not report what happened in Ft. Wayne at this meeting because he did not think anything of it; his pain seemed to have subsided.

Petitioner also testified that he then went to get paperwork that would have exonerated him of the charges regarding his suspension from his truck [at the Ford dealership] and drove back to the Barrington facility. He testified that he told Mr. Carney that the paperwork showed something that would exonerate him of the charges. Petitioner testified that this exchange lasted approximately two minutes. Petitioner did not mention his shoulder injury at this time either.

Petitioner acknowledged receipt of a company handbook with which he testified that he was not entirely familiar. *See* RX3. Specifically, Petitioner testified that he was not familiar with the sections regarding injuries and illnesses. Petitioner acknowledged that the handbook and company policy required him to immediately report any injury, no matter how slight, to his supervisor. Petitioner also acknowledged that he had previously completed an incident report on the same date of an accident at work on July 20, 2010. *See* RX4. On re-direct examination, Petitioner added that he had other slight injuries in the past that he did not report (e.g., slipping on ice one day, being stuck with a needle, falling while getting out of truck and twisting his ankle) and over which he did not file any workers' compensation claims, but he acknowledged that none of these injuries required surgery.

On Friday October 5, 2012, Petitioner testified that he was still stiff. He testified that he and his wife drove six hours to his daughter's university in northern Michigan for parents' day. Petitioner testified that he drove and noticed more pain if he kept his arm still. He testified that they went to a football game, did some walking around the campus, and that he took some pain pills, but received no medical treatment. Petitioner testified that they returned home on Sunday at noon, that he did not sleep well on Sunday night, and that the right shoulder pain worsened by Monday. On cross examination Petitioner testified that he was scheduled for the aforementioned trip to his daughter's college; he denied any plan to play golf or actually playing golf that weekend. He added that he does not regularly play golf.

Petitioner testified that he thought that the pain would go away, but on Tuesday morning his wife told him to go to see a doctor. Petitioner testified that he went to the doctor's office where he always sends his employees; Alpine Family Physicians.

On October 9, 2012 at 3:38 PM, Petitioner sent an e-mail to Mr. Carney stating "Ryan, I apologize but I will not be back today, I have a family emergency. I will bring in the letter tomorrow. Bob[.]" RX5. Petitioner provided no further information in this email.

Petitioner testified that he did not report the alleged injury on October 5, 2012 or at any time until October 10, 2012 when he reported the alleged accident at work to his physician at Alpine Family Physicians.

Medical Treatment

The following day, October 10, 2012, Petitioner went to Alpine Family Physicians in Lake Zurich and was examined by a certified physician's assistant, Ms. Kelly. RX2 at 5-10. Petitioner reported right shoulder pain and injury six days prior while on the ladder fixing a skylight, falling off, and catching his shoulder. *Id.* He also reported pain with movement, throbbing, difficulty sleeping due to pain, trouble extending his arm, a shooting pain into the forearm, and use of advil without relief. *Id.* Petitioner further reported that a "similar injury occurred a few years ago." *Id.* Petitioner underwent x-rays which revealed mild irregularity of the inferior glenoid which may represent a nondisplaced fracture, no definite osseous abnormalities, a properly located glenohumeral joint, and degenerative changes. *Id.* Ms. Kelly diagnosed Petitioner with a right shoulder injury, prescribed hydrocodone and nabumetone, recommended a shoulder sling, placed Petitioner off work, and recommended physical therapy once his pain improved. *Id.* Petitioner testified that he sent an email and scanned a letter from Ms. Kelly to Mr. Carney.

On October 16, 2012, Petitioner saw Dr. Cummins at Lake Cook Orthopedics. PX2 at 7-9; RX2 at 3-4. Petitioner reported an accident at work on October 4, 2012 when he fell approximately 6 feet down off a ladder while sanding a skylight and that his arm was forced up away from his body and experiencing fairly severe pain. *Id.* He also reported pain at a level of 7-8/10, taking Norco and ibuprofen which did a poor job of controlling his pain, inability to sleep on the right side or reach a high shelf, and having a very difficult time managing toileting or washing his back. *Id.* On examination of the right shoulder, Petitioner exhibited quite a bit of guarding, ability to elevate to about 110° with encouragement and slightly more passively, weakness on abduction and external rotation, and guarding with a small amount of crepitation. *Id.* Dr. Cummins diagnosed Petitioner with a right shoulder strain with the possibility of a nondisplaced glenoid fracture or rotator cuff tear. *Id.* He prescribed narcotic pain medication, ordered an MRI, continued Petitioner's sling immobilization, and kept Petitioner off work. *Id*; *cf.* PX2 at 43 (Petitioner is not placed off work, but restricted to no use of the right arm and no driving or operating machinery).

On October 17, 2012, Petitioner underwent the recommended right shoulder MRI without contrast. PX1. The interpreting radiologist noted the following: (1) severe hypertrophic degenerative change of the acromioclavicular ("AC") joint with inferior osteophytes formation of the distal clavicle effacing the myotendinous junction of the supraspinatus; (2) bone marrow edema surrounding the AC joint; (3) a postoperative type change of the lateral aspect of the distal acromion, a complete tear of the supraspinatus tendon at the distal insertion site measuring 1.5 cm transverse by .6 cm superior to inferior by 1.6 cm in the anterior to posterior; (4) severe diffuse rotator cuff tendinosis and thickening; (5) moderate atrophy of the supraspinatus muscle; (6) mild atrophy of the teres minor muscle; (7) mild diffuse chondromalacia with a moderate joint effusion; (8) blunting and irregularity anterior glenoid labrum suggestive of chronic repetitive trauma; (9) blunting of the bicipital labral complex with findings suspicious for a tear of the long head of the biceps tendon with inferior retraction to the level of the proximal humeral diaphysis; and (10) fluid in the subacromial/subdeltoid bursa. *Id.*

At trial, Petitioner testified that he was terminated by Respondent effective October 24, 2012. To Petitioner's knowledge, his suspension was never lifted. Petitioner testified that he has not worked in any capacity since the incident on October 4, 2012.

On October 26, 2012, Petitioner returned to Dr. Cummins reporting somewhat worsened pain and continued symptomatology. PX2 at 10-12, 44. Dr. Cummins reviewed Petitioner's MRI and noted degenerative changes of the AC joint and Petitioner's lack of symptomatology at that site. *Id.* He also noted a 1.5 cm tear involving the supraspinatus tendon, diffuse rotator cuff tendinopathy with mild atrophy of the supraspinatus muscle and the teres minor, fluid in the subacromial space, mild chondromalacia of the glenohumeral joint, no definitive evidence of a labral tear, and a subluxed biceps compared to the radiologist's impression of the biceps tear. *Id.* Dr. Cummins diagnosed Petitioner with a right shoulder rotator cuff tear with possible biceps subluxation or biceps tear. *Id.* He recommended right shoulder arthroscopic acromioplasty, rotator cuff repair, and probable open biceps tenodesis. *Id.* Dr. Cummins refilled Petitioner's prescriptions and kept him off work until the time of surgery. *Id.*

Record Review – Dr. Cole

On November 14, 2012, Dr. Cole performed a record review at Respondent's request. RX2. Dr. Cole noted the reported mechanism of injury to be that Petitioner was sanding an area and standing up four rungs high on a ladder over an 8 foot wall with no ceiling when his foot slipped causing him to drop to the ground landing on his feet with his right arm simply over his head. *Id.* Dr. Cole also noted Petitioner "states that after he fell he was able to move the ladder to the other side of the wall and to finish his overhead sanding. He did not report it to his employer right away, but rather the next week." *Id.* Dr. Cole reviewed an injury report dated October 15, 2012 and Petitioner's October of 2012 treating medical records. *Id.*

Dr. Cole diagnosed Petitioner with a chronic right shoulder rotator cuff tear which he did not believe resulted from Petitioner's work based on the magnitude of the tear suggesting a large, possibly chronic tear that, if it had occurred on Petitioner's claimed date of accident, he would have been unable to continue working as he reported. *Id.* Additionally, Dr. Cole noted that if Petitioner had indeed played golf the same weekend, it was something that might or could have easily aggravated a pre-existing tear. *Id.* Notwithstanding, Dr. Cole noted that if Petitioner truly aggravated his right shoulder and "had severe pain it would be very unlikely that he would continue to work that same day with any overhead activities." *Id.* He further noted that it was "not likely [Petitioner] would have finished overhead sanding and moving of the ladder if this was an acute injury[,]" and

that he believed that Petitioner "would have had immediate onset of pain, that would be severe, that would likely be limiting, given the size and nature of that tear." *Id.* At trial, Petitioner denied playing golf after October 4, 2012, finishing overhead sanding with his right arm after his injury on October 4, 2012 (he used his left arm), or using his right arm at all after the incident.

Ultimately, Dr. Cole opined that Petitioner's right shoulder condition was not causally related to any claimed injury at work. *Id.*

Additional Information

Dr. Cummins authored a narrative report dated February 18, 2013 at Petitioner's request. PX3. Therein, Dr. Cummins summarized his medical treatment of Petitioner and reiterated his recommendations for further treatment including arthroscopic surgery. *Id.* He also opined that Petitioner's right shoulder condition was causally related to his reported work injury based on the history provided by Petitioner and the correlation of that history with Petitioner's physical examinations and MRI findings. *Id.* Dr. Cummins further opined that the treatment rendered thus far and further recommendations made were necessary and related to the reported work accident. *Id.*

Ryan Carney

Mr. Carney testified that he is employed by Respondent as an executive director and has been so employed for approximately one year at the Lake Barrington Woods facility. Mr. Carney was Petitioner's direct supervisor and his duties include handling work accidents and calling in claims to the workers' compensation insurance company.

Mr. Carney testified that that Respondent's handbook requires accidents to be reported, no matter how trivial, to an employee's direct supervisor. He testified that all employees are advised of this policy and they must sign acknowledgement of their receipt of the handbook. He also testified that he discussed safety issues and accident reporting policy with employees, including Petitioner, at meetings.

On October 4, 2012, Mr. Carney testified that he was working and spoke to Petitioner while Petitioner was at the Ft. Wayne location. He testified that he asked Petitioner to come by the Barrington office prior to leaving for his scheduled trip. Mr. Carney testified that he had previously spoken with Petitioner who told him about a planned trip to Michigan for a few days to visit daughter in school and perhaps take part in some golfing. Mr. Carney testified that it was important to have the meeting before Petitioner went on vacation because he was going to be suspended. Mr. Carney testified that he did not tell Petitioner the reason for the meeting.

Mr. Carney testified that Petitioner arrived at the Barrington facility at approximately 1:30 (CST), that he heard Petitioner talking down the hall and that Petitioner had a coffee cup in one hand and paper in the other hand. He also testified that he considers physical discomfort to be shown in facial expressions, coddling of a limb perhaps, or limping. He testified that he did not observe Petitioner showing any outward indication of discomfort or injury; Petitioner appeared to move freely and without pain on October 4, 2012.

Then, Mr. Carney told Petitioner to go into the conference room and they had a meeting that lasted about 30 minutes. At that meeting, Mr. Carney testified that he discussed claims made by another employee that Petitioner had made bigoted remarks towards his subordinates. Mr. Carney testified that Petitioner had an opportunity to speak on the issue. At the end of the meeting, Petitioner was suspended pending an investigation,

he was to remove himself from the property and not allowed back unless directed by Mr. Carney to do so, and he turned over his keys. The next step was that Mr. Carney would contact Petitioner.

Mr. Carney reiterated that Petitioner did not mention any shoulder pain and that he did not observe Petitioner show any outward discomfort. He added that the only time that he saw Petitioner on October 4, 2012 was at this meeting and that Petitioner did not come back to the building to his knowledge.

Mr. Carney testified that his next contact with Petitioner was a few days later when Petitioner sent him an email indicating that he would not be back due to a family emergency. *See* RX5. Mr. Carney testified that Petitioner was not scheduled to work this day and that he did not call Petitioner back to work.

On cross examination, Mr. Carney acknowledged that he did not know whether Petitioner played golf or brought golf clubs with him during the scheduled vacation. He also testified that he did not know how any "golfing" statement made it to Respondent's Section 12 examiner, Dr. Cole.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

In support of the Arbitrator's decision relating to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of his employment with Respondent as claimed. In light of the record as a whole, the Arbitrator does not find Petitioner's testimony at trial to be credible. Petitioner contradicted himself during testimony on cross examination on important facts ranging from the mechanism of injury to whether he had prior medical treatment or symptoms in the right shoulder after his 1997 surgery. Additionally, Petitioner's memory seemed to fail him on cross examination even when confronted with documents impeaching his initial recitation events on the alleged date of accident or during ensuing events thereafter.

Furthermore, the evidence as posited by Petitioner does not present a plausible series of events given the aforementioned inconsistencies. The Arbitrator does not find it reasonable that Petitioner (an individual who had long ago undergone rotator cuff surgery) sustained a completely unwitnessed, traumatic rotator cuff tear at a long-term care facility when he fell off a ladder after which he completed overhead sanding work and moved a large ladder then drove approximately 200 miles from Ft. Wayne, Indiana to a car dealership and then to Barrington, Illinois and sat through a meeting where he was accused of making bigoted remarks and then suspended followed by two six hour commutes to/from northern Michigan during which he drove with his knee and then simply maintained his physical composure until his wife forced him to seek medical attention five days later on October 9, 2012.

Given this chain of events, the inconsistencies in Petitioner's testimony, the documentary evidence presented contradicting Petitioner's testimony, and the opinion containing in Dr. Cole's report, the Arbitrator finds that Petitioner failed to establish that he sustained a compensable injury arising out of and in the course of his employment with Respondent as claimed. By extension, all other issues are moot and all requested compensation and benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

☒ 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

Gloria Savala,
Petitioner,

vs. NO. 11 WC 02331

Nestle USA, Inc.,
Respondent.

14IWCC0388

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, prospective medical expenses and notice and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 25, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC0388

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 27 2014

o-05/22/14
drd/wj
68

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
8(a)

ZAVALA, GLORIA
Employee/Petitioner

Case# **11WC002331**

14IWCC0388

NESTLE
Employer/Respondent

On 6/25/2013, 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:

0328 LEWIS & DAVIDSON LTD
RICHARD C SHOLLENBERGER JR
ONE N FRANKLIN ST SUITE 1850
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
NATHAN BERNARD
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Gloria Zavala,
Employee/Petitioner

v.

Nestle,
Employer/Respondent

Case # **11** WC **2331**

Consolidated cases: **none**

14IWCC0388

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **5/8/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [x] What was the date of the accident?

E. [x] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [x] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [x] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **6/15/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$33,618.32**; the average weekly wage was **$712.25**. (See Arb.Ex#2).

On the date of accident, Petitioner was **49** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$5,078.98** for TTD, **$54,305.58** for medical expenses, **$11,911.95** for short term disability, and **$26,644.33** for long term disability, for a total credit of **$97,940.84**. (See Arb.Ex#2).

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 $473.83 per week for 89-6/7 weeks, from 10/30/09 through 11/9/09, from 2/3/11 through 2/22/11 and from 9/19/11 through 5/8/13, as provided in §8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 6/16/09 through 5/8/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $5,078.98 for temporary total disability benefits that have been paid.

Petitioner is entitled to prospective medical expenses in the form of treatment recommended by Dr. John Fernandez. Respondent shall pay the reasonable and necessary medical expenses associated therewith as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $54,305.58 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability,-if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

6/21/13
Date

ICArbDec19(b)

JUN 25 2013

STATEMENT OF FACTS:

Petitioner testified as follows regarding her occupational exposure to repetitive trauma and manifestation of disablement on June 15, 2009. She was hired by Respondent in 1996 as a packer. (NT p12) In this position, she was rotated hourly between two tasks: packing boxes and making boxes. (NT pp13-16)

Packing boxes entailed filling small or large boxes with candy as it came down a conveyor. (NT p13) In one hour, she filled 200 to 300 small boxes or 60 to 80 large boxes. (NT pp13-14) She stated the pace was pretty rapid. (NT p15)

Assembling boxes was done by hand and by machine. (NT pp14-15) For hand assembly, she would grab a box, assemble it, tape it, put another box inside and pass it onto a co-worker for packing. (NT pp15-16) For machine assembly, she would grab boxes and feed them into a machine. (NT p16) She still had to open a second box to place into the machine assembled box. (NT p16) She made 60 to 80 boxes by hand in one hour. (NT p16)

After ten years in packing, Petitioner started to notice a condition in her hands. (NT p16) She got a new position catching candy dispensed from a machine in three types of containers, which she described as a tote, a container, and a hopper. (NT pp17, 19, 21)

The totes were about 2 feet long, 1 ½ feet wide and 1 ½ feet high. (NT p18) She would get empty totes from a pallet and put them by the machine. (NT pp17-18) The tote would fill with candy and weighed 30 to 35 pounds. (NT p19) She would stack the full totes on a pallet. (NT pp18-19) She would pile 27 to 36 totes on a pallet. (NT pp18-19) In an eight hour shift she would build 6 to 8 pallets. (NT p19)

The containers were cylinders and looked like plastic garbage cans. (NT p19) She would take them from a pallet and put them next to the machine. (NT pp19-20) When full, the containers weighed 200 to 300 pounds. (NT p20) The containers were rolled on dollies 15 to 50 feet to the scale. (NT p20) She would then roll the dolly to a pallet, grab the containers and drag them off the dolly and onto a pallet. (NT pp20-21)

The hopper would be filled with 1,200 to 1,300 pound of candy. (NT pp21-22) Using a hand jack, she would push the hopper out of the department about 10 to 15 feet. (NT p22) In an eight hour shift she would fill 8 to 13 hoppers. (NT p22)

In this new position, she was responsible for 9 to 12 machines. (NT p23) The machines would clog and the ingredients would stop flowing. (NT pp23-24) When she worked filling hoppers there were hoses running from a hopper on top of the machine which would get clogged. (NT p24) The clogging would occur every three to five minutes. (NT p24) She would bang the hose with a stick to free the clog. (NT p24) She would constantly do this throughout the day using both hands. (NT p24)

On June 15, 2009, Petitioner was banging on a hopper with both hands when the stick she was using slipped forward and she felt a pulling in both arms. (NT p25) Before this occurrence, Petitioner was already experiencing pain, tingling and numbness in her hands and arms. (NT p26) She said when this incident occurred it felt a lot worse and she notified her supervisor, Oscar O'Campo. (NT p26, ArbE1) She said she had been having symptoms for 3 to 4 years but had never previously lost time from work or sought medical attention. (NT p26) Mr. O'Campo completed a report and Petitioner signed it. (NT p26) She was then sent by Respondent to Alexian Brothers Occupational Health Clinic. (PX1, RX2)

On June 19, 2009, she was first seen at Alexian Brothers for numbness, tingling and pain in her hands. (PX1 p2, RX2 p1) The initial note states Petitioner had carpal tunnel syndrome 10 years before. (PX1 p2, RX2 p1) Petitioner testified that she told the doctor that when her child was born her, "hands would swell up and red and I felt tingling." (NT p53) After she gave birth, these symptoms went away. (NT p54) The physical exam was limited to the hands and wrists. (PX1 p3, RX2 p1) On the hand-written notes there is a checklist for parts of the body examined and boxes for the condition of the shoulder, arm, elbow and forearm were checked neither normal nor abnormal. (PX1 p3) The diagnosis was bilateral carpal tunnel syndrome left more than right. (PX1 p4) She was referred for an EMG/NCV.

The EMG/NCV was performed by Dr. Galassi on July 9, 2009, at which time Petitioner provided a history of long-standing and gradually worsening pain in the left wrist accompanied by numbness, tingling and pain. (PX1 p5) She also complained of left elbow pain shooting down and left shoulder pain radiating up to the neck. (PX1 p5) She reported similar symptoms on the right but not as pronounced. (PX1 p5) She stated that she reported an injury in June 2010, when the symptoms significantly worsened. (PX1 p5) He performed a physical examination with positive Tinel's signs bilaterally and pain on palpation of the left ulnar nerve at the elbow. (PX1 p5) The EMG/NCV showed ulnar neuropathy across the left elbow of a moderate degree accompanied by denervating changes, and no evidence of median neuropathy at the wrists. (PX1 p6)

On July 16, 2009, Petitioner returned to Alexian Brothers, where she was referred to Dr. Presant Atluri. (PX1 p11) She also had an initial occupational therapy consult on July 27, 2009, during which Petitioner reported pain of 5 out of 10 at rest and 8 out of 10 with activity. (PX1 p17) She described tingling in all her fingers during the day when active and numbness in all her fingers at night. (PX1 p17) The therapist specifically noted pain in the right wrist with motion. (PX1 p17)

On July 29, 2009, Petitioner was seen by Dr. Atluri for numbness and tingling in the left hand involving all the fingers. (PX2 p2) She also described nocturnal symptoms and symptom aggravation with gripping. (PX2 p2) She described similar but less severe symptoms on the right. (PX2 p2) On physical examination, she had positive Tinel's and digital compression at the left carpal tunnel. (PX2 p2) She was tender in the left cubital tunnel. (PX2 p2) She was also tender at the A1 pulley of the left index and middle fingers without active triggering. (PX2 p2) The diagnoses were left cubital tunnel syndrome and possible carpal tunnel syndrome. (PX2 p3) He injected the left carpal tunnel with cortisone and directed her to return in three weeks. (PX2 pp3-4)

Although she reported symptoms in the right hand and elbow, Dr. Atluri did not examine or make a diagnosis regarding the right hand. (PX2 pp.2-4, 6)

On August 5, 2009, Petitioner returned to Dr. Atluri, who noted no improvement since the injection to the wrist. (PX2 p8) He again limited his examination to the left elbow. (PX 2 pp8, 10) He diagnosed left cubital tunnel syndrome and recommended surgery to decompress the left ulnar nerve. (PX2 p8)

This surgery was eventually performed by Dr. Atluri on October 30, 2009. (PX2 p11) Petitioner was taken off work at that time. (PX2 p13) On follow up of November 3, 2009, Dr. Atluri limited his examination to the condition of the left elbow. (PX1 p13) He referred her for physical therapy and advised her to remain off of work until November 12, 2009. (PX2 p13)

On November 5, 2009, she was seen for therapy evaluation at Alexian Brothers which was limited to the left upper extremity. (PX1 p19) During this evaluation, Petitioner described pain levels of 4 out of 10 at rest and 8 out of 10 with activity. (PX1 p19)
Petitioner returned to work under Dr. Atluri's restrictions on November 10, 2009 (NT p31)

On December 2, 2009, Petitioner returned to Dr. Atluri who again limited his examination to the left elbow. (PX2 p15) He recommended continued therapy and restricted her to work with no use of the left hand/arm. (PX2 p15) Petitioner continued her therapy at Alexian Brothers through December 30, 2009, when she reported pain levels of 6 and 7 out of 10 with rest and activity. (PX1 p27)

On December 30, 2009, Dr. Atluri stated he was concerned about persistent symptoms of left medial elbow pain and numbness in the fingers. (PX2 p17) He recommended continued therapy and restricted her to right-handed work. (PX2 p17) On January 27, 2010, Dr. Atluri noted worsening numbness and tingling. (PX2 p17) He was concerned she was developing motor deficits and recommended a repeat EMG/NCV. (PX2 p21) He again limited her to work only with the right hand. (PX2 p21)

On March 10, 2010, the EMG/NCV was performed. (PX2 p24) The test was positive for right median nerve compression, and probable resolving axonal degeneration and regeneration in the distribution of the distal ulnar nerve on the left. (PX2 p25)

On April 21, 2010, Petitioner returned to Dr. Atluri stating that her symptoms were worsening. (PX2 p28) Dr. Atluri again limited his examination to the left upper extremity. (PX2 p28-29, 31) She described weakness in the hand, pain in the posteromedial elbow, and aggravation of symptoms with use. (PX2 p28) The physical examination noted weakness in small finger abduction, sensitivity and tenderness over the cubital tunnel, and subluxation of the ulnar nerve. (PX2 p28) Dr. Atluri stated he remained concerned about possible motor loss in the hand and offered a revision of the ulnar nerve decompression with an anterior transposition. (PX2 p28)

On June 30, 2010, Dr. Atluri noted his exam was limited to the left upper extremity and that there was no change in symptoms. (PX2 p34) He recommended a second opinion by Dr. Sagerman. (PX2 p34)

On July 9, 2010, Dr. Sagerman also noted his exam was limited to the left elbow and found left ulnar neuritis at the cubital tunnel. (PX2 p37) He stated additional surgery could be performed on an elective basis if symptoms warrant. (PX2 p37) On July 21, 2010, Dr. Atluri again limited his examination to the left elbow and noted Petitioner complained her symptoms were too severe to tolerate and again recommended revision surgery. (PX2 p41)

On November 3, 2010, Petitioner consulted Dr. John Fernandez. (PX4 p4) Unlike Drs. Atluri and Sagerman, Dr. Fernandez did not limit his consultation to the left elbow. (PX4 pp4-6) He noted bilateral hand complaints with a history of gradual onset attributed to work activities at work for 14 years. (PX4 p4) She stated her complaints were bilateral but worse on the left. (PX4 p4) She reported numbness and tingling in the left hand, ring and small fingers and the right hand, thumb, index and middle fingers. (PX5 p4) Neurological findings were paresthesia in the left hand ulnar nerve distribution and right hand median nerve distribution. (PX4 p5) The diagnosis was left elbow residual ulnar neuropathy and right wrist carpal tunnel syndrome. (PX4 p5) Dr. Fernandez recommended revision surgery to the left elbow and work restrictions. (PX4 p6)

On February 4, 2011, Dr. Fernandez performed a left elbow nerve release with subcutaneous transposition. (PX4 p12) Following surgery she was taken off work and began therapy at Athletico. (NT p34, PX4 pp15, 60) (PX p60)

On February 17, 2011, Dr. Fernandez noted improvement in the left elbow. (PX4 p17) He confirmed she had been wearing a long arm splint on the left arm as directed. (PX4 p17) She reporting continued numbness and tingling in the median nerve distribution on the right. (PX4 p17) He again diagnosed right carpal tunnel syndrome. (PX4 p17) He advised her to wear a long arm splint on the left and a short arm splint on the right at

night. (PX4 p18) He released her to work with restrictions of no use of the left arm, and use of the right arm to less than 2 pounds of force. (PX4 p18) Petitioner was provided work within these restrictions on February 22, 2011, and she returned to work. (NT p34)

Petitioner testified that when she returned to work, she was assigned to 5 machines, which repeatedly got clogged. (NT p35) She was also required to put rolls of paper weighing 18 to 20 pounds into the machines. (NT p35) Each machine had to be loaded with paper every 20 to 30 minutes. (NT p35)

On March 24, 2011, Petitioner reported to Dr. Fernandez that she had been performing work only with her right upper extremity. (PX4 p24) On physical examination, he noted hypersensitivity of the surgical site. (PX4 p24) He instructed Petitioner to discontinue use of the left long arm splint. (PX4 p24) Dr. Fernandez imposed light duty restrictions on the left upper extremity of less than 5 pounds and on the right upper extremity of less than 2 pounds, as well as, limited repetitive use and limited use of tools. (PX4 pp24-25)

Petitioner testified that despite the reiteration of her restrictions, her work assignment did not change. (NT p36)

On April 21, 2011, Petitioner returned to Dr. Fernandez reporting near complete resolution of numbness and tingling on the left except at the incision site. (PX4 p29) She reported persistent right hand symptoms in the median nerve distribution. (PX4 p29) She continued to use her right short arm splint. (PX4 p29) Neurological signs of right median nerve abnormality were noted. (PX4 p29) He recommended she receive motion and strength therapy, and continued use of the right short-arm splint. (PX4 p30) He modified work restrictions to light duty capacity and less than 10 pounds of force using the left upper extremity. (PX4 p30)

The final therapy progress note of May 11, 2011, states her last evaluation was on April 20, 2011, and that thereafter physical therapy has been denied by workers' compensation. (PX4 p69) The note stated therapy had not achieved the goal of 25 pound grip strength in the left hand, 50 pound lifting, or ability to return to prior unrestricted work. (PX4 p69)

On May 12, 2011, Petitioner saw Dr. Fernandez and reported that she continued to work in the "light duty" machine operator job as described above. (PX4 p35) He noted resolution of symptoms in the left fingers with numbness along incision site. (PX4 p35) She reported right-sided arm symptoms but considered them to be mild. (PX4 p35) He found positive provocative testing in the right median nerve and negative provocative testing in the left ulnar nerve. (PX4 p35) He recommended formal physical therapy for range of motion, strengthening and massage, and advised she may eventually need surgery for her right wrist. (PX4 p35) He restricted her to work in her current capacity with less than 10 pounds of force with the left upper extremity. (PX4 p36)

On June 14, 2011, Dr. Fernandez noted Petitioner felt better after her surgery but the pain was coming back with use. (PX4 p41) She stated she did not know why her complaints were coming back. (PX4 p41) She described left hand weakness with gripping and electric type pain in the left thumb through middle finger; as well as numbness from the thumb to small finger of the right hand. (PX4 p41) Tinel's tests were positive bilaterally at the elbows and the wrists. (PX4 p41) Dr. Fernandez recommended she restart use of the long arm splint on the left, prescribed prednisone and imposed work restrictions against lifting over 5 – 10 pounds and limiting repetitive use and use of tools. (PX4 p42) He reiterated she may eventually need surgery for the right carpal tunnel syndrome. (PX4 p24)

On July 21, 2011, Petitioner returned to Dr. Fernandez complaining of symptoms in all the fingers of the right hand, most significantly the thumb and index fingers. (PX4 p47) The examination was significant for positive

Tinel's at the right elbow and right wrist and positive Phalen's at the right wrist. (PX4 p47) Dr. Fernandez recommended further conservative treatment prior to surgery and ordered fabrication of a long arm splint with 30 degrees of extension to be worn every night. (PX4 p48) Dr. Fernandez made a new diagnosis of right carpal tunnel syndrome, right elbow cubital tunnel syndrome, EMG positive, active. (PX4 p47) Despite these new findings and diagnoses Petitioner described no new accidents or aggravating factors other than her continued "light duty" work for Respondent as described above. (PX4 p47) Petitioner was given a release to return to work with lifting less than 5-10 pounds bilaterally, minimal repetitive use and minimal use of tools. (PX4 p47-48)

On September 14, 2011, Petitioner was seen at Respondent's request by Dr. Bryan Neal. (RX1) Regarding the onset of symptoms, Dr. Neal claims Petitioner stated she "needed to hit a hopper to get candy to flow as the powder was 'not flowing right.' She was hitting the hopper with a 'long plastic rod.' She does admit that she has done this activity before." (RX1 p9) He claims she described holding the stick "with both hands. During the process of hitting a hopper she stated 'the stick recoiled back' and when it (the stick) 'pulled forward' that was when she felt all her nerves pull." (RX1 p9) He states Petitioner claimed "she injured all four parts then." (RX1 p10) Dr. Neal claims Petitioner denied ever experiencing her conditions prior to June 2009. (RX1 p.10) Dr. Neal conceded that the history he had taken was inconsistent with Petitioner's prior medical records containing the gradual increase of pain in the elbows and wrists up to the time of the episode of June 15, 2009. (RX1 p17)

At the time of the exam, Dr. Neal confirmed Petitioner was removing bad candy from machines at work. (RX1 p9) He also confirms she was still lifting the paper rolls weighing 20 to 21 pounds as described above. (RX1 p9)

Dr. Neal opined that Petitioner's subjective complaints were out of proportion with the objective findings and therefore diagnosed right and left upper extremity pain and paresthesia of unknown etiology. (RX1 p17) Dr. Neal opined that Petitioner's condition was not causally related to or exacerbated by any work injury of June 1, 2009. (RX1 p18) Dr. Neal opined that for any condition she may have sustained on June 1, 2009, she was at maximum medical improvement. (RX1 p18) Finally, Dr. Neal stated Petitioner may be released to return to her regular job without any restrictions. (RX1 p18) He qualified this statement saying "Whereas she may have some symptoms (as she is expected to have when not working), and I do anticipate she may have some, it is not definitely known at this time that she is not able to reasonably endure symptoms and therefore work her regular job." (RX1 p18)

Petitioner testified that Dr. Neal's evaluation lasted 30 minutes. (NT p38) When he arrived, he told her she had to answer all his questions with a yes or a no. (NT p38) She stated "so when I wanted to add things, he said no, yes or no." When asked if she was able to fully describe the work activities she felt contributed to her condition, she stated "No. Because he would not allow me to talk." (NT p39)

On September 15, 2011, Petitioner returned to Dr. Fernandez and reported that she had worn her right upper extremity splint for eight weeks without improvement of her condition. (PX4 p54) Dr. Fernandez recommended and tentatively scheduled right cubital tunnel syndrome decompression with ulnar nerve transposition and right carpal tunnel syndrome decompression. (PX4 p55) Dr. Fernandez continued restrictions of light duty for both upper extremities not to exceed 5 to 10 pounds, limited repetitive use and limited use of tools. (PX4 p55) He specified the limit on repetitive use was less than four hours per day. (PX4 p55)

Prior to September 19, 2011, Petitioner has been provided the above-described work unclogging machines and loading 20-pound paper rolls. (NT p40) On or about September 19, 2011, Petitioner was called into the office by her supervisor and told Respondent would no longer provide "light duty" and for her "to return back to work whenever I was okay."

Respondent initiated payment of TTD which was then terminated on or about October 27, 2011. (NT p41) Thereafter, Petitioner received short term and long term non-occupational disability benefits. (NT p41)

In his deposition on January 5, 2013, Dr. Fernandez opined that Petitioner sustained bilateral cubital tunnel syndrome and carpal tunnel syndrome as a result of occupational exposure of flexion-extension through the elbow, as well as, the wrist, coupled with some element of force, which are all known risk factors in causing or aggravating carpal tunnel syndrome and cubital tunnel syndrome. (PX6 pp19-20) Dr. Fernandez explained that in "the vast majority of cases, carpal tunnel syndrome and cubital tunnel syndrome are progressive, relapsing conditions, which are chronic in nature until we cure them. So I would expect her to require surgery like we recommended. There may be times where she feels better; where she could postpone surgery. But it's my opinion that she does require surgery." (PX6 pp20-21)

Respondent denied the surgery recommended by Dr. Fernandez, and Petitioner proceeded on the present petition under Section 19(b) of the Act.

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, AND (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims she sustained carpal tunnel and cubital tunnel injuries due to occupational exposure to repetitive trauma. Petitioner provided unrebutted testimony of her exposure to repetitive trauma while working for Respondent from 1996 to 2009. She described working as a packer for ten years in which she alternated hourly between packing boxes with candy (NT pp12-15), and making boxes to be packed. (NT pp14-16) She packed as many as 300 boxes an hour, or one every 12 seconds, (NT p14) and made as many as 80 boxes an hour, or one every 45 seconds. (NT p15)

Petitioner also provided unrebutted testimony that from 2006 to the date her accident manifested, she moved containers filled with candy. (NT pp17-22) She repeatedly lifted totes by hand which weighed between 30 and 35 pounds. (NT pp18-19) She grabbed and stacked these totes on pallets of 27 to 36 totes each. (NT pp.18-19) She made 6-8 pallets per shift. (NT p19) This means she continuously grabbed, lifted and stacked as many as 288 totes per shift or one tote every 1 2/3rd minutes continuously over an 8 hour period.

She also repetitively pushed containers that weighed 200 to 300 pounds on dollies and then grabbed and dragged the 200 to 300 pound containers off the dollies and onto pallets. (NT pp20-21) She also regularly used a hand jack to push hoppers weighing 1,200 to 1,300 pounds. (NT pp21-22)

Finally, Petitioner described her responsibility to unclog hoses leading into the machines by striking the hose with a stick or plastic rod. (NT pp22-23) She explained that she used both hands to strike the hose and that the hose would clog every three to five minutes. (NT p24)

According to Petitioner, before June 15, 2009, she was already experiencing pain, tingling and numbness in her hands and arms. (NT p26) When she was seen at Alexian Brothers on June 19, 2009, she explained that the occurrence on June 15, 2009, had exacerbated her condition. (RX2 p1) When she was seen on July 9, 2009 for her EMG, she reported pain in both shoulders, elbows and wrists, but that the occurrence significantly worsened the symptoms in her left hand. (PX1 p5) When she first saw Dr. Atluri, she stated that the onset of symptoms began several years before but had progressively worsened and become quite severe. (PX2 p2) When she first saw Dr. Fernandez, Petitioner explained her symptoms began gradually and she attributed them to work activities as a machine operator for 14 years with Respondent. (PX4 p4)

Petitioner testified that on June 15, 2009, a specific aggravation of symptoms in the left wrist occurred. (NT p25) She was holding a stick with both hands and banging a hose which was clogged. (NT p25) The stick slipped and went forward, and she felt a pulling in both arms followed by pain, tingling and numbness in both arms and wrists. (NT p26) This was the same type of pain she had been feeling for 3 to 4 years. (NT p26)

Prior to the incident of June 15, 2009, Petitioner had never received treatment or missed time from work because of this condition.

In his report, Respondent's medical expert, Dr Neal, claims he carefully questioned Petitioner about the onset of her symptoms and that she claimed never to have had symptoms in her arms or wrists prior to the incident of June 15, 2009. (RX1 p17) He claims Petitioner told him all her injuries were due solely to a single occurrence on June 15, 2009, when she hit a hopper with a rod. (RX1 p9) Petitioner testified that she was not able to explain her injury to Respondent's medical expert, because he only allowed her to answer his questions with a yes or no. (NT p38)

The Arbitrator finds Petitioner to be a credible witness and finds as fact that she performed the described highly repetitive work activity requiring grabbing, lifting, pushing and striking. In light of Petitioner's credible testimony and corroborating treating records, the Arbitrator questions Dr. Neal's contention that Petitioner claimed all her symptoms began on the day of the June 15, 2009, incident.

The Arbitrator further finds that while performing highly repetitive work for Respondent, Petitioner gradually developed symptoms of pain, numbness and tingling in her arms and hands. Due to these symptoms, which worsened after June 15, 2009, she sought medical care and was restricted to light work.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the credible evidence that she sustained repetitive trauma type injuries to her right and left upper extremities arising out of and in the course of her employment and that said injuries manifested themselves on or about June 15, 2009.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

In light of the above finding as to accident (issue "C", supra) and given Petitioner's unrebutted testimony to the effect that she notified her supervisor of her symptoms on June 15, 2009 and that she was subsequently treated for these symptoms at the company clinic on June 19, 2009, the Arbitrator finds that Petitioner provided proper and timely notice of the accident pursuant to §6(c) of the Act.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

In his initial visit of November 3, 2010, Dr. Fernandez was advised by Petitioner of a gradual onset of hand and arm symptoms while working as a machine operator for 14 years. (PX4 p4) She stated her complaints were bilateral but worse on the left. (PX4 p4) In his testimony, Dr. Fernandez opined that Petitioner sustained bilateral cubital tunnel syndrome and carpal tunnel syndrome as a result of occupational exposure of flexion-extension through the elbow, as well as, the wrist, coupled with some element of force, which are all known risk factors in causing or aggravating carpal tunnel syndrome and cubital tunnel syndrome. (PX6 pp19-20)

Prior to Dr. Fernandez, Dr. Atluri limited his examination and treatment of Petitioner to the left elbow. At the conclusion of this treatment, his recommendation was additional surgery to revise the cubital tunnel decompression. The Arbitrator notes that Dr. Atluri became Petitioner's surgeon only after a referral by the clinic to which she had been referred by Respondent, and that Dr. Atluri never offered any opinions regarding the cause of her condition. Nonetheless, he communicated with the workers compensation insurer to secure authorization for treatment. (PX2 p32)

As to this issue, Respondent provided the report of Dr. Neal. As stated above Dr. Neal considered only a history of a single episode injury of June 15, 2009, on his causal connection opinion. (PX1 p18) As stated above, the Arbitrator rejects Dr. Neal's description of accident. Dr. Neal offers no opinion as to whether the exposure to repetitive trauma, found to have occurred, was a cause of Petitioner's condition.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident (issue "C", supra), the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident on or about June 15, 2009. Along these lines, the Arbitrator finds the opinions of Dr. Fernandez to be more persuasive than those offered by Respondent's examining physician, Dr. Neal..

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

While this issue was originally in dispute (See Arb.Ex.#1), the parties subsequently prepared an agreed stipulation setting forth an agreed salary of $33,618.32 for the year preceding the injury and an average weekly wage of $712.25. (See Arb.Ex.#2).

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

As to this issue, Petitioner presented the records and testimony of Dr. Fernandez that she had positive Tinel's testing at the right elbow and wrist and positive Phalen's testing at the right wrist. (PX4 pp47-48, 54-55; PX6 pp16-19) Based upon these findings, Dr. Fernandez diagnosed right cubital and carpal tunnel syndrome. (PX4 pp47-48, 54-55; PX6 pp16-19) For this condition, Dr. Fernandez recommended surgeries to decompress the cubital and carpal tunnel with transposition of the ulnar nerve. (PX4 pp47-48, 54-55; PX6 pp16-19)

Respondent offered the opinion of Dr. Neal. Dr. Neal again confined himself to stating only that any condition Petitioner may have sustained in June 2009, had reached maximum medical improvement.

Based upon the above, and the record taken as a whole, as well as the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner is entitled to prospective medical are and treatment as recommended by treating surgeon Dr. Fernandez, including surgery to decompress the cubital and carpal tunnel syndrome. As a result, Respondent shall pay the reasonable and necessary medical expenses associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner provided documentation that following the surgery of October 30, 2009, Petitioner was taken off work through November 10, 2009. (PX2 p13, NT 31) No opinion was offered by Respondent other than the opinion of Dr. Neal, that this surgery was reasonable and necessary. (RX1 p18)

Petitioner also provided documentation that from the surgery on February 4, 2011, Petitioner was taken off work through February 22, 2011. (PX4 pp15, 22; NT p34) No opinion was offered by Respondent other than the opinion of Dr. Neal, that this surgery was reasonable and necessary. (RX1 p18)

Finally, Petitioner provided the records of Dr. Fernandez on September 15, 2011, in which he imposed restrictions of light duty for both upper extremities not to exceed 5 to 10 pounds, limited repetitive use and limited use of tools. (PX4 p55) Petitioner's testimony is unrebutted that Respondent refused to provide work within these restrictions after September 18, 2011. (NT p40)

Respondent provided the above opinion of Dr. Neal that Petitioner may be released to return to her regular job without any restrictions. (RX1 p18) Dr. Neal qualified this statement saying "Whereas she may have some symptoms (as she is expected to have when not working), and I do anticipate she may have some, it is not definitely known at this time that she is not able to reasonably endure symptoms and therefore work her regular job." (RX1 p18)

Based upon the above, and the record taken as a whole, as well as the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner was temporarily totally disable from 10/30/09 through 11/9/09, from 2/3/11 through 2/22/11 and from 9/19/11 through 5/8/13, for a period of 89-6/7 weeks. Along these lines, the Arbitrator finds the opinions of Dr. Fernandez to be more persuasive than those offered by Respondent's examining physician, Dr. Neal.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

While this issue was originally in dispute (See Arb.Ex.#1), the parties subsequently prepared an agreed stipulation wherein it was agreed that Respondent would be entitled to a credit in the amount of $5,078.98 for TTD benefits, $54,305.58 for medical expenses, $11,911.95 for short term disability and $26,644.33 for long term disability. (See Arb.Ex.#2).

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

Terry Hartwig,
Petitioner,

vs. NO. 13 WC 05019

Modern Drop Forge,
Respondent.

14IWCC0389

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, 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 July 17, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 7 2014

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

o-05/22/14
drd/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HARTWIG, TERRY
Employee/Petitioner

Case# **13WC005019**

12WC026541

MODERN DROP FORGE
Employer/Respondent

14IWCC0389

On 7/17/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

0766 HENNESSY & ROACH PC
MICHAEL GEARY
140 S DEARBORN 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Terry Hartwig
Employee/Petitioner

v.

Modern Drop Forge
Employer/Respondent

Case # **13WC5019**

Consolidated case: **12WC26541**

14IWCC0389

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 **June 19, 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [x] Other: Severance

FINDINGS

On the date of accident, **January 23, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$64,480.00**; the average weekly wage was **$1,240.00**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$2,487.30** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$2,487.30**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall be given a credit of **$2,487.30** for TTD, **$0** for TPD, and **$0** for maintenance benefits, for a total credit of **$2,487.30**.

Respondent shall pay Petitioner temporary total disability benefits of **$826.67**/week for **16 3/7^{ths}** weeks, commencing **February 25, 2013** through **June 19, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **January 23, 2013** through **June 19, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$2,487.30** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$1,652.00** to **Advocate Occupational Health**, and **$2,690.00** to **Orland Park Orthopedics**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for a right shoulder MRI under anesthesia in a hospital setting, as recommended by Dr. Blair Rhode.

Case number 12 WC 26541 is severed from case number 13 WC 5019

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.

Milton Black

Signature of Arbitrator

July 17, 2013
Date

JUL 17 2013

FACTS

On January 23, 2013 Petitioner was working for Respondent as a parts inspector. Petitioner testified that the majority of the time he worked as a hammer man. However, on that date he was working as a parts inspector, because Respondent was providing him light duty as a result of a prior hip condition. Inspectors look for the buildup of scale steel or slag on a part. If a part has scale, it must be rejected, because Respondent did not want bad parts to go to the public. Petitioner noticed that a part in the box had scale on it. He reached down with both hands to grab it and to pull it out of the box. However, the part was stuck in the box among the other parts. Petitioner exerted himself to remove the, and in the process he noticed pain in his right shoulder, left shoulder, and neck. Petitioner identified photographs showing the actual shape of the part and showing his work station (PX1A; PX1B; PX1C). The incident was documented by Respondent in a "Department Injury Log" (PX4).

Respondent sent Petitioner for treatment to Advocate Occupational Health on January 25, 2013 (PX2). Petitioner was provided a light duty restriction by Advocate Occupational Health and began therapy through that facility. Petitioner then chose to treat with an orthopedic physician, Dr. Blair Rhode, at Orland Park Orthopedics. Petitioner saw Dr. Rhode on February 25, 2013 (PX1, Dep. Exhibits 1 and 3). A right shoulder MRI was prescribed, and. Dr. Rhode took Petitioner off work. Petitioner testified that he attempted to obtain the MRI but the MRI facility could not get an accurate MRI reading, partially due to his large size. Petitioner testified that he is claustrophobic, and it is difficult for him to undergo an MRI due to him having to remain in a confined setting for a period of time. He testified that in the past he has had MRI's done under anesthesia in a hospital setting and that has worked well for him. The MRI in the hospital setting has not been authorized. The Petitioner remains in an off work status. He has not received temporary total disability payments since they were stopped on February 24, 2013. Additionally, he is waiting for authorization for his right shoulder MRI under

anesthesia at a hospital.

Dr. Rhode testified at a deposition that it is reasonable for the Petitioner to have the MRI in the hospital setting (PX1, p15). Dr. Rhode testified that his future medical needs include the MRI (PX1, p30). Dr. Rhode 's May 24, 2013 post deposition medical records indicate that he is waiting for authorization for the right shoulder MRI with sedation (PX3).

Petitioner was examined by Dr. William Heller on March 13, 2013, at Respondent's request. Dr. Heller felt the Petitioner had sprain/strain type injuries. Petitioner testified that he did not give Dr. Heller the history recited in his report. Dr. Heller testified at a deposition that a right shoulder MRI with sedation would be reasonable treatment for Petitioner.

Peggy Cooper testified for Respondent. She testified that Petitioner was working under her supervision at the time of the alleged work injury. She testified that the "Department Injury Log" is prepared close in time to a reported injury to ensure accuracy. She testified that she was not observing Petitioner at the time of the alleged occurrence.

ACCIDENT

Petitioner was the only witness to the occurrence. Petitioner testified credibly that he was injured attempting to remove a metal part that was stuck among other parts in a box. His testimony was corroborated by a contemporaneous Respondent accident report form. The medical records are consistent.

Based upon the foregoing, the Arbitrator finds that on January 23, 2013 Petitioner sustained an accident that arose out of and in the course of his employment.

CAUSATION

Respondent's defense on this issue is premised upon accident, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident.

PAST MEDICAL

Respondent's defense on this issue is premised upon accident, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that Petitioner is entitled to the claimed unpaid medical expenses.

PROSPECTIVE MEDICAL

Respondent's defense on this issue is premised upon accident, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that Petitioner is entitled to the requested prospective medical treatment.

TEMPORARY TOTAL DISABILITY

Respondent's defense on this issue is premised upon accident, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that Petitioner is entitled to the claimed temporary total disability benefits.

MOTION TO SEVER

Case number 12WC26541 was previously consolidated with case number 13 WC 5019. Petitioner has filed a motion to sever in order to separately proceed with this emergency matter. Consolidation for docketing is not consolidation for trial.

Therefore, case number 12 WC 26541 is severed from case number 13 WC 5019.

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

Garabed Damarjian,
Petitioner,

vs. NO: 10 WC 08037

14IWCC0390

City of Chicago,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

14IWCC0390

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: MAY 27 2014

o-05/22/14
drd/wj
68

Daniel R. Donohoo

Ruth W. White

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAMARJIAN, GARABED
Employee/Petitioner

Case# **10WC008037**

CITY OF CHICAGO
Employer/Respondent

14IWCC0390

On 10/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1702 GRAZIAN & VOLPE PC
VOLPE, RICHARD S
5722 W 63RD ST
CHICAGO, IL 60638

0010 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Garabed Damarjian
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **10** WC **8037**

Consolidated cases: **D/N/A**

14IWCC0390

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 **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **9/25/13**. By stipulation, the parties agree:

On the date of accident, **1/31/09**, 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 $**$53,508.00**, and the average weekly wage was $**1,029.00**.

At the time of injury, Petitioner was **61** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**3,526.04** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,526.04**.

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 **$617.40**/week for a further period of **15** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **3% loss of use of the person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **1/31/09** through **9/25/13**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

10/8/13
Date

OCT 8 - 2013

Arbitrator's Findings of Fact

Nature and extent is the sole disputed issue. Arb Exh 1.

Petitioner, who was 66 years old as of the hearing, testified he has worked for Respondent for 23 years. He is a bridge operator assigned to a bridge on Lake Shore Drive near Navy Pier. In addition to raising and lowering bridges, he does timekeeping and scheduling.

The parties agree Petitioner sustained a work accident on January 31, 2009. Arb Exh 1. Petitioner testified he was injured when he fell down some stairs that lead to the bridge house where he works. Only Respondent employees can access these stairs. The stairs are shown in photographs marked PX 3 and 4. Petitioner testified he took these photographs at some point after the accident.

Petitioner testified that, on January 31, 2009, the stairs in question were covered with snow and ice. He was descending the stairs in order to get something he needed for work when a metal strip on the edge of one stair came loose, causing him to lose his footing and fall. [The photograph marked as PX 4 shows the stair in question; the adjacent stairs have metal strips at their edges.]

Petitioner testified he called his supervisor, James Frobes, and reported the accident. Frobes came to the bridge house and took Petitioner to the Emergency Room at Mercy Hospital.

The Emergency Room records (PX 1) reflect that, four hours prior to arriving at the hospital, Petitioner was descending stairs when a metal plate on the stairs "slipped off," causing Petitioner to fall and "slip down the stairs on [his] back." Petitioner complained of low back pain and difficulty walking. The examining physician noted tenderness and swelling over the central sacrum. Lumbar spine X-rays showed no fractures or dislocations with the interpreting radiologist noting that the sacrum was "not well evaluated" and that a sacral MRI could be ordered. Petitioner was given Flexeril and Toradol, along with a single crutch to assist with walking. Petitioner was instructed to follow up with MercyWorks in two days. PX 1.

On February 3, 2009, Petitioner sought follow-up care at MercyWorks, where he saw Dr. Anderson. Dr. Anderson noted that Petitioner was descending stairs four days earlier when a "metal plate slipped," causing him to fall down four to five steps. Dr. Anderson also noted that Petitioner had discontinued the Toradol due to stomach upset but was taking Advil along with the Flexeril.

On examination, Dr. Anderson noted tenderness but no bruising or swelling at the left sacrum at the S2 level to the coccyx. He also noted negative straight leg raising.

Dr. Anderson diagnosed a contusion of the sacral coccyx. He instructed Petitioner to stay off work, begin heat therapy, continue the Flexeril and start Motrin. He provided Petitioner with literature concerning home exercises. He instructed Petitioner to return in two weeks. PX 2.

Petitioner returned to MercyWorks on February 10, 2009 and again saw Dr. Anderson. Petitioner complained of persistent pain in the sacrum with sitting, walking and change of position. He denied any radicular symptoms. On examination, Dr. Anderson again noted tenderness at the left sacrum and negative straight leg raising. He released Petitioner to light duty, with no use of ladders and no repetitive bending, stooping or squatting. He instructed Petitioner to continue Ibuprofen and heat therapy. PX 2.

At the next visit, on February 16, 2009, Dr. Anderson noted a complaint of persistent left buttock pain. He described the X-ray as negative. He prescribed Motrin and Soma and instructed Petitioner to begin physical therapy. He continued the previous work restrictions. PX 2.

Petitioner attended therapy on four occasions before returning to Dr. Anderson on March 2, 2009. Dr. Anderson noted that Petitioner reported some improved mobility and admitted to less frequent low back pain. He also noted that Petitioner complained of some transient numbness in his left upper leg. He again noted tenderness at the left sacrum and negative straight leg raising. He instructed Petitioner to continue restricted duty and therapy. PX 2. Petitioner continued attending therapy thereafter.

At the next visit, on March 9, 2009, Dr. Anderson again noted improvement but indicated that Petitioner "still has some left leg pain that goes into left thigh." He also noted "questionable tingling into left foot." He described straight leg raising as "questionably positive" on the left. He recommended a lumbar spine MRI and released Petitioner to full duty.

At the hearing, Petitioner could not recall undergoing a MRI scan. The Mercy Hospital records reflect that he underwent a spinal MRI on March 26, 2009 but the MRI report is not in evidence.

On March 30, 2009, Dr. Anderson noted that Petitioner was "doing a little better." Dr. Anderson indicated that the MRI report showed "multi-level degenerative disc disease, most significant at L3-L4 level" and no central canal stenosis or neural foraminal narrowing. Dr. Anderson described his examination findings as unchanged. He prescribed Motrin and additional therapy. He again released Petitioner to full duty. The records in PX 2 reflect that Petitioner attended five more therapy sessions before returning to Dr. Anderson on April 27, 2009. On that date, Dr. Anderson noted that Petitioner was still experiencing left-sided lower back pain but reported better function. He also noted that the therapy records reflected significant progress. [The therapy records are not in evidence.] On examination, he noted primary tenderness on the left at L4-S1 and negative straight leg raising. He instructed

Petitioner to stop Ibuprofen, start Mobic and continue his home exercises. He again released Petitioner to full duty. He instructed Petitioner to return to him on June 8, 2009. There is no evidence indicating that Petitioner returned to MercyWorks on that date.

At the hearing, Petitioner testified he still experiences low back pain and numbness in his feet. He denied having any similar symptoms prior to the accident. He asked his primary care physician about his back condition at one point. [The primary care physician's records are not in evidence.] He continues to take over-the-counter Ibuprofen.

Under cross-examination, Petitioner testified he resumed his regular job once Dr. Anderson released him to full duty. He was still performing that job as of the hearing. He is not subject to any restrictions. His work schedule and salary have not changed. He could not recall whether he ever asked Dr. Anderson to refer him to a specialist. He continues to perform home exercises. He takes Ibuprofen on waking and when he "walks too much." He did not return to MercyWorks on June 8, 2009, as instructed, because the treatment that Dr. Anderson prescribed did not help him. He has not reinjured his lower back or coccyx since the accident.

Respondent did not call any witnesses or offer any documentary evidence.

Arbitrator's Credibility Assessment

The Arbitrator found Petitioner to be highly credible. Petitioner repeatedly stated he did everything he was instructed to do, treatment-wise, but did not improve.

What is the nature and extent of the injury?

Before turning to the issue of permanency, the Arbitrator notes that Respondent took causation out of dispute once Petitioner finished testifying. Arb Exh 1.

There is no dispute that Petitioner fell down concrete stairs while working, striking his lower back against the stairs when he landed. This fall resulted in an injury to the sacral coccyx that remains symptomatic despite conservative care. Petitioner underwent lumbar spine X-rays a few hours after the accident. The radiologist who interpreted these X-rays indicated he had difficulty evaluating the sacrum. He suggested that Petitioner undergo a sacral MRI but there is no evidence this particular study was performed. Based solely on the X-rays, Petitioner was diagnosed with a sacral coccyx contusion. Petitioner also developed left-sided radicular symptoms after the fall. A lumbar spine MRI showed some degree of degeneration at L3-L4. The injury did not prevent Petitioner from resuming full duty but he credibly testified he still experiences low back pain and some numbness. As of the hearing, he was still taking Ibuprofen on a regular basis for these symptoms. Based on the foregoing, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 3% loss of use of the person as a whole, or 15 weeks of compensation, under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Laveda Womack,

Petitioner,

vs. NO: 12 WC 39749

14IWCC0391

Casey's General Store,

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, causal connection, extent of temporary total disability, medical expenses and prospective medical care 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 (1980).

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 the sum of $234.85 per week for a period of 22 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act 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 Petitioner all reasonable and necessary medical expenses as identified in Px5 under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $5,994.69 under §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $939.40 in PPD advance.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,300.00. 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: MAY 2 9 2014
MB/maw
O:4/24/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

WOMACK, LAVEDA
Employee/Petitioner

Case# **12WC039749**

12WC039750

CASEY'S GENERAL STORE
Employer/Respondent

14IWCC0391

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:

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0299 KEEFE & DEPAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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)

Laveda Womack
Employee/Petitioner

v.

Casey's General Store
Employer/Respondent

Case # 12 WC 39749

Consolidated cases: 12 WC 39750

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 24, 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. [x] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, October 24, 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 $12,217.92; the average weekly wage was $234.85.

On the date of accident, Petitioner was 50 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 $939.40 for other benefits (permanent partial disability advance), for a total credit of $939.40.

Respondent is entitled to a credit of $5,994.69 under Section 8(j) of the Act.

ORDER

Respondent shall pay for reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit of $5,994.69 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $234.85 per week for 22 weeks commencing October 25, 2012, through March 27, 2013, as provided in Section 8(b) of the Act.

Petitioner's petition for prospective medical treatment as recommended by Dr. Gornet 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 31, 2013
Date

JUN - 7 2013

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged that she sustained accidental injuries arising out of and in the course of her employment for Respondent. In case number 12 WC 39750, Petitioner alleged that she sustained a repetitive trauma injury to the back and body as a whole with a manifestation date of October 19, 2012. In case number 12 WC 39749, Petitioner alleged that she sustained an injury to the back and body as a whole while lifting a soda crate on October 24, 2012. Respondent disputed liability in respect to both cases on the basis of accident and causal relationship. At trial, Petitioner's counsel made a motion to consolidate these two cases. Respondent's counsel had no objection and the Arbitrator granted the motion.

In regard to the repetitive trauma claim (12 WC 39750) no evidence was tendered at trial that Petitioner sustained a repetitive trauma back injury that manifested itself on October 19, 2012, or at any other time.

In regard to the claim involving the accident of October 24, 2012, (12 WC 39749) Petitioner testified that she had worked for Respondent for approximately four months primarily as a cook/cashier. One of Petitioner's job duties was to stock the cooler with juices, water, soda, etc. The beverages were kept in crates that, when full, weighed 40 to 50 pounds. On October 24, 2012, Petitioner was in the process of picking up a crate of soda and she felt a "pop" in her back which caused her to fall to her knees. Petitioner stated that this caused an immediate onset of pain in her low back that went into her right hip. Petitioner testified that she reported the accident to the assistant manager, an individual by the name of Eve, and that an accident report was completed.

Petitioner sought medical treatment from Dr. David Walls, her family physician, on October 25 and November 1, 2012. Dr. Walls' records were received into evidence at trial and his hand written record of October 25, 2012, indicated that Petitioner was being seen for a work injury. The typewritten portion of his record for that date confirmed that Petitioner injured her back at work while stocking a cooler. Petitioner had severe complaints of low back pain with radiation into the right flank. On examination, straight leg raising was positive on the right side and Dr. Walls prescribed some medication. When Dr. Walls saw Petitioner on November 1, 2012, her symptoms had not improved and she was also complaining of numbness, spasms and weakness of the right leg.

Prior to this accident, Petitioner had a significant back injury which was also work-related. For this prior injury, Petitioner's primary treating physician was Dr. Don Kovalsky. On October 7, 2002, Dr. Kovalsky performed back surgery which consisted of a discectomy and fusion with metal hardware and bone grafting at the L4-L5 level. Petitioner recovered from that surgery and was released by Dr. Kovalsky to return to work without restrictions on July 9, 2003. Petitioner testified that her prior back problems were on the left side and that after she had been released by Dr. Kovalsky, she was able to work without restrictions and that prior to October 24, 2012, her back was "fine."

Dr. Walls saw Petitioner on September 18, 2012, for a number of other health issues; however, a medical history questionnaire was completed on that date which noted that Petitioner had a history of back surgery and back pain. This portion of the record is hand written and is not clear whether the back symptoms that were referenced were in the past or more current.

Petitioner then sought medical treatment from Dr. Matthew Gornet, an orthopedic surgeon, who had previously treated her husband. Petitioner saw Dr. Gornet on November 6, 2012, and informed him of her sustaining the injury at work on October 24, 2012, while lifting a crate full of soda. Petitioner also informed Dr. Gornet of having undergone a prior back fusion. Petitioner complained of back and right leg pain as well as right leg numbness and weakness. Dr. Gornet opined that Petitioner's symptoms were related to the accident of October 24, 2012, and he authorized her to remain off work. He also ordered an MRI scan. An MRI was performed on December 20, 2012, which revealed a central disc herniation at L5-S1. Dr. Gornet recommended physical therapy, but his records stated that the insurer declined to authorize it. Dr. Gornet's alternative recommendation was that Petitioner undergo some steroid injections.

Petitioner was seen by Dr. Kaylea Boutwell on January 7, January 22 and February 4, 2013, and she received epidural steroid injections on each of those visits. Petitioner testified that she did not experience any significant relief of her symptoms following the injections. Dr. Gornet saw Petitioner on February 18, 2013, and Petitioner informed him that she had both injections and physical therapy but still had low back pain with symptoms in the right buttocks, hip and foot. At that time, Dr. Gornet recommended that Petitioner had a CT discogram at L3-L4 and L5-S1 and opined that Petitioner was still disabled from work.

At the direction of the Respondent, Petitioner was examined by Dr. David Lange, an orthopedic surgeon, on February 18, 2013. Dr. Lange obtained a history from Petitioner, reviewed medical treatment records provided to him, reviewed the MRI and examined the Petitioner. Petitioner informed Dr. Lange of the accident of October 24, 2012, as well as her prior spine surgery. Petitioner complained of low back pain with tingling in the right leg and swelling "all over." Dr. Lange observed that Petitioner had a limp on the left side which was opposite the side that she stated she was experiencing tingling. Dr. Lange also noted that conducting a clinical examination of the Petitioner was difficult because she complained of severe pain with even the slightest touch. Further, range of motion testing was not possible because of Petitioner's extreme complaints. Dr. Lange reviewed the MRI scan and opined that the L5-S1 level had a very shallow contained disc herniation.

Dr. Lange opined that Petitioner's subjective complaints of low back pain were out of proportion to her objective clinical findings, the right lower extremity symptoms were not consistent with S1 radiculopathy and there were significant signs of symptom magnification or Waddell's signs. Dr. Lange did agree that Petitioner did sustain a work-related injury on October 24, 2012, but was unable to define how much of her complaints were physiological v. psychological. In regard to treatment, Dr. Lange opined that a short period of physical therapy might be beneficial but that additional epidural injections or a discogram was not indicated. Given the lack of positive objective findings and multiple Waddell's signs, and the fact that the MRI indicated that the L5-S1 disc had more protrusion on the left than on the right side, Dr. Lange opined that Petitioner was a "horrible candidate" for surgery. Dr. Lange opined that Petitioner could return to work

with restrictions including a 10 pound lifting maximum and the use of appropriate body mechanics.

Petitioner returned to work for Respondent on March 25, 2013, and ran the cash register for approximately two hours and then went to the ER of Red Bud Regional Hospital because of severe low back pain. On examination at the ER, it was noted that Petitioner had moderate tenderness to palpation on the left paralumbar area and she was diagnosed with an acute lumbar strain and directed to see Dr. Thomas Soma for follow up treatment. She was authorized to return to work on March 28, 2013.

At trial Petitioner testified she had significant complaints of low back pain that never went away, that simple activities of daily living are virtually impossible and that she can barely walk. Petitioner appeared at trial using a cane to ambulate; however, she agreed that no physician had ever prescribed or recommended the use of a cane. Other than Petitioner's attempt to return to work on March 25, 2013, she has not worked at all since October 24, 2012.

Conclusions of Law

In regard to disputed issues (C) and (D) the Arbitrator makes the following conclusions of law:

In regard to the repetitive trauma claim with a manifestation date of October 19, 2012, (12 WC 39750) the Arbitrator concludes that Petitioner failed to prove that she sustained a repetitive trauma back injury because no evidence was tendered supporting such a claim.

In regard to the claim involving the accident of October 24, 2012, (12 WC 39749) the Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on that date.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that on October 24, 2012, she was in the process of picking up a crate of soda and that she felt a "pop" in her low back, that she reported it to the assistant manager named Eve and that an accident report was prepared. Respondent tendered no evidence to the contrary.

Further, the history of the work-related accident of October 24, 2012, was consistently reported to Petitioner's treating physicians, Dr. Walls and Dr. Gornet and to Respondent's Section 12 examiner, Dr. Lange.

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of October 24, 2012, to the extent that Petitioner sustained a low back strain.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that she previously had low back surgery in 2002 and informed both Dr. Gornet and Dr. Lange of same. Petitioner recovered from that prior surgery and was able to work without restrictions and had no significant back complaints prior to October 24, 2012. The medical records of Dr. Walls of September 18, 2012, refer to Petitioner's history of back surgery/pain but does not emphatically state that Petitioner had back complaints at that specific point in time.

Both Dr. Gornet and Dr. Lange opined that Petitioner had sustained a back injury on October 24, 2012, with Dr. Gornet also opining that Petitioner's symptoms were related to that accident. Dr. Lange does not dispute the causal relationship of Petitioner's back injury to the accident of October 24, 2012; however, he does dispute the severity of the injury.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner in connection with the accident of October 24, 2012, was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $5,994.69 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is not entitled to the prospective medical treatment recommended by Dr. Gornet in connection with the accident of October 24, 2012.

In support of this conclusion the Arbitrator notes the following:

When Petitioner was examined by Dr. Gornet on February 18, 2013, his medical record did not describe any findings on clinical examination and it erroneously stated that Petitioner had received physical therapy. (According to his records, Petitioner informed Dr. Gornet that she had received physical; however, there were no physical therapy records tendered.) Dr. Lange's report of that same date noted that because of Petitioner's extreme complaints, a clinical examination was extremely difficult; however, to the extent that Dr. Lange was able to examine the Petitioner, Petitioner's findings on examination were out of proportion to her complaints and she did exhibit symptom magnification or Waddell signs.

Dr. Lange opined that while a brief period of physical therapy might be indicated, that additional treatment was not indicated, especially any further surgical procedures because Petitioner was not a good surgical candidate.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 22 weeks commencing October 25, 2012, through March 27, 2013, in connection with the accident of October 24, 2012.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work for the preceding period of time. Petitioner was examined by Dr. Lange and authorized to return to work with restrictions and Respondent provided work to Petitioner on March 25, 2013. Petitioner claimed that she was only able to work for two hours as a cashier and went to the ER. Thereafter, she was released return to work on March 28, 2013, but did not do so.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with correction	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Laveda Womack,

Petitioner,

vs. NO: 12 WC 39750

14IWCC0392

Casey's General Store,

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, causal connection, extent of temporary total disability, medical expenses and prospective medical care 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.

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: MAY 29 2014
MB/maw
O:4/24/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

WOMACK, LAVEDA
Employee/Petitioner

Case# **12WC039750**

12WC039749

CASEY'S GENERAL STORE
Employer/Respondent

14IWCC0392

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:

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0299 KEEFE & DEPAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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)

Laveda Womack
Employee/Petitioner

v.

Casey's General Store
Employer/Respondent

Case # 12 WC 39750

Consolidated cases: 12 WC 39749

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 24, 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. [x] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident (manifestation), October 19, 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 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 $12,217.92; the average weekly wage was $234.85.

On the date of accident, Petitioner was 50 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 31, 2013
Date

JUN - 7 2013

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged that she sustained accidental injuries arising out of and in the course of her employment for Respondent. In case number 12 WC 39750, Petitioner alleged that she sustained a repetitive trauma injury to the back and body as a whole with a manifestation date of October 19, 2012. In case number 12 WC 39749, Petitioner alleged that she sustained an injury to the back and body as a whole while lifting a soda crate on October 24, 2012. Respondent disputed liability in respect to both cases on the basis of accident and causal relationship. At trial, Petitioner's counsel made a motion to consolidate these two cases. Respondent's counsel had no objection and the Arbitrator granted the motion.

In regard to the repetitive trauma claim (12 WC 39750) no evidence was tendered at trial that Petitioner sustained a repetitive trauma back injury that manifested itself on October 19, 2012, or at any other time.

In regard to the claim involving the accident of October 24, 2012, (12 WC 39749) Petitioner testified that she had worked for Respondent for approximately four months primarily as a cook/cashier. One of Petitioner's job duties was to stock the cooler with juices, water, soda, etc. The beverages were kept in crates that, when full, weighed 40 to 50 pounds. On October 24, 2012, Petitioner was in the process of picking up a crate of soda and she felt a "pop" in her back which caused her to fall to her knees. Petitioner stated that this caused an immediate onset of pain in her low back that went into her right hip. Petitioner testified that she reported the accident to the assistant manager, an individual by the name of Eve, and that an accident report was completed.

Petitioner sought medical treatment from Dr. David Walls, her family physician, on October 25 and November 1, 2012. Dr. Walls' records were received into evidence at trial and his hand written record of October 25, 2012, indicated that Petitioner was being seen for a work injury. The typewritten portion of his record for that date confirmed that Petitioner injured her back at work while stocking a cooler. Petitioner had severe complaints of low back pain with radiation into the right flank. On examination, straight leg raising was positive on the right side and Dr. Walls prescribed some medication. When Dr. Walls saw Petitioner on November 1, 2012, her symptoms had not improved and she was also complaining of numbness, spasms and weakness of the right leg.

Prior to this accident, Petitioner had a significant back injury which was also work-related. For this prior injury, Petitioner's primary treating physician was Dr. Don Kovalsky. On October 7, 2002, Dr. Kovalsky performed back surgery which consisted of a discectomy and fusion with metal hardware and bone grafting at the L4-L5 level. Petitioner recovered from that surgery and was released by Dr. Kovalsky to return to work without restrictions on July 9, 2003. Petitioner testified that her prior back problems were on the left side and that after she had been released by Dr. Kovalsky, she was able to work without restrictions and that prior to October 24, 2012, her back was "fine."

Dr. Walls saw Petitioner on September 18, 2012, for a number of other health issues; however, a medical history questionnaire was completed on that date which noted that Petitioner had a history of back surgery and back pain. This portion of the record is hand written and is not clear whether the back symptoms that were referenced were in the past or more current.

Petitioner then sought medical treatment from Dr. Matthew Gornet, an orthopedic surgeon, who had previously treated her husband. Petitioner saw Dr. Gornet on November 6, 2012, and informed him of her sustaining the injury at work on October 24, 2012, while lifting a crate full of soda. Petitioner also informed Dr. Gornet of having undergone a prior back fusion. Petitioner complained of back and right leg pain as well as right leg numbness and weakness. Dr. Gornet opined that Petitioner's symptoms were related to the accident of October 24, 2012, and he authorized her to remain off work. He also ordered an MRI scan. An MRI was performed on December 20, 2012, which revealed a central disc herniation at L5-S1. Dr. Gornet recommended physical therapy, but his records stated that the insurer declined to authorize it. Dr. Gornet's alternative recommendation was that Petitioner undergo some steroid injections.

Petitioner was seen by Dr. Kaylea Boutwell on January 7, January 22 and February 4, 2013, and she received epidural steroid injections on each of those visits. Petitioner testified that she did not experience any significant relief of her symptoms following the injections. Dr. Gornet saw Petitioner on February 18, 2013, and Petitioner informed him that she had both injections and physical therapy but still had low back pain with symptoms in the right buttocks, hip and foot. At that time, Dr. Gornet recommended that Petitioner had a CT discogram at L3-L4 and L5-S1 and opined that Petitioner was still disabled from work.

At the direction of the Respondent, Petitioner was examined by Dr. David Lange, an orthopedic surgeon, on February 18, 2013. Dr. Lange obtained a history from Petitioner, reviewed medical treatment records provided to him, reviewed the MRI and examined the Petitioner. Petitioner informed Dr. Lange of the accident of October 24, 2012, as well as her prior spine surgery. Petitioner complained of low back pain with tingling in the right leg and swelling "all over." Dr. Lange observed that Petitioner had a limp on the left side which was opposite the side that she stated she was experiencing tingling. Dr. Lange also noted that conducting a clinical examination of the Petitioner was difficult because she complained of severe pain with even the slightest touch. Further, range of motion testing was not possible because of Petitioner's extreme complaints. Dr. Lange reviewed the MRI scan and opined that the L5-S1 level had a very shallow contained disc herniation.

Dr. Lange opined that Petitioner's subjective complaints of low back pain were out of proportion to her objective clinical findings, the right lower extremity symptoms were not consistent with S1 radiculopathy and there were significant signs of symptom magnification or Waddell's signs. Dr. Lange did agree that Petitioner did sustain a work-related injury on October 24, 2012, but was unable to define how much of her complaints were physiological v. psychological. In regard to treatment, Dr. Lange opined that a short period of physical therapy might be beneficial but that additional epidural injections or a discogram was not indicated. Given the lack of positive objective findings and multiple Waddell's signs, and the fact that the MRI indicated that the L5-S1 disc had more protrusion on the left than on the right side, Dr. Lange opined that Petitioner was a "horrible candidate" for surgery. Dr. Lange opined that Petitioner could return to work

with restrictions including a 10 pound lifting maximum and the use of appropriate body mechanics.

Petitioner returned to work for Respondent on March 25, 2013, and ran the cash register for approximately two hours and then went to the ER of Red Bud Regional Hospital because of severe low back pain. On examination at the ER, it was noted that Petitioner had moderate tenderness to palpation on the left paralumbar area and she was diagnosed with an acute lumbar strain and directed to see Dr. Thomas Soma for follow up treatment. She was authorized to return to work on March 28, 2013.

At trial Petitioner testified she had significant complaints of low back pain that never went away, that simple activities of daily living are virtually impossible and that she can barely walk. Petitioner appeared at trial using a cane to ambulate; however, she agreed that no physician had ever prescribed or recommended the use of a cane. Other than Petitioner's attempt to return to work on March 25, 2013, she has not worked at all since October 24, 2012.

Conclusions of Law

In regard to disputed issues (C) and (D) the Arbitrator makes the following conclusions of law:

In regard to the repetitive trauma claim with a manifestation date of October 19, 2012, (12 WC 39750) the Arbitrator concludes that Petitioner failed to prove that she sustained a repetitive trauma back injury because no evidence was tendered supporting such a claim.

In regard to the claim involving the accident of October 24, 2012, (12 WC 39749) the Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on that date.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that on October 24, 2012, she was in the process of picking up a crate of soda and that she felt a "pop" in her low back, that she reported it to the assistant manager named Eve and that an accident report was prepared. Respondent tendered no evidence to the contrary.

Further, the history of the work-related accident of October 24, 2012, was consistently reported to Petitioner's treating physicians, Dr. Walls and Dr. Gornet and to Respondent's Section 12 examiner, Dr. Lange.

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of October 24, 2012, to the extent that Petitioner sustained a low back strain.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that she previously had low back surgery in 2002 and informed both Dr. Gornet and Dr. Lange of same. Petitioner recovered from that prior surgery and was able to work without restrictions and had no significant back complaints prior to October 24, 2012. The medical records of Dr. Walls of September 18, 2012, refer to Petitioner's history of back surgery/pain but does not emphatically state that Petitioner had back complaints at that specific point in time.

Both Dr. Gornet and Dr. Lange opined that Petitioner had sustained a back injury on October 24, 2012, with Dr. Gornet also opining that Petitioner's symptoms were related to that accident. Dr. Lange does not dispute the causal relationship of Petitioner's back injury to the accident of October 24, 2012; however, he does dispute the severity of the injury.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner in connection with the accident of October 24, 2012, was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $5,994.69 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is not entitled to the prospective medical treatment recommended by Dr. Gornet in connection with the accident of October 24, 2012.

In support of this conclusion the Arbitrator notes the following:

When Petitioner was examined by Dr. Gornet on February 18, 2013, his medical record did not describe any findings on clinical examination and it erroneously stated that Petitioner had received physical therapy. (According to his records, Petitioner informed Dr. Gornet that she had received physical; however, there were no physical therapy records tendered.) Dr. Lange's report of that same date noted that because of Petitioner's extreme complaints, a clinical examination was extremely difficult; however, to the extent that Dr. Lange was able to examine the Petitioner, Petitioner's findings on examination were out of proportion to her complaints and she did exhibit symptom magnification or Waddell signs.

Dr. Lange opined that while a brief period of physical therapy might be indicated, that additional treatment was not indicated, especially any further surgical procedures because Petitioner was not a good surgical candidate.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of 22 weeks commencing October 25, 2012, through March 27, 2013, in connection with the accident of October 24, 2012.

In support of this conclusion the Arbitrator notes the following:

Petitioner was under active medical treatment and authorized to be off work for the preceding period of time. Petitioner was examined by Dr. Lange and authorized to return to work with restrictions and Respondent provided work to Petitioner on March 25, 2013. Petitioner claimed that she was only able to work for two hours as a cashier and went to the ER. Thereafter, she was released return to work on March 28, 2013, but did not do so.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Martha Guzman,
Petitioner,

vs.

Hoya Free-Form Co,
Respondent.

14IWCC0393

NO: 12 WC 31087

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, temporary total disability, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 18, 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: MAY 30 2014
KWL/vf
O-5/20/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0393

GUZMAN, MARTHA
Employee/Petitioner

Case# **12WC031087**

HOYA FREE-FORM CO
Employer/Respondent

On 11/18/2013, 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:

1067 ANKIN LAW OFFICE LLC
JOSHUA RUDOLFI
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

0532 HOLECEK & ASSOCIATES
JEFF GOLDBERG
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

14IWCC0393

MARTHA GUZMAN
Employee/Petitioner

v.

HOYA FREE-FORM CO.
Employer/Respondent

Case # **12** WC **31087**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **10/8/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [x] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [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 claimed date of accident, **2/3/2012**, 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 not*** sustain an accident that arose out of and in the course of employment. Based on this finding, the Arbitrator views the remaining disputed issues as moot. The Arbitrator makes no findings as to those issues.

In the year preceding the injury, Petitioner earned $**19,240.00**; the average weekly wage was $**370.00**.

On the claimed date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent child.

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.

ORDERS

For the reasons set forth in the attached credibility assessment and conclusions of law, the Arbitrator finds that Petitioner lacked credibility and failed to prove a work accident of February 3, 2012. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

11/15/13
Date

ICArbDec19(b)

NOV 18 2013

Arbitrator's Findings of Fact

Petitioner testified through a Spanish-speaking interpreter. She testified she previously worked at Respondent, cleaning and transporting eyeglass lenses. She lifted and carried 12 to 20 boxes of lenses at a time about every 5 or 10 minutes throughout each workday. She worked 8 hours per day, 5 days per week. T. 16-17.

Petitioner's original Application, filed on September 10, 2012, alleges a low back injury of February 21, 2012. Arb Exh 2. On July 22, 2013, Petitioner filed an Amended Application changing the date of accident to February 3, 2012. Arb Exh 3. T. 8-9.

Petitioner testified that, on February 3, 2012, she was lifting boxes of lenses when she experienced cramping in her lower back. She felt as if something had moved inside her back. She continued working. She did not report any injury that day because she thought her back pain would go away. The pain persisted, however. T. 17-19.

On February 7, 2012, Petitioner saw Dr. Becerra, her personal care physician. Records in evidence reflect that Petitioner had previously seen Dr. Becerra on various occasions in 2011 for general health conditions, including diabetes and abdominal pain. PX 2.

Dr. Becerra's note of February 7, 2012 reflects that Petitioner complained of "1 week h/o low back pain on right side associated with increased urinary frequency and urgency" and some low abdominal pain emanating from the back. The note contains no mention of work or a work accident. On examination, Dr. Becerra noted tenderness to palpation of the low abdomen and questionably positive CVA tenderness vs. lumbar muscle tenderness." The doctor also noted negative straight leg raising. She diagnosed an "unspecified backache" and a urinary tract infection. She recommended a urinalysis and urine cultures. She prescribed Bactrim, as she had at a previous visit in December 2011. She instructed Petitioner to return to her in two weeks. PX 2.

Petitioner testified she continued working after seeing Dr. Becerra. On February 9, 2012, a Thursday, she went to the Emergency Room at St. Anthony Hospital. T. 9. The Emergency Room records (PX 3) reflect that Petitioner complained of "pain RUQ radiating to the back and nausea x 5 days." The records also reflect that Petitioner described the onset of her pain as gradual. The records contain no mention of work or a work accident. On examination, the Emergency Room physician, Dr. Langridge, noted "tenderness confined to the abdominal wall in the region of the RUQ." Dr. Langridge noted no tenderness to palpation of the lower back. An abdominal ultrasound was negative for gallstones. Dr. Langridge suspected abdominal wall muscle-related pain because she was able to "palpate the tender muscle on examination" and the pain worsened when Petitioner sat up from a lying position. Dr.

Langridge prescribed Norco and instructed Petitioner to follow up with her personal care physician in two days.

Petitioner testified she called Maria, Respondent's human resources representative, on February 9, 2012 and reported the February 3, 2012 accident to her. She is familiar with Maria's voice and Maria identified herself during the conversation. T. 19-21.

Petitioner returned to Dr. Becerra on February 21, 2012 (T. 21), with the doctor noting an Emergency Room visit of February 13, 2012 and a CT scan of the abdomen and pelvis. [Petitioner did not offer into evidence any Emergency Room records dated February 13, 2012 or any CT scan report.] Dr. Becerra noted that the CT scan showed "non-obstructing calculi on the kidney." On examination, Dr. Becerra noted tenderness to palpation of the right lumbar paraspinals and right sacroiliac joint. She diagnosed a lumbar strain. She administered an injection of Kenalog and prescribed physical therapy. Her note contains no mention of work or a work accident.

Petitioner testified she continued working during this period. T. 21. She returned to Dr. Becerra on March 13, 2012 (T. 21) and complained of neck and back pain. Dr. Becerra noted that Petitioner had undergone a cervical laminectomy in 2010. [Records in PX 4 show that Petitioner was involved in an automobile accident on July 28, 2009 and underwent care with Drs. Becerra and Kranzler thereafter.] She also noted that Petitioner described her neck pain as right-sided and as having started a week earlier. Petitioner described her low back pain as right-sided and worse with movement. Dr. Becerra noted that Petitioner "constructs eye lenses and is standing for most of the day." She described Petitioner's job as repetitive and involving "moving from right to left with each lens rapidly." On examination, she noted tenderness to palpation to the right side of the neck and diminished lumbar lordosis. She recommended neck and back therapy and Flexeril. She "continued" a 10-pound lifting restriction. [There is no evidence of Dr. Becerra having previously imposed this restriction.]

Petitioner testified she continued working throughout this period. She began a course of physical therapy at St. Anthony Hospital on March 16, 2012. T. 22. The therapist who evaluated Petitioner on that date recorded the following history:

> "She has back pain on her right side from the top down, rated at 6/10. She went to the emergency room and the doctor told her that her muscles were inflamed. She cleans the lenses in a factory so she is twisting often. **She has no overt trauma** but she does stand all day and rotates side to side. She does some lifting (15 or a little more lbs). The time she carries boxes is when she feels the pressure in her back. She now has a lifting and carrying restriction at work. She can't lay down. It is better in sitting she still feels pressure. Hot showers help her to relax."

(emphasis added). On April 23, 2012, a different therapist noted a new onset of bilateral scapular and cervical pain. PX 3.

Petitioner testified that physical therapy did not help her. T. 22.

On May 8, 2012, Petitioner returned to Dr. Becerra. The doctor's history of that date states:

> "Martha Guzman is a 44-year-old female who presents for evaluation of recurrent neck pain. Has had pt but still getting pain and also on lower back. Worse at work where she washes eyeglasses, separates them, collects them and moves them – pushing them constantly."

On examination, Dr. Becerra noted decreased head rotation secondary to muscle pain and pain on palpation of the right paraspinal lumbar muscles. She diagnosed cervicalgia and lumbago. She prescribed a Medrol Dose-Pak, Flexeril, Ibuprofen and continued therapy. She recommended that Petitioner exercise four or more times per week. She instructed Petitioner to return in two weeks. PX 2.

Petitioner returned to Dr. Becerra the next day, May 9, 2012, and complained of worsening low back pain radiating to her right leg. Petitioner indicated she had been unable to work that morning due to this pain. Petitioner described having difficulty pushing a pedal she was required to push. Dr. Becerra took Petitioner off work (T. 22) and ordered a "repeat" lumbar spine MRI. [There is no evidence indicating the doctor had previously ordered an MRI.]

The MRI, performed without contrast on May 16, 2012 (T. 22-23), was unremarkable. PX 3.

On May 21, 2012, Petitioner returned to Dr. Becerra and reported slight improvement. Petitioner indicated it was still painful for her to bend or twist. The doctor noted the negative MRI results. The doctor described straight leg raising as negative. She recommended Naprelan and Flexeril, along with aerobic exercise classes. She instructed Petitioner to return in two weeks.

On May 30, 2012, Petitioner underwent another physical therapy evaluation at St. Anthony Hospital. The evaluating therapist noted that Petitioner complained only of neck pain and described her low back as "fine" now that she was off work.

On June 5, 2012, Petitioner returned to Dr. Becerra. Petitioner reported some improvement secondary to physical therapy but indicated she had experienced pain on trunk twisting the previous weekend. On examination, Dr. Becerra noted muscle spasm of the

lumbar region. She recommended continued therapy and aerobic exercise. Petitioner testified that Dr. Becerra referred her to Dr. Kranzler at this appointment. T. 23. PX 2.

On June 19, 2012, Petitioner was discharged from mid-thoracic and cervical spine therapy at St. Anthony Hospital so that she could begin work conditioning at a different facility on Kedzie. PX 3.

On July 10, 2012, Petitioner saw Dr. Kranzler, the neurosurgeon who had operated on her cervical spine two years earlier. Petitioner testified she saw Dr. Kranzler at Dr. Becerra's referral.

Dr. Kranzler's note of July 10, 2012 contains no mention of a February 3, 2012 work accident. The note reflects that Petitioner "does a great deal of lifting and pushing heavy items" at work and "began to have pain in her back" at work on April 9, 2012. The note also reflects that Petitioner "has been off work since May and is on disability at this time."

Dr. Kranzler indicated that Petitioner complained of pain in her low back, right hip, right leg and right shoulder as well as "numbness of her right and left toes after physical therapy."

On examination, Dr. Kranzler noted that Petitioner was able to walk well, "including on her toes and heels" and bent to ankle length. He also noted spasm on the right side of the back, straight leg raising to 80 degrees bilaterally and intact sensation.

Dr. Kranzler reviewed the report of the May 16, 2012 lumbar spine MRI. He noted that the MRI scan was not available. He diagnosed lumbar radiculopathy and ordered a DSSEP of the lumbar area.

Dr. Kranzler's records contain a lengthy patient information sheet dated July 10, 2012. This sheet reflects that Petitioner attributed her symptoms to a work injury of April 9, 2012 and had been off work since May 9, 2012. PX 4.

Documents in PX 4 reflect that Petitioner requested an FMLA leave from Respondent on July 11, 2012, citing a serious health condition.

On July 25, 2012, Petitioner underwent the recommended DSSEP testing, which showed a 1.0 delay on the left and a 1.2 delay on the right at L5. PX 4.

On July 27, 2012, Petitioner returned to Dr. Becerra and complained of mid-chest pain with swallowing. Dr. Becerra recommended X-rays of the ribs and clavicle. PX 2.

Petitioner returned to Dr. Kranzler on July 31, 2012. On that date, Petitioner complained of low back pain radiating down both legs, right worse than left, as well as numbness and tingling in the big and second toes. Dr. Kranzler reviewed the MRI film and the

DSSEP results. He interpreted the MRI as showing a bulge at L4-L5. He advised Petitioner to undergo surgery but noted she "opted to try low dose oral steroids."

On August 1, 2012, Dr. Kranzler completed and signed a CIGNA group insurance "medical request form" indicating he had recommended surgery but Petitioner had not yet decided whether she wanted to pursue this. The doctor also indicated he would find it difficult to specify work restrictions without a functional capacity evaluation. He described Petitioner's condition as work-related. PX 4.

Petitioner testified that, on August 10, 2012, Dr. Becerra instructed her to remain off work pending the recommended surgery. T. 26.

On August 16, 2012, Sibyl Baily, Respondent's regional human resources coordinator, wrote to Petitioner, confirming her eligibility for 12 weeks of FMLA leave and asking her to complete and submit various documents. PX 4.

On August 22, 2012, Dr. Kranzler completed a certification form in support of Petitioner's FMLA claim. This form reflects that Petitioner's job involved lifting "more or less 5 lbs., standing and walking 90% of her day." Dr. Kranzler indicated Petitioner required care and was not able to perform these duties. PX 4.

Records in PX 4 reflect that Dr. Kranzler scheduled Petitioner to undergo a lumbar hemilaminectomy on October 26, 2012 but that the surgery did not proceed.

Petitioner testified she returned to Dr. Kranzler on April 23, 2013, at which time the doctor again recommended surgery and directed her to remain off work. T. 26. A form in PX 4 reflects that Dr. Kranzler instructed Petitioner to remain off work on April 23, 2013.

A bill in PX 1 reflects that Petitioner saw Dr. Becerra for "spasmodic torticollis" on April 29, 2013 but the records in evidence do not include a treatment note bearing that date.

Petitioner testified she has not yet undergone the recommended surgery. She will undergo the surgery if it is awarded. T. 26-27.

Petitioner testified she had no lower back complaints and underwent no lower back treatment prior to February 3, 2012. T. 27-28. She started working for Respondent on July 7, 2011 and had no difficulty performing her duties until February 3, 2012. T. 28. She is still experiencing lower back pain. This pain prevents her from working, cleaning, sweeping and walking for long periods. Standing alleviates the pain a little. T. 28-29. She has received no benefits since she has been off work. Public Aid/Medicare paid her medical bills. She wants to undergo the recommended surgery to eliminate the pain. T. 29-30.

Under cross-examination, Petitioner testified she stood at a table while cleaning lenses. She would clean the lenses by hand and then place them in a machine for further processing. T.

31. The lenses were in plastic boxes or trays. The trays had drainage holes. T. 32. A single tray weighed only a couple of pounds. The lenses were also light in weight but she had to carry a large stack of trays from her work area to a co-worker. T. 33, 37. The stack was about 2 ½ feet high. T. 35. She was required to clean 12 trays of lenses every 5 minutes. She typically carried 12 trays at a time. T. 36.

Petitioner testified the accident of February 3, 2012 occurred around 1 PM. She could not recall if it occurred before or after lunch. She had worked more than four hours before the accident occurred. T. 37. She did not report the accident to anyone that day. On February 9, 2012, she went to the Emergency Room by car. Her husband drove her to the hospital. T. 38. At the hospital, she did not complain only of stomach problems. T. 38. She complained of back pain and a doctor examined her back. T. 38. She underwent an MRI at the hospital because the doctor suspected she had a gall bladder problem. T. 39. When she left the hospital, she was told to stay off work for three or four days. She was told she had an "inflamed muscle from work." T. 39. She returned to work the Monday after February 9, 2012. When she resumed working, she did not perform any lifting. She only cleaned lenses. She continued doing this until May 9, 2012.

Petitioner testified she has seen Dr. Becerra for about 10 years. She has a lot of confidence in Dr. Becerra. T. 39-40. On February 21, 2012 she told Dr. Becerra about her back pain and her lifting-related duties. Dr. Becerra indicated her problem was work-related. T. 40-41. After February 2012, there was never a time when her lower back pain disappeared. T. 41. She did not tell Dr. Becerra she experienced a gradual onset of lower back pain. It was when she picked up boxes on February 3, 2012 that her lower back pain began. T. 42. Dr. Becerra recommended an MRI and later told her the MRI was normal. When she saw Dr. Becerra after her visit to the Emergency Room, the doctor imposed a 10-pound lifting restriction. After February 9, 2012, she performed no lifting at work. She only cleaned the lenses. T. 44.

Petitioner testified she told Dr. Kranzler she lifted heavy items at work. She did not tell him she was injured while lifting in April. T. 45-46. She told Dr. Kranzler she was on light duty and was no longer lifting trays. T. 46.

Petitioner testified that Miguel Duran was her supervisor. Duran is familiar with the kind of duties she performed. Duran was not always at work, however. He was sometimes on vacation. He is the person who set her schedule. T. 46-47. She told Duran about the difficulty she had lifting items. She did not tell Duran she experienced lower back pain while lifting trays. T. 47.

On redirect, Petitioner testified she typically carried 12 trays at a time but sometimes carried more. Each tray weighed a few pounds. She does not know the exact weight. T. 48. The stack she carried could have weighed 20 to 25 pounds. T. 48-49. She continued to experience lower back pain after she resumed working following her Emergency Room visit. Even though the work she performed after that visit consisted solely of cleaning lenses, she still had to stand all day while doing this. She had difficulty standing for long periods due to pain in

her back and right leg. She did not have this pain before the accident. T. 51-52. She currently takes Vicodin. Dr. Kranzler prescribed this medication. She takes the medication when her pain is intolerable. T. 54.

Under re-cross, Petitioner testified she told Dr. Becerra about all of her job duties, not just the lifting. T. 55.

Miguel Duran testified on behalf of Respondent. Duran testified he has worked for Respondent for 21 years. He has been a supervisor in the "surface department" for the last 16 to 17 years. T. 60. He supervises about fifteen people. T. 60. Respondent operates an optical lab that fabricates, coats and tints lenses for eyeglasses. T. 59, 61.

Duran testified he hired and supervised Petitioner. T. 62. Petitioner worked at the "CREST" machine at the washing station. Her job involved "de-blocking," or tapping, lenses to remove alloy blocks, rinsing the lenses at a sink, positioning the lenses in "very thin metal baskets" and then putting the filled baskets into machines for further cleaning and specialized ionized washing. T. 65-68, 71. A filled basket weighed about one pound. T. 76. A robotic arm lifted each basket in and out of each machine. T. 73. Petitioner worked at a table that was about 4 ½ feet high. T. 66. She moved from left to right, down a line, while performing her tasks. The baskets were put into trays and the trays were generally stacked twelve-high. T. 79. A stack of twelve trays was about 3 ½ feet tall. T. 79. Initially, Petitioner had to carry stacks of trays of lenses, sometimes only 2 to 3 feet and sometimes as far as 30 feet. T. 82. She did not always carry the same number of trays. She made about five trips per hour. T. 84.

Duran testified that Petitioner reported to him directly and that he worked alongside her in the lab. T. 87. If Petitioner had sustained a work accident, he would have been the person to whom she would have reported that accident. T. 87. He instructed Petitioner about this in various safety meetings. T. 87-88. Petitioner did not report any work injury to him and he did not observe her having any difficulty lifting the trays. At some point, probably beyond the initial 90-day probationary period, Petitioner told him she had a back problem but she did not link this problem to any particular cause. T. 89. If Petitioner had told him this before her 90-day probationary period ended, he would have told her to get documentation from a doctor. He only allows one absence during the probationary period. T. 90-91. Once the 90-day period ended, Petitioner would have had three personal days she could have used. T. 91. Once she had used up those three days, she would have been required to produce a doctor's note. T. 91. Petitioner was not subject to any restrictions until she brought him a doctor's note setting forth a lifting restriction. T. 92-93. He accommodated this restriction by having another employee, known as a "floater," lift and carry trays for Petitioner. T. 93. He did not see Petitioner perform any lifting after she brought in the doctor's note. He was not involved in the events that occurred on Petitioner's last day of work. T. 94-95.

Under cross-examination, Duran testified that Petitioner was required to carry some trays only a short distance. She had to carry other trays about 30 feet to the "back coating" area. She carried between 6 and 10 trays at a time to that area. T. 96-97. He cannot recall

when Petitioner gave him the doctor's note. T. 97. He did not complete any accident report in connection with Petitioner. If anyone completed a report, it would have been someone in the human resources department. T. 98-99. If an employee under his supervision had a work accident, he completed a report and gave it to his supervisor, Phillip Griest. T. 99-100. He usually discussed a worker's restrictions with Griest. Griest had a tendency to keep restricted employees off work while his own tendency was to keep those employees working, albeit within their restrictions. T. 100-101. He would have to refer to paperwork in Griest's office in order to ascertain when Petitioner began performing light duty and when she last worked for Respondent. T. 103. He knows Petitioner took some personal days before her last day of work. T. 104.

On redirect, Duran reiterated that neither Petitioner nor the notes indicated that the lifting restrictions stemmed from a work accident or work activities. T. 106.

In addition to the treatment records previously summarized, Petitioner offered into evidence a Public Aid lien reflecting payments made toward Petitioner's medical expenses. PX 1.

Respondent did not offer any documentary evidence.

Arbitrator's Credibility Assessment

At the hearing, Petitioner came across as a thoughtful, sincere individual but there were significant inconsistencies between her testimony and her medical records. Those inconsistencies call Petitioner's credibility into question.

Petitioner emphatically denied having any lower back problems before her claimed work accident of February 3, 2012 but Dr. Kranzler's records show she complained of lower back and left leg pain as well as neck and arm pain in November of 2009, following her automobile accident. DSSEP testing performed by Dr. Chhabria on November 24, 2009 showed evidence of conduction delay on the left at S1. On December 10, 2009, Dr. Kranzler diagnosed lumbar as well as cervical radiculopathy. The doctor's operative report of April 14, 2010 reflects that Petitioner "also has lumbar symptoms, low back and left leg pain with radiation down to her ankles." Following the surgery, Dr. Kranzler again noted left leg complaints on June 8, 2010. PX 4.

Petitioner linked the onset of her low back problems to a specific lifting incident of February 3, 2012 but none of her records contain any mention of such an incident.

Did Petitioner sustain an accident arising out of and in the course of her employment on February 3, 2012?

At the outset, the Arbitrator notes that Petitioner did not allege repetitive trauma. Rather, she insisted that all of her lower back problems started after she lifted a stack of trays at work on the afternoon of February 3, 2012.

The Arbitrator finds that Petitioner failed to prove a work accident of February 3, 2012. The St. Anthony Hospital Emergency Room records of February 9, 2012 reflect that Petitioner complained of nausea and right upper quadrant pain "radiating to the back." The records do not mention work or a back injury. PX 3. It appears Petitioner underwent scans at a different Emergency Room on February 13, 2012 but no records dated February 13, 2012 are in evidence. Dr. Becerra's office notes of February 9 and 21, 2012 reflect complaints of low back pain but contain no mention of work, let alone a specific work accident. PX 2. A therapy note dated March 21, 2012 reflects that Petitioner denied any overt back trauma. PX 3. Dr. Kranzler's records mention a work accident but one that occurred on April 9, 2012, not February 3, 2012. Petitioner denied telling Dr. Kranzler she was injured in April but a handwritten patient information sheet in the doctor's chart reflects that Petitioner's symptoms began on April 9, 2012, secondary to a work injury. PX 4.

Having found that Petitioner failed to prove a work accident of February 3, 2012, the Arbitrator views the remaining disputed issues as moot. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Bradshaw,

Petitioner,

14IWCC0394

vs. NO: 10 WC 31840

State of Illinois/Menard Correctional Center,

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, notice, medical expenses, and permanent disability, hereby reverses the Arbitrator's Decision and finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment on July 20, 2010.

Evidentiary Rulings

The Commission notes that at the arbitration hearing before Arbitrator Gallagher on June 11, 2013, the Petitioner offered and the Arbitrator entered into evidence PX1 through PX17 and PX19 through PX22. (T.15) Petitioner also offered what were marked as Petitioner's Exhibits 18 and 23. Petitioner's Exhibit 18 was a report authored by Zachary Weiss (hereinafter "Weiss"), a college student hired by Petitioner's counsel to review Dr. Sudekum's reports. Petitioner's exhibit 23 was Weiss' evidence deposition. Both were objected to by Respondent on the basis of relevancy. Respondent's counsel noted that both exhibits are from an unrelated case, Richard Brueggemann v. State of Illinois/Menard Correctional Center, 10WC472 & 12WC40657 & 12WC42758. The Arbitrator reserved ruling on the admissibility of the exhibits and explained that he would enter his ruling "at the time I enter my decision." (T.10-12, 15-16)

The Commission finds that, ultimately, PX18 and PX23 were never admitted into

evidence and, as such, are not properly part of the record. Despite mentioning and relying on the exhibits in his decision, the Arbitrator failed to admit them into evidence. The Commission finds that if the Arbitrator had admitted them into evidence, it would have been error to do so as they are irrelevant and inadmissible.

The Commission notes that PX18 and PX23 are irrelevant to the matter at hand. The exhibits are from a previously tried case, Richard Brueggemann v. Menard Correctional Center, and at best they are hearsay documents. The exhibits simply point out general similarities in Dr. Sudekum's reports. In his reports, Dr. Sudekum provides general and generic information regarding upper extremity neuropathies in order to explain the conditions and causes for the conditions.

This is to be expected not just in Dr. Sudekum's reports, but all medical reports outlining conditions and the causes of those conditions. The generic information and testimony provided is appropriate and, as previously explained, expected. However, the Commission notes that when Dr. Sudekum issues findings and opinions regarding a specific claimant, the information he provides is detailed and specific and deals solely with the claimant in question. The Commission finds nothing improper in providing a combination of general information regarding conditions and the causes of those conditions along with detailed and specific findings and opinions regarding a claimant. This would be true for any physician reporting on a patient's condition.

The Commission notes that the Arbitrator allowed the deposition taken of Dr. Sudekum for James Bauersachs v. State of Illinois/Menard Correctional Center, 10WC27503 (PX15), and the exhibits from that evidence deposition, consisting of invoices for Section 12 examinations conducted for employees of Respondent with workers' compensation claims and a prior arbitration decision, Richard Kirkover v. State of Illinois/Menard Correctional Center, 10WC33480, into evidence (PX17). The deposition and the exhibits from that deposition deal with cases completely separate and unrelated to the case at bar. The testimony and evidence from these exhibits are irrelevant to the case at bar and should not have been admitted.

Finally, the Commission notes that under Supreme Court Rule 206, a party serving notice of deposition intending to record the deponent's testimony by use of an audio-visual recording device, must advise the parties in that notice of his intent to use the audio-visual recording device. Ill. S. Ct. R. 206(a)(2) (2013). The rule further explains that:

> "[i]f any party intends to record the testimony of the witness by use of an audio-visual recording device, notice of that intent must likewise be served upon all other parties a reasonable time in advance. Such notice shall contain the name of the recording-device operator." Ill. S. Ct. R. 206(a)(2) (2013).

During Dr. Sudekum's April 26, 2012 evidence deposition, Respondent's counsel explained that she received a telephone call from Petitioner's counsel the day before advising that Dr. Sudekum's cross-examination would be videotaped. (PX19) Respondent's counsel also noted

that Petitioner's counsel brought his own videographer. Respondent's counsel objected on the basis of notice and explained that the deposition "is my deposition, I noticed it. It was not noticed for a video deposition." (PX19) Though inartful, the objection was proper and should have been sustained. Petitioner's counsel clearly failed to meet the requirements of Rule 206 regarding the use of audio-visual recording devices at depositions. Therefore, Dr. Sudekum's cross-examination from the April 26, 2012 evidence deposition is stricken from the record.

Accident

Regarding the merits of the case at bar, after a complete review of the record, the Commission finds that Petitioner failed to establish that his bilateral upper extremity conditions are a result of or were aggravated by his work for Respondent.

On August 6, 1998, Petitioner saw his primary care physician, Dr. Krieg, regarding right elbow pain "on and off for the past couple of months." (RX6) Dr. Krieg diagnosed Petitioner as having tendinitis. The next time Petitioner complained of elbow pain was on October 18, 2001, when Petitioner complained of left elbow pain "for the last couple of months." (RX6) Dr. Krieg noted that Petitioner "sanded for an extended period of time" while working for Respondent. At this point, Petitioner was working on the paint crew. (T.35) Dr. Krieg diagnosed Petitioner as having tendonitis. In 2003, Dr. Krieg removed a nodule from Petitioner's right elbow, after which Dr. Krieg noted that Petitioner had "good range of motion with minimal tenderness." (RX6)

On August 21, 2007, Petitioner saw Dr. Krieg following an injury to his right fifth finger at work. (RX6) The Commission notes that the record does not indicate that Petitioner was having problems with his wrists or elbows at that time. Petitioner was then working as a maintenance craftsman for Respondent. (T.24, 40) On October 4, 2007, during a follow up visit for his finger injury, Petitioner reported to Dr. Krieg that his "grip strength is not quite what it was....He did a lot of sanding the other day and some pain and tenderness in the outer aspect of his right elbow. Some pain down into the forearm and up into the upper arm." Dr. Krieg diagnosed Petitioner as having right tennis elbow and took Petitioner off work for a couple of days. (RX6) On November 27, 2007, Dr. Krieg noted that Petitioner's "pain and other things still occur with activity. Now he has got some stiffness of the elbow. He did have improvement with Cho-Pat strap. He is able to do his regular job." (RX6) Dr. Krieg ordered physical therapy and told Petitioner to return if he had more problems. Petitioner did not return to Dr. Krieg until February 28, 2008, when he again complained of right elbow pain "on and off for several months. At times he feels there is a loose body present that causes sudden discomfort. If he pushes on it, it gets better." (RX6) Dr. Krieg diagnosed Petitioner as having chronic right elbow pain.

In September 2008, Petitioner transferred to the supply supervisor position. (T.24) In this position, Petitioner worked in the commissary, supply warehouse, and handled the property control assignment. (T.24,47-48,50) Petitioner testified that the new position would be "better" for his health. (T.46) Petitioner admitted that during the property control assignment, when he drove trucks, or was the clothing officer, he did not do any bar rapping or open doors or gates with Folger Adam keys in his "personal area." (T.89-90)

The Commission notes that when Petitioner next contacted Dr. Krieg, he had been working as a supply supervisor; a job Petitioner defined as less strenuous, for two years. (RX6) Petitioner called Dr. Krieg on June 21, 2010, at his wife's urging, to ask him to schedule an EMG/NCV study. The phone call notation indicates that Petitioner stated that his condition might be "workers' comp." On July 20, 2010, Petitioner underwent his first EMG/NCV study, the result of which showed "bilateral carpal tunnel syndrome more pronounced on the right than the left" and "mild compression at Guyon's canal" on the right. (PX3) Petitioner filled out injury reports at work on August 12, 2010. (PX10, RX2, RX3) The CMS Initial Workers' Compensation Medical Report indicates that Petitioner had numbness in both hands for one year. (PX10, RX3) Petitioner indicated in the forms that his upper extremity injuries were due to repetitive trauma at work. (PX10,RX2,RX3)

On November 8, 2010, Petitioner saw Dr. Brown. (PX4) Petitioner provided Dr. Brown his job history with Respondent, explaining that he spent three years as a "craftsman where he would drywall, concrete, build walls, use hand tools and paint. For the past two years he's driven a truck two days a week. He will also type 89% of the time, three days a week. He will scan items, turn keys about thirty times an hour. [Petitioner] explains to me that he had about a year history of gradual, progressive numbness and tingling in both his hands including his little and ring fingers associated with medial elbow pain." (PX4) Dr. Brown ordered a new EMG/NCV study and found that "[b]ased on [Petitioner's] job description and duration of exposure to those activities over the past twenty-seven and a half years I do believe his work at Menard would be considered in part an aggravating factor in the need for further evaluation and treatment for both carpal tunnel syndrome and cubital tunnel syndrome."

An EMG/NCV study, conducted that same day, showed "significant moderate sensory motor median neuropathy across the right carpal tunnel. There is milder sensory motor medial neuropathy across the left carpal tunnel. There is mild demyelinative ulnar neuropathy across the right elbow. There is moderate demyelinative ulnar neuropathy across the left elbow." (PX5) After reviewing the new study, Dr. Brown diagnosed Petitioner as having bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. (PX4) Ultimately, Dr. Brown found that Petitioner had chronic compression neuropathies, had failed to respond to conservative treatment, and that Petitioner was a candidate for surgical decompression. (PX11-pgs.17-18) Petitioner retired in July 2011. (T.22)

On December 26, 2011, Respondent's independent medical examiner, Dr. Sudekum, reviewed Petitioner's medical records, diagnostic exams, and the multiple job analysis reports, job descriptions, and videos of the positions held by Petitioner while working for Respondent, except the property control assignment. (RX7-ERX2) Dr. Sudekum opined that Petitioner's "job duties as a Correctional Officer and/or Maintenance Craftsman at Menard did not cause or aggravate carpal and/or cubital tunnel syndrome or affect his need to undergo evaluation and/or treatment for those conditions." He stated: "It is my opinion that the commissary 'check out' position which may be assigned to the Supply Supervisor I and II's, if performed on a prolonged and sustained basis could aggravate carpal tunnel syndrome. I do not feel that the commissary 'check out' position would cause or aggravate a cubital tunnel syndrome or ulnar neuropathy at the elbows since the performance of this job there does not involve any direct contact or irritation

to the ulnar nerve in the medial elbow region."

After reviewing the property control and officers clothing position job descriptions, Dr. Sudekum issued an addendum on January 6, 2012. He noted that: "[Petitioner] first complained of symptoms 'carpal tunnel symptoms' in July 2010 while he was employed in the Property Control area as a Correctional Supply Supervisor II. The above job description does not indicate or suggest that the Property Control position involves any sustained or strenuous manual activity that would normally be associated with causation and/or aggravation of carpal and/or cubital tunnel syndrome. It is my opinion...that the job activities performed by Corrections Supply Supervisors II's assigned to the 'Property Control and Officers Clothing' area, would not serve to cause or aggravate carpal or cubital tunnel syndrome and I do not feel that [Petitioner's] work activities, as a Supply Supervisor II in the Property Control Area, would have served to cause or aggravate possible carpal and/or cubital tunnel syndrome." (RX7-ERX3)

On April 11, 2012, Petitioner underwent a third EMG/NCV study which showed mild bilateral median neuropathy at the wrist and mild left ulnar neuropathy at the elbow. (PX7) Dr. Young reviewed the study and diagnosed Petitioner as having bilateral carpal tunnel and cubital tunnel syndromes. (PX6) Dr. Young explained that Petitioner "more than likely has a false negative on the right and he does have bilateral ulnar nerve entrapment as well as median nerve entrapment." Dr. Young ordered a carpal tunnel release and nerve transposition. Petitioner underwent carpal tunnel and ulnar nerve transpositions on April 25, 2012 and July 27, 2012, respectively. (PX6,PX8)

First, the Commission notes that the record establishes that Petitioner has had continuing elbow problems since 1998. The Commission finds the appearance of Petitioner's bilateral carpal tunnel syndrome two years after he has been working a less strenuous and more varied positions with Respondent indicative of the lack of connection between Petitioner's upper extremity problems and his work for Respondent. Even more instructive and persuasive to the Commission is the fact that Petitioner's symptoms of carpal tunnel syndrome appear about two years after he stopped performing the two tasks generally linked to carpal tunnel syndrome, those being bar rapping and using Folger Adam keys. (T.89-90) The Commission notes that while all the job descriptions and videos provided indicate that Petitioner's duties as a supply supervisor I and II were hand intensive, they also indicate and establish that the duties are also varied in nature. Petitioner, according to his testimony, was constantly working between the property control assignment, the commissary, and the warehouse and his tasks in each of those assignments were, again varied in nature. (T.86-92)

The Commission further notes that Dr. Brown, in finding that Petitioner's upper extremity conditions are related to his employment with Respondent, considered the totality of Petitioner's time with Respondent, 26 years, and considered Petitioner's bar rapping, key turning, and the gripping and pulling of doors to be instrumental in aggravating Petitioner's carpal tunnel syndrome and cubital tunnel syndrome. (PX11-pgs.23-26, 28) In regards to repetitive traumas, the court in *A.C. & S. v. Industrial Commission*, 304 Ill. App. 3d 875, 879 (1999), stated that:

"An employee who suffers a gradual injury due to a repetitive

> trauma is eligible for benefits under the Act, but he must meet the same standard of proof as a petitioner alleging a single, definable accident. Proof that the relationship of employer and employee existed at the time of the accident is one of the elements of an award under the Act. The date of the accidental injury in a repetitive trauma case is the date on which the injury 'manifests itself.'" (Interval citations omitted.)

"'Manifests itself' means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 531(1987). Furthermore, "[t]here must be a showing that the injury is work related and not the result of a normal degenerative aging process. *Belwood*, 115 Ill. 2d at 530.

As previously noted, the medical records indicate that Petitioner's elbow issues started in 1998. In August 1998, Petitioner told Dr. Krieg he had increased elbow pain when held "one of his children's hands and twists sort of funny he experiences some increased pain in the elbow area." (RX6) While Petitioner in later visits mentioned sanding at work when feeling elbow symptoms, by November 27, 2007, Petitioner was having elbow pain "and other things...with activity." The Commission notes that the evidence indicates that the worsening of Petitioner's elbow conditions are the "result of the normal degenerative aging process" and not attributable to his work for Respondent. As for Petitioner's wrist conditions, the Commission notes, as mentioned above, that Petitioner's symptoms occurred about two years after he stopped performing the type of work generally associated with the cause of or aggravation of carpal tunnel syndrome (i.e. sanding, working with vibratory tools, bar rapping, etc.)

As explained by Dr. Sudekum in his January 6, 2012 addendum report, "[Petitioner] first complained of symptoms 'carpal tunnel symptoms' in July 2010 while he was employed in the Property Control area as a Correctional Supply Supervisor II. The above job description does not indicate or suggest that the Property Control position involves any sustained or strenuous manual activity that would normally be associated with causation and/or aggravation of carpal and/or cubital tunnel syndrome." (RX7-ERX3) The evidence supports Dr. Sudekum's opinion that Petitioner's job duties during the supply supervisor assignment would not cause or aggravate Petitioner's bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome.

In his December 26, 2011, report, Dr. Sudekum explained that "Supply Supervisor I & II positions/check out position in the commissary involved "moderately repetitive, but non-strenuous, keyboarding and manual activity. The Supply Supervisor III position...does not appear to be either strenuous or repetitive with respect to manual activities....I did not identify any significant or sustained repetitive impact to the hand, repeated heavy gripping, grasping, or pounding with the hand, use of vibratory tools or abnormal sustained wrist or elbow postures involved in the job of a Correctional Supply Supervisors at Menard Correctional Center. The routine manual tasks performed by Correctional Supply Supervisors at Menard Correctional center, are relatively benign, non-traumatic activities that would not normally cause carpal tunnel syndrome, cubital tunnel syndrome or other common upper extremity 'repetitive trauma injuries'....I do not feel that [Petitioner's] prior employment as a Correctional Officer or

Maintenance Craftsman...caused, contributed to or aggravated carpal and/or cubital tunnel syndrome." (RX7-ERX2) The Commission notes that Dr. Sudekum's findings regarding the non-strenuous and non-repetitive nature of Petitioner's job is supported by the job analysis reports and the videos showing correctional officers demonstrating the work done by supply supervisors. Dr. Sudekum also noted that Petitioner's "nonwork-related risk factors that could potentially predispose him to the development of carpal and/or cubital tunnel syndrome include his age over 52 years and the existence of the right volar wrist ganglion cyst. Volar wrist ganglion cysts can cause compression and/or irritation to the adjacent median in the carpal tunnel region." Petitioner's history of a ganglion cyst is established by the medical records which indicate that the cyst was removed in 2003. (RX6)

Therefore, based on the totality of the evidence provided, the Commission finds that Petitioner has failed to establish that he sustained accidental injuries arising out of and in the course of his employment with Respondent on July 20, 2010. Accordingly, we reverse the Decision of the Arbitrator and deny compensation.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator is reversed as Petitioner failed to prove he sustained an accidental injury arising out of his employment with Respondent, and, therefore, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: MAY 30 2014
MJB/ell
o-04/22/14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Erik Brown,

Petitioner,

14IWCC0395

vs. NO: 09WC9450

Sedona Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, permanent disability and medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:bjg
0-4/22/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0395

BROWN, ERIK
Employee/Petitioner

Case# **09WC009450**

SEDONA STAFFING
Employer/Respondent

On 7/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0149 LAW OFFICES OF WARREN E DANZ PC
MIKE SUE
710 N E JEFFERSON
PEORIA, IL 61603

0358 QUINN JOHNSTON ET AL
JOHN F KAMIN
227 N E JEFFERSON ST
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- [ ] 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

ERIC BROWN,
Employee/Petitioner

v.

SEDONA STAFFING,
Employer/Respondent

Case # 09 WC 09450

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Peoria**, on **February 28, 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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other: _____

FINDINGS

On **April 12, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the alleged accident.

In the year preceding the injury, Petitioner earned **$1,565.81**; the average weekly wage was **$260.97**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **four** dependent children under 18.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

Respondent is entitled to a credit of $ **0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$260.97**/week for **37.5** weeks, because the injuries sustained caused the **7.5%** loss of use of his **person as a whole**, as provided in Section 8(d)2 of the Act.

Petitioner is now entitled to receive from Respondent compensation that has accrued from **April 12, 2007** through **February 28, 2013,** and the remainder, if any, of the award is to be paid to Petitioner by Respondent in weekly payments.

Respondent shall pay to Petitioner reasonable and necessary medical services of **$ 5,807.98,** as provided in Sections 8(a) and 8.2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator **JOANN M. FRATIANNI**

July 22, 2013
Date

JUL 29 2013

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified he was hired by Respondent and assigned to work at Caterpillar. On April 12, 2007 he was delivering parts to a bin and as he was bent over another employee had sent an engine on a line that struck him in the lower back and knocked him down. Following this accident, Petitioner testified that he was taken to Caterpillar security but received no treatment as he was not a Caterpillar employee. He then returned and finished working his shift.

Petitioner testified that he was unable to get out of bed the next day due to pain. He called Respondent and advised them of the incident and was referred to IWIRC for treatment. Petitioner was seen at IWIRC on April 13, 2007 and released to light duty work. Petitioner came under the care of Dr. Christine Cisneros who diagnosed a lower back contusion and prescribed an MRI. The MRI was performed on April 19, 2007. Petitioner then returned to see Dr. Cisneros, who indicated that the MRI was normal and was unable to find any objective findings during her examination. She then released Petitioner to return to work regular duty on April 23, 2007.

In the meantime, Petitioner saw Dr. Daniel Hoffman, an orthopedic surgeon, on April 18, 2007. Dr. Hoffman referred Petitioner to see Dr. Trudeau for an EMG/NCV study. Dr. Hoffman also referred Petitioner to Central Illinois Pain Clinic where he underwent multiple injections.

Dr. Hoffman testified by evidence deposition (Px12). Dr. Hoffman testified he was not sure if had seen Petitioner prior to this injury. Dr. Hoffman recorded a history on April 18, 2007 and prescribed an MRI. The MRI did not show any herniated discs. Petitioner continued to complain of pain so he then was referred to a pain clinic. Dr. Hoffman testified there was a sciatic nerve trauma that was diagnosed by Dr. Trudeau during his EMG performed on September 12, 2007. Dr. Hoffman testified that he prescribed physical therapy and was seen by a neurosurgeon who felt that surgery was indicated. Petitioner then subsequently moved out of state. Dr. Hoffman testified he has not seen Petitioner since April 20, 2009. Dr. Hoffman indicated that Petitioner was at that time capable of performing light duty work with no lifting over 10 pounds, no crawling, bending, stooping and sitting and standing as needed. Dr. Hoffman testified that he had previously authored various no work slips as it was his understanding that no light duty was available. Dr. Hoffman indicated that no one had contacted him to see if Petitioner could perform light duty work, and also noted that Petitioner never asked if he could be released to light duty. Dr. Hoffman also testified he was not aware that Petitioner had been administered a drug screen which revealed positive findings. He was also not aware that Petitioner had undergone a FCE evaluation and never noticed any problems with his gait.

Petitioner then saw Dr. Paul Smucker on August 22, 2008. Petitioner saw Dr. Smucker at the request of Respondent. Dr. Smucker testified by evidence deposition (Rx1) that he reviewed medical records of treatment as part of his examination. Dr. Smucker noted an antalgic gait and limited weight bearing on the right. Range of motion to the right lower extremity was normal, on the left was tremendous guarding. Neurological exam to both lower extremities revealed normal right leg strength, but was not testable due to guarding and ratchety and breakaway pain. No evidence of fasciculation or atrophy was noted which would reflect muscle denervation or severe neuropathy. Reflexes were intact bilaterally and symmetric with no ankle clonus present. Dr. Smucker indicated ankle clonus would be present if there was an upper neural motor neuron lesion such as a brain or spinal cord injury. Dr. Smucker reviewed the MRI and felt it was normal. Dr. Smucker diagnosed left buttock contusion with subsequent leg and buttock pain paresthesia. Dr. Smucker recommended a FCE due to the guarding he found and noted the subjective complaints seemed to be out of proportion to what he could document during his examination. Dr. Smucker felt Petitioner was not in need of further trigger point and/or epidural steroid injections and felt he should avoid all narcotic pain medicines. (Rx1)

An FCE was subsequently performed and Dr. Smucker had the opportunity to review the results. Dr. Smucker noted variability in heel striking during ambulation activities, but while walking to an examination room while talking on his cell phone he demonstrated normal heel strike. Dr. Smucker concluded following the FCE that he had no medical explanation as to why Petitioner would be incapable of heel striking during the FCE examination. Dr. Smucker was of the opinion that Petitioner should return to work with no restrictions.

Dr. Smucker admitted that a normal MRI would not likely reveal a sciatic nerve injury and that the self-limiting behaviors noted during the FCE may be from Petitioner's perception of pain. Dr. Smucker did indicate that waxing and waning of symptoms could be associated with a sciatic nerve injury.

Mr. Nathan Porch testified by evidence deposition. (Rx2) Mr. Porch testified that he was the therapist who performed the FCE and has been a therapist since 1999. Mr. Porch testified the FCE was performed over two days, and included a written intake, hooking up a heart rate monitor and taking blood pressure before the exam. The functional testing consists of lifting, carrying, pushing, pulling and mobility tasks along with positional tolerance tasks. Mr. Porch testified that if a patient was not willing to load bear on one of their extremities, it would limit their ability to function at their highest level of performance in carrying loads and would also decrease ability with floor to waist lifting and ambulatory tasks.

Mr. Porch testified that on the first day of testing, Petitioner did not perform heel striking during all ambulation tests and in between the tasks he performed. In addition, Petitioner limited his left foot weight bearing while performing lifting tests. Mr. Porch noted that at the end of a task he observed Petitioner walking 60 feet to an exam room and demonstrated the ability to heel strike while walking. At that time Petitioner was using his cell phone. When Petitioner left the facility, he again started to demonstrate problems with heel striking.

Petitioner was examined at his own request by Dr. Michael Watson on October 15, 2012. Dr. Watson testified by evidence deposition (Px13) that he is a general orthopedic surgeon. During the examination he reviewed medical records of treatment and diagnostic testing previously performed. Dr. Watson felt that nerve studies performed on November 24, 2010 revealed mild to moderate chronic left L5 radiculopathy. When Petitioner attempted to walk with a normal gait pattern he modified his ambulation by not striking his left heel on the ground. Dr. Watson noted that Petitioner would walk on his toes with his left hip in a flexed position. Dr. Watson diagnosed sciatic neuropathy or piriformis syndrome from blunt trauma to the sciatic nerve. Dr. Watson felt this was related to the injury of April 12, 2007.

Dr. Watson disagreed with the full duty work release recommended by Dr. Smucker based on the amount of pain Petitioner was in and concurred with restrictions of no lifting greater than 10 pounds, which did not include lifting from floor level. Dr. Watson noted he did not believe the FCE conclusions would be consistent with a full duty work release.

On cross-examination, Dr. Watson testified he discarded all his notes and records concerning his examination and simply retained his report. Dr. Watson further testified his opinions are based on patient history and his subjective complaints of pain, along with physical examination findings. Dr. Watson indicated that he did not include the heel striking conflicting episodes during the FCE in his report as he was unsure of its significance. Dr. Watson did not perform any testing to rule out malingering.

Respondent introduced a report from Dr. Smucker dated December 31, 2012. This report indicates that Dr. Smucker reviewed the report of Dr. Watson along with medical records from Texas. Dr. Smucker following this review indicated his unwillingness to change his diagnosis and opinions.

Based upon the above, the Arbitrator finds that the conditions of ill-being as noted above, or more specifically, contusions to the sciatic nerve, are causally related to the accidental injury which arose out of and in the course of Petitioner's employment with Respondent on April 12, 2007. The Arbitrator affords more weight to the opinions of Dr. Smucker rather than those of Dr. Watson in reaching this conclusion.

G. What were Petitioner's earnings?

Petitioner alleges an average weekly wage of $475.00. No evidence was presented by Petitioner to corroborate that allegation.

14IWCC0395

Respondent claims an average weekly wage of $260.97 and introduced into evidence a wage statement that supports their claim.

Based upon the above, the Arbitrator finds that the average weekly wage is $260.97 with actual earnings for the year preceding this accident date of $1,565.81.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence the following unpaid medical bills which were incurred after this accidental injury:

OSF Medical Center	$ 4,804.00
OSF Afn, Inc.	$ 255.40
Injured Workers' Pharmacy	$ 6,536.63
Dr. Daniel Hoffman	$ 90.00
Memorial Medical Center	$ 739.48
Dr. Edward Trudeau	$ 3,652.00
Methodist Outpatient Therapy	$ 2,019.00
IWIRC	$ 136.98

These charges total $18,233.49.

The Arbitrator finds that Dr. Cisneros was of the opinion that Petitioner as of April 23, 2007 was in no need for further medical treatment.

Petitioner did continue receiving medical treatment after that date and reported minimal symptom improvement. Dr. Smucker was of the opinion that the injections were not reasonable nor necessary. Dr. Watson did not give his opinion as to the propriety of such medical treatment.

See also findings of this Arbitrator in "F" above.

Based on said findings, the Arbitrator awards the following medical charges, subject to the limitations imposed by the Medical Fee Schedule created by the Act, which were incurred prior to the examination of Petitioner by Dr. Smucker:

Dr. Edward Trudeau	$ 3,652.00
Methodist Outpatient Therapy	$ 2,019.00
IWIRC	$ 136.98

These charges total $5,807.98.

All other charges not so awarded by this Arbitrator are hereby denied for the reasons cited above.

K. What temporary benefits are in dispute?

Ms. Marchelle Marfell was called by Respondent to testify. Ms. Marfell testified she was office manager for Respondent on April 12, 2007. On that date Petitioner reported an injury at work and she referred him to IWIRC.

She later received a note from IWIRC documenting work restrictions, following which she contacted Petitioner about returning to light duty work.

Ms. Marfell testified that she documents all conversations with employees about returning to work on a computer chronology note system. She reviewed her notes that indicated she initially contacted Petitioner at 11:09 a.m. on April 18, 2007 to offer light duty work. She called him again at 1:56 p.m. that same day as she had not heard from him. At that time she spoke with Petitioner, confirmed the job, the hours and pay. Petitioner responded that he would need to think about it and would contact them back and let them know. Petitioner then called at 9:07 a.m. on April 19, 2007, and stated that he would accept the position but wanted to start on Monday, April 23, 2007.

Ms. Marfell identified a light duty offer (Rx4a) letter which Petitioner signed indicating he accepted the offer and the start date was April 23, 2007. Ms. Marfell testified that Petitioner did not show up to work that day. He was scheduled to start at 8:00 a.m. but called in at 11:39 a.m. indicating that he would not be able to work due to the hours. He indicated he had his kids during the day and he had one home sick. He then executed a form rejecting the light duty work offer. (Rx4b)

Ms. Marfell testified that on April 23, 2007 she received the results of a drug screen that had been performed at IWIRC. The results of the drug screen were reviewed after the conversation in which Petitioner rejected the offer of light duty work. Ms. Marfell testified that per company policy, Petitioner was terminated for the positive drug test and was notified in writing sent certified mail of his termination. (Rx5) The doctor had signed off of the drug screen report on April 20, 2007.

Petitioner claims entitlement to temporary total disability benefits from respondent for 269-1/7 weeks for the period of April 18, 2007 through May 11, 2007 and from February 8, 2008 through February 28, 2013. Respondent denies any liability for temporary total disability benefits in this matter.

See also the findings of this Arbitrator in "F" above.

Based upon said findings, the Arbitrator further finds that as a result of this accidental injury, Petitioner was not temporarily and totally disabled from work for any period of time so claimed. All claims of temporary total disability by Petitioner are hereby denied.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "F" above.

Based upon said findings, the Arbitrator finds that as a result of this accidental injury, Petitioner sustained a sciatic nerve injury with continued subjective complaints that are now permanent in nature and subject to an award of permanent partial compensation.

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN RUSHING,

Petitioner,

14IWCC0396

vs. NO: 10 WC 17180

PRAIRIE FARMS DAIRY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability (TTD), medical expenses, and permanent partial disability, and being advised of the facts and applicable law, hereby reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on January 18, 2010.

The Commission finds that Petitioner's work duties were repetitive in nature. His right shoulder condition is causally related to his work duties. Having found accident and causal connection, the Commission finds Petitioner is entitled to TTD from April 2, 2010 through June 10, 2010, representing 10 weeks. The Petitioner is entitled to medical expenses in the amount of $5,589.19. The Commission finds that Petitioner sustained ten percent loss of use the right shoulder pursuant to Section 8(d)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Mr. Rushing has been employed with Prairie Farms Dairy for 13 years. He has worked in a variety of positions during his employment that required a lot of heavy lifting and pulling at or above the shoulder level. T.24. He denied any prior right shoulder issues.

2. Mr. Rushing admitted into evidence and testified as to the following job history:

   a. From June 2000 through December 2000, he worked in the warehouse. He would pick orders by hand and stack them onto a pallet. Some of the pallets were high and usually were above his head. T.17 & PX.4.

   b. From December 2000 to December 2003, he worked on the D Dock where he would load and unload trailers. The plastic milk cases were stacked 4 to 6 cases high. PX.4. He testified that the stacks were about even with his head. T.18. He would also pull the product with a hook. PX.4.

   c. From December 2003 to December 2004, he worked in the ABC cooler. He drove a forklift and hand wrapped the pallets with plastic wrap. PX.4.

   d. From December 2004 to November 2008, he ran the HTST (high temp, short time) hand bag filler and half gallon machine. PX.3., PX.4. & T.19. He testified that he filled 10 quart bags and 5 gallon bags of product. He would put a label on the bag, then grab the bag and stick it in a filler tube. The machine would fill the bag and drop it on the table. T.19. He would grab the bag and slide it across the table into a milk crate. He would put two ten quart bags into a case or one 5 gallon bag into a case. He would do this for 8 hours a day, 40 hours a week. T.20. He testified that it was not uncommon to fill and package over a 1000 or more 10 quart bags plus 5 gallon bags per day. PX.3. The HTST position did not require him to reach overhead. T.32.

   e. From November 2008 to March 2009, Mr. Rushing ran the EQ5 filling machine. PX.3., PX.4. He stated that cleaning the machine was much more tedious than cleaning the half gallon machine. *Id.* He would put cartons into chutes. The machine would take and unfold the cartons, glue them and then fill the carton with product and send it out the other end. T.21.

   f. From March 2009 to the present, Mr. Rushing worked as a mix maker and ran the HTST machine "off and on" during this time period. He would make ice cream mixes, milks, and creams. He would take a bag off a pallet, open it and empty it into the mixing machine. T.22. A full pallet would require him to reach above his head. *Id.* Most of the bags were 50 pounds and contained whey *Id.* The number of bags varied per day, but he did between 100 and 300 bags per shift. *Id.* He stated that this was manual labor and required a lot of pulling and lifting. T.24.

3. Mr. Rushing testified that his work is labor intensive. He did a lot of lifting and pulling on a daily basis. T.21. He stated that the top row of the whey bags was between 44 and 48 inches off the ground, which was about mid-chest level. T.26. However, the pallet was on a platform and he was on a grate that was lower than the platform. T.27. He stated that most of his work was below the shoulder level. T.28. The majority of the time he would use both arms to pull the bags off the pallets.

4. Mr. Kenneth Felty testified for the Respondent. He has been employed by the Respondent for 8 years. He reviewed the job description. He measured the pallets of whey and stated that the top level was 44 to 48 inches off the ground. T.42. The HTST did not require lifting at or above the shoulder. T.43. However, he did not perform this job.

5. On cross-examination, Mr. Felty testified that the cocoa powder was the only pallet stacked higher than 44 to 48 inches. T.44. However, the Petitioner would only have to do this one day a week at most. T.45. The pallet would get lower as they took the bags off. *Id.* He stated that there were instances in the course of one day multiplied by several days in a year over several years where the Petitioner was lifting 50 pound bags off a pallet that were at or above the shoulder level. T.47.

6. Petitioner was previously seen at Memorial Physical Therapy Center in 2006. He attended physical therapy from May 3, 2006 through June 2, 2006. According to the outpatient self-evaluation form of May 3, 2006, Mr. Rushing reported that he had medial epicondyldtis and ulnar transposition in both arms in 2002 and 2003. His main complaints were in his right side lower back and shoulder. He was not sure if this was work-related. On May 24, 2006, Petitioner had pain in the right posterior shoulder region under the axilla at the border of the lateral scapula. He reported that he did not sleep well at night and tossed and turned especially when he rolled on his right side. He was discharged on June 2, 2006. At the time of his discharge, Petitioner had met the short term goals, but was to continue with a home exercise program. RX.4.

7. Mr. Rushing presented to Dr. Rawdon of Healthcare Physicians of Southern Illinois on January 19, 2010 for right shoulder pain. He had no known injury. PX.8. He was 5' 10" tall.

8. Petitioner underwent a right shoulder MRI without contrast on March 11, 2010. The MRI revealed AC joint degenerative and inflammatory changes of moderate degree resulting in impingement with distal supraspinatus tendinosis and a partial thickness undersurface articular rim-rent type tear, but no full thickness tear or retraction. PX.7.

9. Mr. Rushing was seen by Dr. Donald Weimer of Belleville Orthopedics on March 18, 2010. The Petitioner had no history of injury, but performed a rather labor intensive job. He had pain throughout the shoulder, worse over the AC joint and somewhat down over the lateral deltoid area. Dr. Weimer noted that given Petitioner's age and activity level, right shoulder arthroscopy with decompression, distal clavicle excision and debridement was recommended. PX.6.

10. According to the Fort Dearborn Life Claim Form completed on March 25, 2010, Petitioner's right shoulder impingement, AC joint arthritis and rotator cuff tear were noted as not being work-related. RX.1. Dr. Weimer testified that his nurse completed the form and he does not necessarily review disability claim forms. PX.5. pg.29. His nurse marked that the right shoulder pathology was not work-related. *Id.*

11. Petitioner underwent right shoulder arthroscopy with arthroscopic subacromial decompression, arthroscopic distal clavicle excision, and debridement of bursal surface rotator cuff tendonosis on April 2, 2010. There was mild degenerative fraying of the posterior labrum. There was impingement present beneath the undersurface of the anterior acromion and the acromioclavicular joint. The bursal side of the rotator cuff was inspected and diffuse tendonosis was found, but no tear was identified. The area of the tendonosis was debrided. The post-operative diagnosis was right shoulder subacromial impingement, acromioclavicular joint osteoarthritis, bursal surface rotator cuff tendonosis. PX.8.

12. Following the surgery, Mr. Rushing underwent physical therapy with Pro Rehab. He was discharged from physical therapy on June 7, 2010. PX.9.

13. Petitioner was seen by Dr. Weimer on June 10, 2010. He was 10 weeks post right shoulder surgery. He was able to elevate to 180 degrees and external rotate to 60 degrees. The impingement, cross-arm, Jobe's and empty can tests were negative. His strength was +5. He was released back to work full-duty. PX.6.

14. At Respondent's request, Dr. Frank Petkovich reviewed the medical records and authored a report on November 8, 2011. He diagnosed Mr. Rushing with right shoulder degenerative arthritis, right acromioclavicular joint with impingement and tendinosis at the insertion of the supraspinatus tendon, right shoulder. He opined that his work had nothing to do with his condition. It did not cause any exacerbation, aggravation or acceleration of the underlying degenerative process. The surgery was ultimately necessary and the treatment was reasonable. RX.7.

15. Dr. Petkovich performed a Section 12 examination for the Respondent on December 7, 2011. He diagnosed Mr. Rushing with impingement of the right shoulder subacromial space with tendinitis at the insertion of the rotator cuff, and degenerative arthritis of the right acromioclavicular joint. He opined that Petitioner's employment

was not a cause for his condition. His job did not cause any exacerbation, aggravation or acceleration of his right shoulder condition. His condition was idiopathic and unrelated to his employment. All the treatment had been reasonable and necessary. He then authored a second report on February 28, 2012 following his review of Dr. Weimer's deposition and his review of the job history and description. His opinion remained unchanged. RX. 7.

16. Petitioner testified that he is currently able to work without any problems. T.15. His right shoulder will be stiff if he sleeps on it, which then requires him to take Ibuprofen. T.16.

17. Dr. Weimer was deposed on February 10, 2012. He is a board certified orthopedic surgeon. PX.5. He diagnosed Petitioner with impingement and a partial thickness rotator cuff tear. During surgery, he noted that the rotator cuff was frayed and performed debridement of the rotator cuff. He then took care of the impingement process and the arthritis at the acromioclavicular joint with decompression and distal clavicle excision. PX.5. pg.9. He had Petitioner off work from April 2, 2010 through June 10, 2010, when he was released back to work full-duty. PX.5. pg.11.

18. Dr. Weimer opined that Petitioner's job duties, given the type of duties and the length of time he was performing his duties, were a cause in the development of his problems which necessitated treatment. PX.5. pg.13. The treatment was reasonable and necessary.

19. On cross-examination, Dr. Weimer noted that Mr. Rushing performed a labor intensive job. It was unusual to see a person of his age with degenerative changes at his AC joint to the point it was causing impingement of the rotator cuff. He stated that if it was not job related, then what else was it related to as it was unlikely based on his age. PX.5. pg.18. He was not aware of any substantial injury to Petitioner's right shoulder. *Id.* Dr. Weimer did not review a physical demand analysis and did not know what activities Petitioner performed outside of work.

20. Dr. Weimer noted that there were no acute findings during the shoulder surgery. PX.5. pg.23. He noted that Petitioner's pathology would have developed over time. *Id.* His post-operative diagnosis was right shoulder subacromial impingement, acromioclavicular joint osteoarthritis and bursal surface rotator cuff tendinosis. Those are diagnosis commonly seen in aging adults. PX.5. pg.25. He stated that impingement syndrome is typically caused by performing activities at or above the shoulder level or with weightlifting. *Id.* He noted that Petitioner's job description did not mention any work at or above the shoulder level. PX.5. pg.26. He opined that the impingement caused the rotator cuff tendinosis. PX.5. pg.27.

21. Dr. Frank Petkovich was deposed on March 5, 2012. Dr. Petkovich is board certified in orthopedic surgery and is an independent medical evaluator. RX.7. pg.4. He performed an IME on the Petitioner on December 7, 2011. He reviewed the MRI and found it consistent with impingement in the right shoulder with degenerative changes at the acromioclavicular joint. RX.7. pg.10. He diagnosed Petitioner with impingement of the right shoulder subacromial space with tendinitis at the insertion of the rotator cuff and degenerative arthritis of the right acromioclavicular joint. RX.7. pg.12. He stated that most of the time impingement is idiopathic. He testified that repetitive overhead work and weightlifting can cause impingement and degenerative changes. RX.7. pg.13.

22. Dr. Petkovich opined that Petitioner's impingement caused the tendinitis in the right shoulder at the insertion of the rotator cuff. RX.7. pg.15. He did not believe that Petitioner's employment had anything to do with his underlying degenerative condition in his right shoulder, specifically his degenerative arthritis right acromioclavicular joint or the bone spurs in the subacromial space and the tendinitis at the insertion of the rotator cuff. *Id.* He did not have a rotator cuff tear so his impingement was not far enough along that it had advanced to a tear. His right shoulder pathology was idiopathic. *Id.*

There is no legal requirement that a certain percentage of the workday be spent on a task to support a finding of repetitive trauma. The Commission often categorizes compensable injuries into two types--those arising from a single identifiable event and those caused by repetitive trauma. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, 1028, 106 Ill. Dec. 235 (1987). An employee who alleges injury from repetitive trauma must still meet the same standard of proof as other claimants alleging accidental injury. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264, 144 Ill. Dec. 794 (1989). The employee must still show that the injury is work-related and not the result of a normal degenerative aging process. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979, 983, 259 Ill. Dec. 918 (2001).

It is for the Commission to determine, as a matter of fact, whether a pre-existing condition has been aggravated, and that determination will not be overturned unless it is against the manifest weight of the evidence. *General Electric v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 60 Ill. Dec. 629 (1982). Even under a repetitive trauma concept, the petitioner must establish that the injury was related to his employment. *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 109 Ill. Dec. 634 (1987). Repetitive trauma claims generally rely upon medical testimony to establish the causal connection between the work performed and the claimant's disability. *Nunn*, 157 Ill. App. 3d at 477.

The Commission notes that the evidence establishes that Mr. Rushing had a degenerative condition in his right shoulder that required surgery. The surgery revealed mild degenerative fraying of the posterior labrum along with impingement. While Petitioner may have treated for

his right shoulder in 2006, no evidence was admitted into evidence establishing that Petitioner underwent any medical treatment to his right shoulder between June 2006 and January 2010.

During the period between June 2006 and January 2010, Petitioner was working a variety of jobs for the Respondent. His job duties required lifting 50 pound bags up to 300 times a day, or filling bags up to 1000 times per day. The Commission finds that Petitioner's job duties were repetitive in nature. Also, there is no evidence that any of Petitioner's non-work related activities contributed to his right shoulder condition. Therefore, the Petitioner proved that his right shoulder condition was aggravated or accelerated by his repetitive work duties and that his condition is causally related to his job duties.

The Commission further finds the opinion of Dr. Weimer more persuasive than the opinion of Dr. Petkovich. Dr. Weimer noted that the condition was degenerative in nature, but was unlikely due to his age given he was only 39. He opined that it was work-related given his job required manual labor, was repetitive in nature and he performed it for a lengthy period of time. Dr. Petkovich's opinion is that it is likely idiopathic in nature. However, his opinion ignores the fact that Petitioner's job duties were repetitive in nature and did require overhead lifting of heavy bags. All of which can contribute to Petitioner's condition.

The Commission finds the Petitioner is entitled to TTD from April 2, 2010 through June 10, 2010, representing 10 weeks. The Petitioner is entitled to medical expenses in the amount of $5,589.19. The Commission finds that the Mr. Rushing sustained 10% loss of use of the right shoulder pursuant to Section 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 30, 2013, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $620.34 per week for a period of 10 weeks, from April 2, 2010 through June 10, 2010, 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 $558.31 per week for a period of 50 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $5,589.19 for medical expenses under §8(a) of the Act, and subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court

DATED: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 4-22-14
052

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID MCCORMICK,

Petitioner,

14IWCC0397

vs. NO: 11 WC 44752

PIERCY AUTO BODY, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability (TTD), medical, and permanent partial disability, and being advised of the facts and applicable law, hereby reverses the Decision of the Arbitrator and finds that Petitioner's current condition of ill-being is causally related to his April 7, 2011 work-related accident.

The Commission finds that the Petitioner is entitled to TTD from November 3, 2011 to April 17, 2012, representing 23-5/7 weeks. The Petitioner is entitled to medical expenses in the amount of $10,032.76, which includes $9,460.07 that was paid by the Illinois Department of Public Aid, and the outstanding bill from Central Illinois Neuro Health in the amount of $535.69 and Bloomington Heart Institute in the amount of $37.00. The Commission finds that Petitioner sustained twenty-five percent loss of use of the person-as-a-whole pursuant to Section 8(d)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. On April 7, 2011, Mr. David McCormick was preparing an engine and transmission for painting. The caster wheel exploded causing the engine hoist to strike him in the back of the head knocking him to the floor. T.9. He saw stars, but did not lose consciousness. He had a lump and a gash in his head. T.10. He went home for lunch around 12:30 p.m. and was still bleeding. He returned and continued to work his regular duties.

2. Jason Hospelhorn, the President of Piercy Auto Body, testified that he received a phone call from his manager informing him the hoist broke and fell on Petitioner's head. T.33. When he arrived at the shop, Petitioner had already resumed working. Petitioner showed him the gash and bump on his head. The Petitioner declined treatment. T.34. He noted there was dry clotted blood on the injury. T.35.

3. Mr. McCormick testified that he started to lose some strength in his arms and had pain running down the back of his neck and into his shoulders. T.12. At first he thought it was just a "crook" in his neck so he changed his pillow. *Id.* He started switching pillows about a week to two weeks after the accident. T.13. He denied prior cervical pain, right arm pain and right hand pain.T.22.

4. Petitioner continued to work his regular job and quit on April 29, 2011. T.13. He stated that initially he was going to be off for the summer as he did not have a sitter for his daughter. However, he then had the issue with his arm and had to stop working. *Id.* He was in constant pain when he last worked for the Respondent. He could not pour milk out of a gallon jug. He could not lift 10 pounds. T.14. His arm did not get any better while off work. He was taking care of his seven and a half year old daughter. T.26. He testified that he did not play with her or horse around with her while he was off work. T.27.

5. Mr. Hospelhorn testified that Petitioner continued to perform his job through April 29, 2011. He testified that about 3 weeks after the accident, the Petitioner advised him that he was having a hard time lifting his arm above his shoulder. T.35. The Petitioner told him that he would have to paint stuff by turning it sideways as a way to reach the higher parts of the object. T.36.

6. Mr. Hospelhorn stated Petitioner showed up to work at 7:45 a.m. on the day he quit. The Petitioner stated that his arm was bothering him and he could not lift it above his shoulder. T.36. He stated that he was having issues completing his job and issues with his spouse. T.37. Mr. McCormick told him he quit and that he had to take care of his daughter. *Id.* Mr. Hospelhorn was not aware of the Petitioner having any issues prior to the accident. He further testified that the Petitioner did not have any issues performing his job after the accident. T.38. He performed his regular duties for about 3 weeks before he started having issues with his shoulder and issue with lifting his arm. T.39.

7. Petitioner testified that between the end of April and July, when he went to the doctor, he contemplated suicide several times as he could no longer take the pain. T.26. He did not go to the ER as he did not have insurance and had no way to pay for the treatment. *Id.*

8. McCormick presented to Dr. Robert Duncan of Colfax Family Chiropractic on July 8, 2011. He reported pain in the neck and right shoulder following a work accident. His pain had been slowly increasing since the accident. The diagnosis was cervicalgia and dorsalgic with radicular neuralgia and associated vertebral subluxations. PX.2. He treated with Dr. Duncan for 3 visits only. T.18. In lieu of payment, Petitioner's wife provided marketing services to Dr. Duncan.

9. Petitioner was seen by Linda Cooper, NP of Sugar Creek Primary Care on August 8, 2011. He reported that his pain started in the back of his head and went down the right shoulder through the arm. He had burning pain since June. Two weeks after the accident, he developed pain in the right side of his neck, along the top of his right shoulder, and in his posterior right forearm. He had a large knot on top of his shoulder base of the neck. He started lifting weights using a dumbbell but was unable to curl his right forearm with more than 10 pounds due to weakness. Examination of the head and neck was normal with satisfactory range of motion. His strength was adequate with normal stability. The right upper extremity was normal to inspection. He had full shoulder extension, flexion and rotation. His mood, affect and judgment were appropriate. The diagnosis was muscle spasm. PX.4. Dr. Sumit Ranjan took Petitioner off work pending his neuro-surgeon evaluation.

10. Petitioner underwent MRI of the cervical spine on August 23, 2011 that revealed mild degenerative changes at C5-C6. PX.5. The right shoulder MRI was unremarkable.

11. Petitioner underwent an MRI of the cervical spine on September 26, 2011 that revealed an abnormal signal with enhancement within the cervical cord at the C4 level. The MRI was consistent with an intramedullary lesion. Infectious/inflammatory and neoplastic etiologies were diagnostic considerations. PX.7.

12. Jerry Frank completed a First Report of Injury on September 29, 2011. It was noted Petitioner was injured on April 7, 2011 when a hoist struck his head. He now had compressed discs in the neck affecting the nerve in his neck, shoulder and right arm. He last worked on April 29, 2011. PX.14.

13. Petitioner underwent an MRI of the cervical spine on October 28, 2011 that again demonstrated the intramedullary lesion at C4. The enhancement was more pronounced since the prior MRI. The finding was concerning for intramedullary neoplasm. PX.8.

14. Mr. McCormick was seen by Dr. Emilio Nardone on November 8, 2011. He reviewed the MRIs and recommended an EMG/NCV to better delineate the problem. The Petitioner had narrowing of the disc at C4-C5, C5-C6 with a slight anterolisthesis of C4 and C5 on flexion view. PX.6.

15. Petitioner underwent an EMG on December 5, 2011 that revealed right C6 radiculopathy, at least moderate, mild right median neuropathy at the wrist or carpal tunnel syndrome. Early mild left ulnar nerve entrapment at the elbow was also seen. RX.3.

16. Petitioner underwent a myelographic CT scan of the cervical spine on January 13, 2012. The test revealed mild cervical spondylosis at C4-C5 and C5-C6. There was uncovertebral osteophyte formation narrowing the right neural foramen at C4-C5 and C5-C6 and left neural foramen at C5-C6. He also underwent a cervical myelogram for right shoulder, scapular and neck pain. The cervical myelogram showed no significant extradural defect. PX.1.

17. Petitioner underwent a C4-C5, C5-C6 anterior decompression with microsurgical dissection, C4-C5, C5-C6 allograft and fusion, C4-C6 anterior plating on January 27, 2012. The post-operative diagnosis was spondylosis with foraminal stenosis. PX.1.

18. Dr. Nardone authored a report to Petitioner's attorney on February 14, 2012. He opined that Petitioner's work injury caused the symptoms for which he was treated and required surgery. The foraminal stenosis was pre-existing, but the fact that he developed a neurological deficit, and also the signal change within the spinal cord seemed to have a direct relationship with the work injury of May 2011. PX.1.

19. Petitioner underwent an IME with Dr. Andrew Zelby on February 27, 2012. He diagnosed Petitioner with cervical spondylosis, benign neoplasm of the spinal cord, and history of anterior cervical discectomy and fusion. The intramedullary abnormality in the spinal cord was not traumatic in origin. The work injury did not cause any condition in his cervical spine or cause the modest degenerative condition to become symptomatic. The intramedullary was not consistent with myelomalacia. If it were traumatic, then he would have had symptoms instantaneous and profound with the onset of paralysis. His lack of symptoms for 3 weeks, along with the findings on the diagnostic studies demonstrated the injury did not cause his constellation of symptoms or the intramedullary findings in the spinal cord. The surgery was not reasonable or necessary. There was no relationship between his reported injury and the intramedullary abnormality in his spinal cord. He sustained no permanency. RX.1.

20. Petitioner was seen by Dr. Nardone on April 17, 2012. Petitioner was happy with the results and the x-rays looked good. The Petitioner was discharged from care with no

restrictions. Because of the signal change within the spinal cord, he recommended a six month check-up. PX.12.

21. Petitioner testified that he did not return to work until October 2012. Mr. Richard Taylor testified that the Petitioner returned to his prior job performing the same duties. T.45. He stated that he can only sleep in a couple of positions. His shoulder tends to dislocate and he has a little bit of fatigue in his arm. T.22. He has lost a little bit of range of motion in his neck. *Id.* His right arm pain is not 100 percent. T.23. He also has some atrophy in his right biceps. *Id.*

22. Dr. Nardone was deposed on November 6, 2012. He is board certified in neurosurgery. PX.1. He testified that all the test results point to the accident as the cause of the injury that required the surgery. PX.1. pg.11.

23. On cross-examination, he testified that the findings on the MRI, CT scan and myelogram would have pre-dated the work accident. He stated that the Petitioner's injury was kind of discrete and did not have the signal and overall characteristics of an expansive lesion. He stated that there was a small probability that it developed on its own without trauma, but typically this condition is associated with trauma. PX.1. pg.14. He stated that any trauma that causes sudden movement of the neck or movement of the spinal cord could cause his condition. Symptoms, however, would typically occur immediately. Some may have delayed symptoms, but a large majority of people would experience immediate symptoms within the next one to two days. *Id.* He stated that if the Petitioner did not experience symptoms within a couple of days, then it was more difficult to put together. *Id.*

24. Dr. Nardone testified that if the Petitioner did not seek treatment for 3 months, his opinion would be impacted. He stated that three months is a long period and makes it difficult to justify a statement that the trauma was the only cause of the symptoms. PX.1. pg.15. He stated that the symptoms were coming from the myelomalacia, which was coming from the lesion in the spinal cord. PX.1. pg.16.

25. Dr. Zelby was deposed on February 21, 2012. He is board certified in neurosurgery. He stated that his diagnosis was degenerative in nature except what was within the substance of the spinal cord. He stated that the lesion was not traumatic, rather it was neoplastic. It was not clear what it was. RX.1. pg.13. It was something that was non-degenerative, non-traumatic that was in the spinal cord that was not the spinal cord. *Id.* There was no way to determine how long it had been present. *Id.* He stated that if the changes in the spinal cord were related to the trauma, then the symptoms would have been instantaneous and dramatic like as in quadriplegia. There were no acute abnormalities to suggest that the incident caused or accelerated any condition. RX.1. pg.14. He noted that the symptoms did not present for 3 weeks. Given it took three

months to seek treatment, it was obvious that he sought treatment for a condition that had nothing to do with an incident. RX.1. pg.15.

26. He stated that the surgery was not necessary. RX.1. pg.16. He had mild degenerative changes that had no huge pathology. He had no condition that was amenable to surgical treatment. He stated that the Petitioner sustained a contusion to the scalp and given the timing of the symptoms, he would be hard pressed to find medical evidence to support any other diagnosis. RX.1. pg.17. There is no medical evidence to support that the medical treatment was causally related to the accident *Id.*

27. On cross-examination, Dr. Zelby stated that C6 radiculopathy is a sign of neurological impairment. RX.1. pg.19. He stated that deltoid and bicep weakness on one side can be indicative of neurological problem. RX.1. pg.20. He stated that hypothetically speaking, being struck on the head by a car engine could aggravate a degenerative cervical condition. RX.1. pg.21. He stated that it is possible he could have cervical pain and not treat with a doctor. He had a small bone spur that was slightly encroaching on the spinal fluid sleeve and causing trace narrowing of the channel on the right. RX.1. pg.23. This is not consistent with right arm pain as there is no neural impingement.

The petitioner has the burden of establishing, by a preponderance of the evidence, some causal relation between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 63, 541 N.E.2d 665, 669, 133 Ill. Dec. 454 (1989). The determination as to causal connection falls uniquely within the province of the Commission and will not be overturned unless it is contrary to the weight of the evidence. *Boatman v. Industrial Comm'n,* 256 Ill. App. 3d 1070, 1071-72, 628 N.E.2d 829, 830, 195 Ill. Dec. 365 (1993). It is solely within the Commission's province to judge the credibility of witnesses, determine what weight to give testimony, and resolve conflicting evidence, including medical testimony. *McRae v. Industrial Comm'n,* 285 Ill. App. 3d 448, 451, 674 N.E.2d 512, 514, 220 Ill. Dec. 969 (1996).

The Commission finds that the delay in seeking medical treatment does not support a finding of no causal connection. It is well established that an employee will not be denied compensation because he continued to work for as long as he could after the injury. *Christman v. Industrial Comm'n* (1989), 180 Ill. App. 3d 876, 536 N.E.2d 773. There is sufficient evidence that the Petitioner began to experience symptoms shortly after the accident. Those symptoms were not present prior to the accident. They are causally related to his work accident.

The parties stipulated that the Petitioner sustained a work-related accident on April 7, 2011. The accident was reported and the Petitioner continued to work. The Petitioner testified that he started to lose some strength in his arms and had pain running down the back of his neck and into his shoulders. Mr. Hospelhorn testified that Petitioner advised him that he was having a hard time lifting his arm above his shoulder. The Petitioner also advised Mr. Hospelhorn that he had to alter the way in which he worked. The Commission notes that none of those issues were

present prior to the accident. In fact, Mr. Hospelhorn testified that he was not aware of the Petitioner having any issue performing his job prior to the accident.

The Commission finds the opinion of Dr. Nardone more persuasive than the opinion of Dr. Zelby. Dr. Nardone noted that some people may have a delayed onset of symptoms. He further noted that all of the tests point to the accident as being the cause of Petitioner's condition. Dr. Zelby, however, testified that the condition was degenerative in nature and there was nothing to suggest the incident caused or accelerated any condition. However, he then testified that being struck in the head by a car engine could aggravate a degenerative condition. He further noted that it was possible to have cervical pain and not treat with a doctor.

The Commission is not persuaded by the opinion of Dr. Zelby that, despite being hit in the head by an engine hoist, petitioner's condition is not related to the work accident. There is no evidence of any other accident as being the cause of Petitioner's condition. The chain of events demonstrates that Mr. McCormick's condition is causally related to his work accident.

Therefore, the Commission finds Petitioner proved that his current condition is causally related to the work-related accident. The Petitioner is entitled to TTD from November 3, 2011 through April 17, 2012, representing 23-5/7 weeks. The Petitioner is entitled to medical expenses in the amount of $10,032.76. The Commission finds that Petitioner sustained twenty-five percent loss of use of the person-as-a-whole pursuant to Section 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 7, 2011, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $441.64 per week for a period of 23-5/7 weeks, from November 3, 2011 through April 17, 2012, 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 $397.48 per week for a period of 125 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of 25% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $10,032.76 for medical expenses under §8(a) of the Act, and subject to the fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $70,200.00. 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: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

MJB/tdm
O: 4-22-14
052

DISSENT

I respectfully dissent from the decision of the majority. Arbitrator Mathis' findings are both thorough and well reasoned. This decision is correct and should be affirmed.

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jame Vaughn,

Petitioner,

14IWCC0398

vs. NO: 13 WC 8414

State of Illinois,
Shawnee Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 12, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:bjg
0-5/6/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0398

VAUGHN, JAMES Case# **13WC008414**

Employee/Petitioner

SOI/SHAWNEE CORR CTR

Employer/Respondent

On 11/12/2013, 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:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
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

NOV 12 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Vaughn
Employee/Petitioner

v.

SOI/Shawnee Corr. Ctr.
Employer/Respondent

Case # **13** WC **8414**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Herrin**, on **October 9, 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. [ ] 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 **June 21, 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 $**58,080.00**; the average weekly wage was $**1,116.92**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

Respondent is entitled to a credit of $**if any** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical expenses outlined in PX1 within the limits of Sections 8(a) and 8.2 of the Act. Respondent shall be given credit for any amounts previously paid through its group carrier and shall hold Petitioner harmless from any claims made by any healthcare providers for which Respondent is receiving this credit, as provided in §8(j) of the Act.

The petitioner has reached Maximum Medical Improvement, but the Arbitrator finds that he has suffered no permanent disability as a result of the accident.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

November 12, 2013
Date

NOV 12 2013

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES VAUGHN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13 WC 08414
	)	
STATE OF ILLINOIS/SHAWNEE C.C.,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

The petitioner is a Correctional Officer. On June 21, 2012, he was assigned to the inmate yard. There is a phone in the yard which is secured to the wall in a locked box. The phone rang, and the petitioner turned to answer it. He testified that he dropped the lock, bent over to retrieve it, and while straightening up, struck his head on the corner of the box. He testified that he was not paying attention to his location vis-a-vis the lockbox because he was concentrating on the inmates' location. He wrote up an incident report that day. See RX2.

The petitioner reported to the Heartland Regional Medical Center Emergency Room. He provided a consistent history and was noted to have a small abrasion. A CT scan was done and was normal. He was provided pain medication and discharged. PX3.

The petitioner did not seek any follow-up treatment. He acknowledged having seen his family physician for other issues in the interim and not discussing this injury. He returned to work and has continued to work in his pre-injury position. He testified to a bump on the scalp and to taking over the counter medications for persistent headaches.

OPINION AND ORDER

Accident and Causal Relationship

For an accidental injury to arise out of employment, its origin must be in some risk connected with or incidental to the employment. See, e.g., *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill.2d 52, 63 (1989). While the mere act of bending over is by itself not normally indicative of increased risk, in this case, the petitioner's duties necessarily diverted his attention to a potential threat. The Arbitrator finds this did increase his risk of injury, and therefore finds a work-related accident did occur within

the meaning of the Act. The abrasion was the result of the petitioner's striking his head on the box; medical bills and nature and extent of the injury will be dealt with in their individual sections below.

Medical Expenses

The treatment incurred on June 21, 2012 appears medically appropriate. The respondent is directed to pay those medical bills pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for any and all amounts previously paid but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

Nature and Extent of the Injury

Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

Applying this standard to this claim, the Arbitrator first notes neither party submitted an AMA impairment rating. The other four factors provide the following:

1) The petitioner was a corrections officer;

2) He was 35 on the date of loss;

3) He effectively lost no time from work, and has continued to work in his usual pre-injury occupation;

4) He testified to persistent headaches, but did not seek ongoing medical care.

Considering these points and the evidence as a whole, the Arbitrator finds this to have been a minor incident. Objective studies were normal and the petitioner suffered only a minor abrasion, not a laceration or significant trauma. In view of the totality of the evidence, the Arbitrator finds no permanent disability to have been established.

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

FERMIN RIVERA,

Petitioner,

14IWCC0399

vs. NO: 10 WC 33061

LABOR SOLUTIONS,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court. Pursuant to the Circuit Court's Order dated September 12, 2013, Judge Robert Lopez Cepero found that the Commission exceeded the scope of his first remand Order dated September 26, 2012. Judge Cepero ordered the findings on causal connection in the IWCC's Decision dated January 15, 2013 stricken. This matter was remanded back to the Commission to document specifically its calculation of the medical award with a thorough explanation of the amount awarded.

In his previous Order dated September 26, 2012, the Circuit Court ordered the Commission to "document specifically its calculation of the medical award with a thorough explanation of the final order amount." In conformance with that Order, the Commission, in its Decision and Opinion on Remand dated January 15, 2013, authored a nine page decision explaining its award of the medical bills.

The Commission found that the Respondent was not liable for the EMG/NCV in the amount of $8,609.00; that Respondent was not liable for the low back physical therapy after September 3, 2010 totaling $2,112.00; that the medical bills from Medicos Pain & Surgical Specialists totaling $12,843.52 were not reasonable or necessary; and, that the non-emergency

transportation charges provided by Marque Pain & Surgical Specialists in the amount of $2,000.00 were unreasonable and unnecessary. The Commission relied upon the totality of the record and in part upon the opinions of Dr. Jesse Butler and Dr. Edward Pillar in support of its Decision.

The Commission's Decision and Opinion on Remand dated January 15, 2013 did not rely upon any new or different causal connection opinions. The opinions of Dr. Butler and Dr. Pillar were admitted into evidence and without objection during the January 3, 2011 arbitration hearing. The Commission adopted the opinions of Dr. Butler and Dr. Pillar. Those opinions were relied upon as they are an integral part of the record. The Commission therefore affirms the award from its Decision and Opinion on Remand dated January 15, 2013 and again relies upon the same opinions and evidence contained in the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Mr. Rivera testified that he was employed with Labor Solutions (a staffing agency) for approximately four years. T.6-7. Through Labor Solutions, the Petitioner worked for CPC Laboratories performing maintenance and cleaning. T.7.

2. On June 7, 2010, the Petitioner was cleaning fluids when he slipped and fell at CPC Laboratories. T.9-10. Immediately after the accident, Petitioner completed an accident report and was taken to Concentra Medical Center. T.10.

3. According to the Concentra records, the Petitioner reported pain in his left shoulder, elbow and wrist. PX.1. While the Petitioner testified that he complained of back pain while at Concentra, the Concentra medical record indicates that Petitioner stated that he slipped and fell on his left shoulder, elbow and hurt his wrist. T.21 & PX.1. The examination revealed full range of motion of the neck. There was tenderness of the lateral aspect of the shoulder and deltoid, and normal rotator cuff motion. *Id.* X-rays of the left wrist and shoulder were negative. Mr. Rivera was given light duty restrictions and returned to work. T.11. The Petitioner testified that he was later given an assistant because he was in "bad condition." T.12. The Concentra record is silent as to complaints of injury to the back.

4. The Petitioner presented to Concentra on June 10, 2010 with continued complaints of left shoulder, elbow and wrist pain. PX.1. Examination of the shoulder revealed tenderness of the AC joint with rotation. *Id.* He was returned to regular duty. *Id.* Petitioner followed-up with Concentra on June 14, 2010 and June 16, 2010 with continued complaints of shoulder, elbow and wrist pain. *Id.* Again, the records from Concentra contain no reference of low back pain.

5. In contrast to the medical records, the Petitioner testified that during his second and third visits with Concentra, he complained of low back pain and informed the doctors he continued to be in "bad shape." T.23.

6. On June 18, 2010, Mr. Rivera presented to Concentra and noted pain in the left wrist, elbow and shoulder, and pain in the lumber region. PX.1. He denied any radiation or prior injury and his symptoms were exacerbated by flexion and lifting. *Id.* Examination of the lumbar region revealed a negative bilateral leg raise, normal sensation and tenderness of the right paraspinous muscle. *Id.* Petitioner was diagnosed with a lumbar strain, wrist contusion and shoulder strain. He was given work restrictions consisting of no lifting over 20 pounds, no bending more than 3 times per hour and no squatting, pushing or pulling. *Id.* An x-ray of the lumbar spine revealed spurs of the osteopenia. There were no fractures, subluxation, spondylolosthesis or spina bifida. However, degenerative facet arthropathy was seen. *Id.*

7. On June 25, 2010, Mr. Rivera presented to Concentra and reported that he had been working within his work restrictions. His pain was located in the anterior aspect of the left shoulder and left posterolateral aspect of the trunk. He rated his pain as a 1 out of 10. The pain did not radiate into his leg. The diagnosis was a shoulder strain, wrist contusion and contusion of the lumbar region. Petitioner was discharged from care and returned to work with no restrictions.

8. The Respondent referred Mr. Rivera to Dr. Edward Pillar of Excel Occupational Health Clinic. The Petitioner presented to Dr. Pillar on July 27, 2010 and complained of pain. T.12 and PX.2. The Petitioner provided a history of his injury and noted that he experienced pain in the left shoulder, forearm and wrist along with pain in the right low back. PX.2. Petitioner reported that he was discharged from Concentra, that therapy provided no relief and that he continued to experience pain in the left shoulder and right low back. *Id.*

9. Dr. Pillar's examination revealed a negative bilateral straight leg raise and good active range of motion in the lumbar spine with no lumbar paraspinal muscle spasms. PX.2. He had tenderness to palpation in the lumbar paraspinal musculature; however, Dr. Pillar noted Petitioner required a significant amount of encouragement to give full strength during manual muscle testing. He did not demonstrate any focal weakness around the left shoulder. *Id.* O'Brien signs were essentially negative on the left and right. Petitioner was diagnosed with persistent low back pain and a left shoulder contusion. He was allowed to continue to perform his regular work activities. *Id.*

10. Mr. Rivera presented for a follow-up visit with Dr. Pillar on August 3, 2010 with continued complaints of left shoulder pain and low back pain that radiated down his right leg. He rated his pain as 5 out of 10. PX.2. Dr. Pillar reviewed the records from Concentra and noted there were no complaints of low back pain. *Id.* Examination of the

low back showed no evidence of radiation to the leg and Dr. Pillar returned Petitioner to work without restrictions. *Id.*

11. On August 10, 2010, the Petitioner had continued complaints of left shoulder pain along with pain down the right side of his leg. PX.2. Petitioner noted physical therapy from Concentra provided very little relief. The straight leg raise examination was positive on the right and negative on the left. There were positive Waddell signs and the doctor noted complaints of "RLE pain of shoulder not withstanding negative ss (b), +biceps on L&R (denies previous shoulder injury)." *Id.* Petitioner was diagnosed with low back pain with possible lumbar radiculopathy, left shoulder pain and right shoulder weakness. Petitioner was again given no work restrictions.

12. On August 17, 2010, Mr. Rivera underwent another examination with Dr. Pillar. Dr. Pillar noted that he discussed this matter with Petitioner's physical therapist who stated that Petitioner demonstrated inconsistent findings on examination and demonstrated positive Waddell signs. The physical therapist reported that the indications suggested Petitioner was fabricating or at least exaggerating his low back pain complaints. *Id.*

13. Dr. Pillar noted that Petitioner's right and left shoulder demonstrated equal active range of motion. PX.2. The impingement signs were negative on the left. The straight leg raise was negative bilaterally in both the supine and seated position. Petitioner demonstrated full active range of motion in the lumbar spine with encouragement to give full effort. The Waddell signs were again positive with Petitioner complaining of low back pain with compression on top of his head. Dr. Pillar noted that there were no consistent objective abnormalities on examination and he demonstrated inconsistent findings on examination. Dr. Pillar could not relate any of Mr. Rivera's current complaints to the work-related injury of June 2010. *Id.* Petitioner was given no work restrictions and discharged from care. *Id.*

14. Mr. Rivera testified that he decided to go to Marque Medicos for treatment. Petitioner was examined by Sophia James, D.C. on August 30, 2010. T.26. Petitioner complained of left shoulder pain and a constant, pulsating low back pain going into the right leg down into the posterior knee. Petitioner rated his left shoulder pain as 6 out of 10. *Id.*

15. Dr. James' examination revealed some hypertnicity and tenderness of the left upper trapezius and left rhomboid. Active range of motion of the left shoulder revealed Petitioner could do flexion to 50 degrees, extension to 20 degrees and abduction to 70 degrees. PX.3. The internal and external rotation was within normal limits, but there was discomfort with external rotation. *Id.* Examination of the lumbar spine revealed active range of motion with flexion of 80/90 degrees and pain with extension of 20/30 degrees. *Id.* There was right and left rotation of 20/30 degrees with pain. *Id.* Deep tendon reflexes of the lower extremities were 2+ bilaterally. The bilateral dermatomal sensation was normal from L3 to S1 and muscle testing of the lower extremity was also within normal

limits at 5/5 bilaterally. *Id.* The x-ray of the left shoulder and lumbar spine revealed no evidence of fracture, dislocation, osseous or joint pathology. *Id.* Petitioner was diagnosed with left shoulder pain, low back pain and right lumbar spine radiculitis. He was prescribed physical therapy and an MRI of the left shoulder and lumbar spine was recommended. Directly after the examination, Dr. James opined that Mr. Rivera's accident of June 7, 2010 caused his current symptoms. *Id.*

16. An MRI of the left shoulder and lumbar spine was performed on September 3, 2010. PX.3. According to Dr. James, the MRI of the left shoulder revealed a large, full thickness tear involving portions of the infraspinatus and supraspinatus tendons. *Id.* There was a retraction to the mid portion of the humeral head and a small effusion. The MRI of the lumbar spine revealed numerous disc bulges from L2-L3 through L5-S1. Dr. James noted that the largest disc bulge at L4-L5 measured 5mm. *Id.*

17. On September 9, 2010, Mr. Rivera underwent a pain management consultation with Dr. Andrew Engel of Medicos Pain and Surgical Specialists on referral by Dr. James. PX.3. Examination revealed decreased range of motion to the left shoulder secondary to pain and full range of motion of the cervical spine. *Id.* The lumbar extension was limited secondary to pain and there was no S1 tenderness. *Id.* The straight leg was negative on the left. *Id.* An EMG was recommended and it was noted Petitioner would visit Dr. Ellis Nam, an orthopedic surgeon, for the tendon tear. In the notes, Dr. Nam recorded that the Petitioner stated that he did not want to return to work. Regardless, Dr. Nam released Petitioner to work with restrictions. Dr. Engel opined Petitioner's condition was related to his work accident.

18. An EMG study was performed on September 10, 2010. The needle examination of the right lower extremity musculature and lumbar paraspinal muscle was normal. There was no evidence of acute de-nervation of the lumbosacral nerve root and no evidence of a peripheral entrapment or polyneuropathy.

19. Petitioner met with Dr. Nam on September 13, 2010 and noted persistent pain and weakness. He described his pain as very aggressive. PX.5. Examination of the cervical spine revealed good range of motion and there was some tenderness of the left shoulder along the AC joint. *Id.* Dr. Nam reviewed the MRI findings of the left shoulder and noted a large nature of fluid, which was suggestive of acute injury. Dr. Nam recommended left shoulder arthroscopy intervention. *Id.* Dr. Nam took Petitioner off work until October 11, 2010. PX.3.

20. Petitioner underwent nine additional therapy sessions between September 14, 2010 and October 29, 2010 with Marque Medicos and Medicos Pain & Surgical Specialists.

21. Dr. David Raab performed a Section 12 examination of the left shoulder at the request of the Respondent on November 1, 2010. RX.1. Dr. Raab noted that Petitioner had a rotator

cuff tear of the left shoulder. There was evidence of retraction of the supraspinatus, subchondral cyst at the insertion of the supraspinatusm, as well as some atrophy of the supraspinatus that was indicative of chronicity of the rotator cuff tear. *Id.* He opined the tear was pre-existing and not related to the injury of June 7, 2010. *Id.* The need for surgery was not causally related to the fall and would have occurred with or without the work-related injury. *Id.* He found any work restrictions would not be related to the injury of June 7, 2010. Mr. Rivera was at MMI. *Id.*

22. Dr. Jesse Butler performed a Section 12 examination of the lumbar spine at the request of the Respondent on November 3, 2010. RX.3. Dr. Butler did not agree with the conclusion that the MRI revealed disc bulges. He noted the MRI was "remarkably" normal for Petitioner's age. *Id.* He found the back injury was not causally related to the work accident and Petitioner could return to work full-duty. *Id.* No additional physical therapy was needed as Petitioner had reached MMI and no additional care was necessary. He noted the EMG was not medically indicated and he underwent excessive physical therapy. *Id.*

23. Petitioner testified the Section 12 examination of the left shoulder lasted 30 minutes and the Section 12 examination of the low back lasted 5 minutes. T.20.

24. On November 8, 2010, Petitioner underwent an L4-L5 transforaminal epidural steroid injection, which provided minimal relief. PX.4. and T.17.

25. Petitioner testified that he continues to experience pain in his left shoulder, elbow and right side of his back along with a pulling sensation that goes down his right leg. T.11 Petitioner testified he had no previous injuries, accidents or treatment to his left shoulder, right leg or low back. T.18-19. He is still off work at the recommendation of his doctors. T.17. The physical therapy for his back was suspended, and he receives one day of therapy only for his shoulder. T.18. Petitioner rated his current back pain as 5 out of 10 and his shoulder pain as 7 out of 10. *Id.*

The Commission is not bound by the arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).

Under Section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. *University of Illinois v. Industrial*

Comm'n, 232 Ill.App.3d 154, 164, 596 N.E.2d 823, 173 Ill.Dec 199 (1992). The claimant has the burden of proving that the medical services were necessary and the expenses incurred were reasonable. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534, 758 N.E.2d 18, 259 Ill. Dec. 173 (2001). Whether an incurred medical expense was reasonable and necessary and should be compensated is a question of fact for the Commission. *University of Illinois*, 232 Ill. App. 3d at 164. A decision must be supported by facts contained in the record and not based on mere speculation or conjecture. *Illinois Bell Telephone Company v. Industrial Comm'n*, 265 Ill. App. 3d 681, 638 N.E.2d 307 (1994).

It is the function of the Commission to resolve disputed questions of fact and evidentiary conflicts. *Spector Freight Systems v. Industrial Comm.*, 93 Ill.2d 507 (1983). In deciding such conflicts, it is well established that the Commission has the authority to draw reasonable inferences from both direct and circumstantial evidence. *County of Cook v. Industrial Commission*, 69 Ill.2d 10, 12 (1977).

The Commission adopts the Decision of the Arbitrator concluding that Mr. Rivera's left shoulder injury was caused by the work accident. Therefore, the Commission affirms the award of TTD, unpaid medical bills and prospective medical as it relates to the left shoulder injury.

However, with regard to the low back injury, the Commission finds that the evidence demonstrated that Petitioner sustained a lumbar strain only as the result of his work-related accident. When Petitioner first sought treatment, the medical records contained no mention of a back injury. Before June 18, 2010, despite the fact that Petitioner was treated several times for the shoulder injury, there was no documented low back complaint.

Petitioner's own physical therapist found inconsistent findings as well as positive Waddell findings. He noted the Petitioner was exaggerating his lower back complaints on August 17, 2010. The physical therapist noted that additional physical therapy would be of limited benefit to Petitioner.

Dr. Butler reviewed the August 31, 2010 x-ray and the September 3, 2010 lumbar MRI. He noted it showed no evidence of disc herniation or stenosis and it was "remarkably" normal. Dr. Butler found no disc bulges and did not agree with the finding of a 3mm to 5mm disc bulge. Dr. Butler opined that no treatment was indicated, no condition of ill-being was related to his accident, additional physical therapy was not needed, and Petitioner was at MMI. Dr. Butler opined the Petitioner had excessive physical therapy, and no objective evidence indicated a need for the EMG/NCV.

The EMG was not reasonable and necessary as there is no medical evidence indicating a need for the EMG. This is corroborated by the fact that the EMG was normal and revealed no evidence of acute de-nervation of the lumbosacral nerve root, and no evidence of a peripheral entrapment or polyneuropathy. The lack of objective medical evidence in the records coupled with the negative x-ray and MRI, the positive Waddell findings, the opinion that the Petitioner

exaggerated his low back complaints as noted by the therapist, and the opinions of Dr. Butler and Dr. Pillar cause the Commission to conclude that the EMG/NCV performed on September 10, 2010 was unreasonable and not medically necessary. Therefore, the Respondent is not liable for payment of the EMG/NCV in the amount of $8,609.00.

According to the medical records, the Petitioner received physical therapy for his back and shoulder from August 30, 2010 through September 20, 2010 and also on October 8, 2010, October 27, 2010, November 1, 2010 and November 9, 2010. Petitioner failed to demonstrate sufficient credible evidence to support that continued physical therapy after September 3, 2010 was reasonable and necessary. Petitioner's statement to Dr. Nam that he did not want to return to work, the positive Waddell signs during examination on August 17, 2010, the therapist notes that he was exaggerating his symptoms, the normal x-rays and normal MRI combined with the opinions of Dr. Butler and Dr. Pillar all indicate that medical treatment after September 3, 2010 was not necessary. The Commission finds that the physical therapy to the back after September 3, 2010 was excessive and unreasonable. The Commission finds that the Respondent is not liable for the low back physical therapy after September 3, 2010 totaling $2,112.00.

The Commission further finds that based on the lack of objective medical evidence in the records, the negative x-ray and MRI, the positive Waddell findings, the opinion that the Petitioner exaggerated his low back complaints, and the opinions of Dr. Butler and Dr. Pillar, the treatment received from Medicos Pain & Surgical Specialists totaling $12,843.52 was unreasonable and not medically necessary. Therefore, the Commission finds that the Respondent is not liable for those payments totaling $12,843.52.

The Commission also finds that the non-emergency transportation provided by Marque Pain & Surgical Specialists was unreasonable. The Commission therefore finds that the Respondent is not liable for those payments totaling $2,000.00.

The Commission finds that the Respondent is liable for the medical bills from Dr. Nam totaling $501.00, Archer MRI totaling $3,106.00, Specialized Radiology Consultants totaling $115.00, and Marque Medicos totaling $5,154.00.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $245.33 per week for a period of 16 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,876.00 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for prospective medical care, specifically left shoulder arthroscopy, subacromial decompression, and rotator cuff repair along with all related benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 30 2014

Michael J. Brennan

MJB/tdm
O: 5-6-14
52

Kevin W. Lamborn

Thomas J. Tyrrell

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

☐ 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

Jeff Hickman,

Petitioner,

14IWCC0400

vs. NO: 07 WC 56155

HCR Manor Care Normal #401,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on Remand from the Circuit Court of Illinois. The Circuit Court vacated the Commission's Decision vacating the Arbitrator's award of benefits. Timely Petition for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, medical expenses, prospective medical care, credit due Respondent, and evidentiary issues, 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).

This matter was originally tried before Arbitrator Falcioni on September 11, 2008 as a 19(b) hearing. Arbitrator Falcioni issued his decision on September 22, 2008, finding that Petitioner suffered a work-related injury and awarded temporary total disability benefits and medical expenses. Respondent filed a Petition for Review. On October 7, 2009 the Commission found that Petitioner's failure to provide his Social Security Disability records and refusal to sign a consent form releasing the Social Security Disability records to Respondent was sufficient to

14IWCC0400

infer that the Social Security Disability records most likely contained information unfavorable to Petitioner and inconsistent with the Arbitrator's finding that Petitioner suffered an aggravation of his pre-existing conditions on August 20, 2007. The Commission remanded the case back to the Arbitrator for further proceedings to allow Petitioner the opportunity to provide the Social Security records.

Petitioner appealed the Commission Decision to the Circuit Court. On June 25, 2010, Circuit Court Judge Scott Drazewski remanded the case back to the Arbitrator with instructions for "Petitioner-Appellant to either provide the prior Social Security Disability records, or, if Petitioner continues to refuse to provide the records, then the Arbitrator will render a new decision that takes this refusal into account."

The matter was heard on remand before Arbitrator Falcioni on March 21, 2013. Petitioner's then available Social Security Disability records were entered into evidence, as was the original record of the September 11, 2008 hearing. Petitioner's counsel explained, and Respondent's counsel agreed, that the parties were proceeding "on the previous 19(b) decision for the medical and TTD accrued through the date of arbitration on 9/11/08 only. Those are the only issues up on review. We want to preserve all appeal rights with the original decision. We want to preserve our right to TTD, medical and permanency after the 9/11/08 decision to be decided at a later date." (T.8)

After reviewing the Social Security Disability records entered into evidence, the Arbitrator determined in his April 2, 2013 decision that "no new relevant evidence... [was] produced through the Social Security record which would affect [the Arbitrator's] opinions of causation on Petitioner's left knee, cervical area, or SI joint problems." The Arbitrator re-issued his original September 22, 2008 decision finding that Petitioner suffered an aggravation of his pre-existing left knee, low back and SI joint, and cervical spine conditions on August 20, 2007 and that his conditions were all causally related to the August 20, 2007 accident. The Arbitrator reinstated his original awards of temporary total disability benefits and medical expenses.

The Commission notes, as did the Arbitrator, that the Social Security Disability records that were produced include almost all of the same medical records provided at the original September 11, 2008 hearing. Most of the additional records released by the Social Security Administration that were not provided at the September 11, 2008 hearing dealt with unrelated medical issues and/or mentioned that Petitioner suffered from ongoing left knee, neck and low back issues prior to the August 20, 2007 accident, a fact that had been established with the medical records that had been originally provided at the September 11, 2008 hearing. Therefore, the Commission agrees with the Arbitrator that there was "no adverse new information" in the Social Security Disability records that were received. The Commission notes that the complete Social Security Disability record is no longer available. (PX20)

After reviewing and considering the Social Security Disability records that were produced and the evidence provided at the original September 11, 2008 hearing, the Commission finds that Petitioner suffered a temporary aggravation of his pre-existing conditions and that the aggravation had resolved by October 20, 2007.

Petitioner suffered from left knee, low back and cervical problems prior to the August 20, 2007 undisputed accident. The Commission notes that on March 28, 2007, Dr. Benyamin administered an interlaminar cervical epidural steroid injection due to Petitioner's ongoing cervical pain (PX30—PX9) and on August 5, 2007, Petitioner got a refill for Oxycodone due to ongoing low back pain and spasms. (PX30—T.42) The Commission further notes that Petitioner was working without restrictions even with is ongoing problems and that Dr. Benyamin noted that Petitioner was "functioning well with medication and injections." (PX30—PX9)

Following the August 20, 2007 accident, Petitioner complained of left knee, low back and neck pain. The Commission notes that Petitioner underwent SI and left knee injections, which he had not undergone for some time, after the accident. (PX30—PX6 & RX14) Petitioner also continued to undergo cervical injections (PX30—PX9) and underwent a course of physical therapy (PX30—RX10). Petitioner stopped attending physical therapy after October 31, 2007. (PX30—RX10) The physical therapy records show that on November 26, 2007, the physical therapist noted that Petitioner had put physical therapy on hold and stopped attending therapy. (PX30—RX10). The Commission notes that after undergoing conservative treatment after the August 20, 2007 accident, by October 20, 2007, Petitioner's overall complaints were basically the same complaints he had prior to the August 20, 2007 accident. (PX30—PX6, PX7 & RX10)

Regarding Petitioner's cervical condition, the Commission notes the cervical spine MRI taken on April 15, 2002, showed interval increase in the degenerative intervertebral disc space disease since May 19, 2000, broad-based central herniated disc protrusion at C3-4 which has increased since May 19, 2000, a large right central and foraminal herniated disc extrusion at C5-6 with compressive changes upon the cervical dural sac, moderate spinal stenosis and narrowing and compromise of the right C5-6 neural foramen, increase in the size of the broad-based central herniated disc protrusion at C6-7, and mild spinal stenosis at C6-7 which has increased since May 19, 2000. (PX30—PX7) The December 4, 2004, cervical MRI showed evidence of anterior fusion with metallic plate and screws at C5 through C7 and degeneration and minimal bulging of the annulus at C3-4. (PX30—PX4) The October 24, 2005, cervical MRI showed satisfactory appearance of anterior cervical fusion from C5 to C7, and slight narrowing of the intervertebral disc at C3-4 degenerative in nature. (PX30—PX5) And finally, the cervical MRI taken on October 23, 2007, after the accident, showed satisfactory appearance of anterior cervical fusion from C5 to C7 and suggestion of mild to moderate broad-based central and slightly left paracentral disc herniation at C3-4 level resulting in mild to moderate central stenosis without cord impingement. (PX30—PX3)

On March 3, 2008, Respondent's Section 12 examiner, Dr. Steven Delheimer, noted that the cervical MRI reports from 2002 and 2007 "were clinically unchanged and showed no objective evidence that the incident of August 20, 2007 aggravated or accelerated the pre-existing condition." (PX30—PX15) Dr. Delheimer found that what Petitioner suffered on August 20, 2007, was a soft tissue injury to the cervical spine which would have resolved in eight weeks. Dr. Delheimer also found that any ongoing symptoms after the eight week period were attributable to Petitioner's pre-existing degenerative cervical condition.

In reference to Petitioner's lumbar condition, Dr. Delheimer explained that Petitioner's pain was "unsubstantiated by any type of objective finding. The examination today showed the

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movements of his back and his gait to be significantly different from what I observed on the video surveillance tapes." (PX30—PX15) Dr. Delheimer opined that Petitioner did not sustain any lumbar injury on August 20, 2007 and explained that "regardless of the incident of August 20, 2007 there has been no aggravation, acceleration, or exacerbation of the pre-existing lumbar condition. Furthermore, any treatment to the lumbar spine following the incident of August 20, 2007 would be related to [Petitioner's] underlying degenerative disc disease." Dr. Delheimer felt Petitioner had reached maximum medical improvement regarding the August 20, 2007, accident and could return to work without restrictions.

Regarding his left knee condition, Petitioner was asked to see Dr. Lawrence Li, another Section 12 examiner for Respondent. (PX3—RX19) In his report, issued on March 3, 2008, Dr. Li diagnosed Petitioner as having significant underlying arthritis with an acute aggravation and explained that Petitioner's left knee "symptoms are pre-existing and were brought and temporarily aggravated by his work injury....I believe any aggravation of his underlying condition was temporary and would have resolved over a matter of one to two months....I believe that the treatment provided with the exception of the synvisc injections was related to the August 20, 2007 injury. The synvisc injections were for his underlying condition." Dr. Li did not feel Petitioner required a total knee replacement and that Petitioner had reached maximum medical improvement from the August 20, 2007 accident.

The Commission notes that Dr. Delheimer issued a second report on April 11, 2008, after reviewing Dr. Benyamin's records and found that Petitioner did not sustain a cervical injury on August 20, 2007, noting Petitioner's "significant history of prior neck complaints" and treatment just two weeks before the accident. (PX30—PX16 & RX21) Dr. Delheimer also changed his opinion regarding Petitioner's lumbar condition and found that "at worst" Petitioner suffered a soft tissue lumbosacral strain on August 20, 2007. The Commission finds this second report less persuasive than his first since the records from Dr. Benyamin failed to provide any significantly new information to Dr. Delheimer. Dr. Delheimer was already aware that Petitioner had a pre-existing cervical condition and that he had been treating periodically and taking medication for this pre-existing condition after reviewing Petitioner's other medical records when he issued his first report.

The Commission relies on the findings and opinions of Dr. Delheimer and Dr. Li and notes that both doctors reviewed not only Petitioner's medical records but the surveillance videos, as well. The Commission notes that the videos, all taken after October 1, 2007 (PX30—RX1), show Petitioner moving around and bending without difficulty. The Commission further notes that the surveillance videos fail to show Petitioner limping, a condition which Petitioner's former co-worker, Debra Garrells, and Dr. Steven Vincent, who conducted a psychological examination of Petitioner on September 25, 2007 for Petitioner's Social Security Disability claim, noted after the August 20, 2007 accident. (PX30—T.48-49, RX33)

Regarding the testimony of Debra Garrells, the Commission notes that during cross-examination, she admitted that Petitioner stayed with her following the accident, an action that indicates that she and Petitioner appeared to have more than a working relationship and leads the Commission to question her credibility in this matter. (PX30—T.49-50)

Based on the medical records, the Section 12 examination reports from Dr. Delheimer and Dr. Li, and the surveillance videos, the Commission finds that the limping Petitioner exhibited on September 25, 2007, had resolved by October 20, 2007, since the surveillance video taken in October 2007 showed Petitioner moving about, without a limp, as well as bending, stooping, walking and getting in and out of cars without difficulty. (PX30—RX1) The Commission finds that the surveillance videos show that Petitioner had returned to his functional, pre-accident state.

Therefore, based on a complete review of the entire record, the Commission finds that Petitioner suffered a temporary aggravation of his pre-existing left knee, low back and cervical spine conditions during the August 20, 2007, undisputed accident. The Commission further finds that the aggravations had resolved by October 20, 2007. The Commission finds that Petitioner is entitled to temporary total disability benefits from August 23, 2007 through October 20, 2007. The Commission further finds that Petitioner is entitled to medical expenses through October 20, 2007, per the fee schedule, and to a reimbursement of $46.29 for medications paid out-of-pocket through October 20, 2007 by Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the 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 shall pay to the Petitioner the sum of $604.29 per week for a period of 8-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $7,790.50 for medical expenses under §8(a) and 8.2 of the Act, and $46.29 as re-imbursement for out-of-pocket medication payments.

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.

No bond is required for removal of this cause to the Circuit Court by Petitioner. 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: MAY 30 2014
MJB/ell
o-05/06/14
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Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0400

HICKMAN, JEFF
Employee/Petitioner

Case# **07WC056155**

HCR MANORCARE NORMAL #401
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:

0564 WILLIAMS & SWEE LTD
JAN SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2542 BRYCE DOWNEY & LENKOV LLC
JUSTIN NESTOR
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeff Hickman
Employee/Petitioner

v.

HCR ManorCare Normal #401
Employer/Respondent

Case # **07** WC **56155**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **Ottawa**, on **3-21-13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [ ] Is Petitioner entitled to any prospective medical care?

L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD

M. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **8-20-07**, 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 **$2578.88**; the average weekly wage was **$906.43**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **1** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$11136.21** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,136.21**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Credits

Respondent shall be given a credit of **$11,136.21** for TTD, **$0** for TPD, and **$0** for maintenance benefits, for a total credit of **$0**.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $604.29/week for 54 5/7 weeks, commencing 8-23-07 through 9-11-08, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $5008.82 and $8157.00 to Millennium Pain Center, $1666.72 to McLean County Orthopedics, $255.90 to Clinton Internal Medicine, $423.00 to Central Illinois Neurohealth Sciences, $2797.43 to Diagnostic Neuro Technology, $17,197.81 to BroMenn, $2625.13 to Anesthesia Consultants, $800.06 to RX Third Party, $441.23 to Bloomington Radiology, and $5330.69 to John Warner Hospital.

In addition, Respondent is ordered to re-pay Medicare in the amount of $3655.26, and to reimburse Petitioner in the amount of $111.08.

Penalties

Respondent shall pay to Petitioner penalties of **$0**, as provided in Section 16 of the Act, Section 19(k) of the Act, and Section 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 28, 2013
Date

ICArbDec19(b)

APR 2 - 2013

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

This case was previously tried as a 19(b) hearing before Arbitrator Robert Falcioni on 9-11-08. In a 9-22-08 decision, Arbitrator Falcioni awarded TTD for 54 5/7 weeks, from 8-23-07 through the date of hearing on 9-11-08; payment of medicals in the amount of $44,703.79; reimbursement to Medicare in the amount of $3655.26 and reimbursement to Petitioner in the amount of $111.08.

In his 9-22-08 decision, the Arbitrator found that, although Petitioner had a previous left knee condition from a work accident in 1997, which included an osteotomy on 3-3-98 and subsequent medical care, Petitioner sustained a significant aggravation of his pre-existing arthritis as a result of his work accident on 8-20-07 and that his current condition, with resulting disability, is causally related to his work accident. The Arbitrator found that, although Petitioner had undergone a cervical fusion at C5-6 and C6-7 on 5-21-02 and had some ongoing medical care to his cervical area, the 8-20-07 work accident aggravated Petitioner's cervical condition (with subsequent left radicular pain), contributing to the need for Petitioner's cervical surgery on 12-19-07 consisting of a posterior cervical foraminotomy at the C3-4 level. The Arbitrator further found that Petitioner's work accident aggravated a pre-existing SI joint. The Arbitrator stated that Petitioner's work accident contributed to his current temporary total disability (PX 27, p.p. 6, 7 of decision).

In his 9-22-08 decision, the Arbitrator stated: "The Arbitrator specifically wishes to stress that although Petitioner has varying degrees of degenerative conditions ongoing in the body parts that are the subject of this claim at the time of the accident alleged herein, he was in fact working full duty at a job that required heavy lifting and was able to do said job. Further, it does not appear from the voluminous medical record introduced by both Respondent and Petitioner that as of the date of accident, any medical provider had recommended any of the surgeries that Petitioner subsequently underwent (PX 27, p. 7)."

Petitioner had been receiving Social Security Disability benefits since 2001. Prior to arbitrating this case on 9-11-08, Respondent's counsel asked Petitioner to sign a release so Respondent could obtain Petitioner's Social Security file. Petitioner did not sign the release.

Respondent, HCR Manor Care Normal #401, reviewed this decision before the Workers' Compensation Commission. In a 10-7-09 decision, the Commission vacated the Arbitrator's decision

and remanded the case back to the Arbitrator for a new decision which would include consideration of Petitioner's Social Security.

The Commission found that, pursuant to *ReoMovers, Inc. v IIC*, 226 Ill.App.3d 216, 589 N.E.2d 704, 168 Ill.Dec. 304 (1st Dist. 1992), "where a party fails to produce evidence in his control, the presumption arises that the evidence would be adverse to that party. As such, we find that Petitioner's unwillingness to release those records is sufficient to find that those records would most likely reflect information that is unfavorable to Petitioner. Specifically, the records most likely contain information inconsistent with a finding that Petitioner aggravated any of his pre-existing conditions," (PX 28, p.p. 2, 3).

The Commission stated that because Petitioner refused to release his SSD records, there is very little information regarding what Petitioner's conditions of ill-being were, what his "baseline conditions" might be, and what the terms of his "back to work" program were. The Commission stated that "This information is extremely relevant to Petitioner's claim of an aggravation of pre-existing conditions and the evidence in the record of Petitioner working for a month, after being on disability for the better part of six years, does not prove that Petitioner was capable of full duty work prior to this injury," (PX 28, p. 2).

The Commission also found:

"Based upon Petitioner's failure to provide the prior Social Security Disability records, which we find are very relevant to Petitioner's claim, we hereby vacate the Arbitrator's decision and remand this case back to the Arbitrator for further proceedings to allow Petitioner the opportunity to provide those records. The Arbitrator shall issue a new decision following careful consideration of those records and which is consistent with our Decision on Review. If Petitioner continues to refuse to provide them, then the Arbitrator is instructed to issue a new decision that takes this refusal into account as discussed above," (PX 28, p. 3).

Petitioner appealed to the Circuit Court. In a 6-25-10 decision, Judge Scott Drazewski remanded the case back to the Arbitrator for further instructions for Petitioner-Appellant to either provide the prior Social Security Disability records, or, if Petitioner continues to refuse to provide them, then the Arbitrator will render a new decision which takes the refusal into account (PX 29).

At the arbitration remandment hearing on 3-21-13, the parties stipulated that the hearing was limited to the same issues as presented at the previous 19(b) hearing which include TTD, medical, penalties and causal connection through 9-11-08.

The Arbitrator finds that, based on the Commission's decision and Judge Drazewski's decision, the focus of this remandment are:

1. Did Petitioner comply with both the Respondent's request and the Commission's Order to produce his Social Security Disability records at arbitration on 3-21-13?

2. Do the Social Security records provide adverse new information that would affect the Arbitrator's 9-22-08 decision finding that Petitioner's accident of 8-23-07 caused an aggravation of a pre-existing cervical, SI and left knee condition which contributed to Petitioner's temporary total disability from 8-23-07 through 9-11-08 and the need for medical care?

1. DID PETITIONER COMPLY WITH RESPONDENT'S REQUEST AND THE COMMISSION'S ORDER TO PRODUCE HIS SOCIAL SECURITY RECORDS AT ARBITRATION ON 3-21-13?

Prior to Arbitration on 9-11-08, Respondent requested that Petitioner sign a release so it could obtain Petitioner's Social Security records.

At arbitration on 3-21-13, Petitioner testified, and the records reflect, that Petitioner signed a Social Security Consent for Release of Information for Respondent on 6-7-10 (PX 1, RX 30) and 12-15-10 (PX 2, RX 31). Respondent subpoenaed Petitioner's Social Security records on 6-18-10 and 10-31-10 (RX 32, RX 34, PX 7). Respondent hired Gould & Lamb, a Medicare vendor, to evaluate Petitioner's claim and Petitioner signed a release and appointment of representation for Gould & Lamb on 12-15-10. Petitioner's counsel expressed a willingness to work with Gould and Lamb and asked them to contact her in correspondence to Respondent dated 8-19-11 (PX 9, RX 37).

Petitioner and his counsel also attempted to obtain Petitioner's Social Security records. Petitioner signed an Appointment of Representation for his attorney and Petitioner's counsel requested the Social Security records on 4-20-11 (PX 5). Petitioner signed an SSA-1696 Form and Petitioner's counsel re-requested the file on 6-15-11 (PX 6). In addition, Petitioner testified that he drove to the Springfield Social Security office to try to obtain his Social Security file (see also PX 21, RX 40, RX 41). Petitioner produced these records obtained from these inquiries as exhibits at arbitration on 3-21-13 (PX 13, 14, 15, 16, 18, 19, 20, 24, 25, and 26). Respondent produced these records at arbitration on 3-21-13 (RX 33, 37, 38, 41, 43, 45).

Petitioner's counsel requested a copy of the original decision from the Social Security Administration in Bloomington, Illinois on 5-3-12 and received a notice from Social Security stating that they were unable to process the request for a copy of the original decision and medical records as the file had been destroyed (RX 43, PX 20).

The Arbitrator finds that to the best of his ability, Petitioner has complied with the Commission's order to produce his Social Security file. The Arbitrator also finds that Petitioner has complied with Respondent's request that Petitioner sign a release so that Respondent could obtain Petitioner's Social Security file.

2. DO THE SOCIAL SECURITY RECORDS PROVDE ADVERSE NEW INFORMATION THAT WOULD AFFECT THE ARBITRATOR'S 9-22-08 DECISION FINDING THAT PETITIONER'S ACCIDENT OF 8-23-07 CAUSED AN AGGRAVATION OF A PRE-EXISTING CERVICAL, SI AND LEFT KNEE CONDITION WHICH CONTRIBUTED TO PETITIONER'S TEMPORARY TOTAL DISABILITY AND NEED FOR MEDICAL CARE?

In reviewing the Social Security records which both parties received from the Social Security Administration, the Arbitrator finds that Respondent had more medical records on Petitioner (which dated back to 1997) at the initial arbitration on 9-11-08 than the Social Security Administration had in its file.

The medical records contained in the Social Security records procured by Respondent and Petitioner's counsel (PX 13, 14, 19, RX 33, 37, and 45) contain records from Millennium Pain Center (these were provided at the 9-11-08 arbitration in PX 9 and RX 14); Clinton Internal Medicine (these

were provided at the 9-11-08 arbitration in RX 5 and PX 7), Prairie Cardiovascular (these were provided at the 9-11-08 arbitration in RX 15); BroMenn Hospital records (these were provided at the 9-11-08 arbitration contained in RX 12 and PX 6); Dr. Fletcher's records (these were provided at the 9-11-08 arbitration contained in RX 16). The only treating medical records that Social Security had that Respondent did not introduce on 9-11-08 is records relating to a colonoscopy of 3-22-06 and treatment for gastritis.

Respondent provided significantly more records than Social Security had in its possession. Records that Respondent produced at the 9-11-08 arbitration which were not contained in the Social Security file were: records from Carle Clinic from 1998 to 2008; Central Illinois Neuro Health Sciences from 2002 through 2008; Clinton Chiropractic from 2002 through 2008; records from Dr. Dold from 1997 through 2008; records from Dr. Herrin from 1997 through 2008; records from Dr. Hon from 1997 through 2008; records from Dr. McIlhaney from 1997 through 2008; and records from Springfield Neurosurgical Associates (Dr. Pencek) from 1997 through 2008. The records that Respondent produced on 9-11-08 included treatment for Petitioner's pre-existing knee, low back and cervical area.

The Social Security records contain a few additional reports and records that were not introduced at arbitration on 9-11-08. These were reports generated by Social Security doctors and include a 3-31-99 report from Dr. McCracken. Dr. McCracken did not examine Petitioner, but filled out a form stating that Petitioner had low back and left knee pain and he would be restricted to 20 pound lifting with a 6 to 8 hour work day (PX 13). The Social Security records include a 3-8-99 report from Dr. Atluri who stated that Petitioner had degenerative joint disease, lumbosacral disc prolapse, left knee arthritis, depression, CAD, and high blood pressure (PX 13). The Social Security records also contain a psychological report from Dr. Forbes dated 3-2-99 which diagnosed Petitioner as having clinical depression as a result of pain and inability to work. Dr. Forbes stated that Petitioner had the ability to understand and carry out instructions and that he may have problems with work pressures (PX 13). In an OMB form, 0960-0413, a person by the name of Addia White stated that Petitioner met the listing for affective disorders, depression as a result of the pain on 3-29-99 (contained in PX 13). The Social Security records also include a psychological evaluation performed by Dr. Stephen Vincent, a licensed clinical psychologist, on 9-25-07. Dr. Vincent stated that Social Security asked him to do a mental status examination of Petitioner. Dr. Vincent stated that Petitioner was moderately depressed and his thought processes were slow and deliberate yet logical. Dr. Vincent stated that Petitioner had a long history of depression with ongoing symptoms and signs of depression with exacerbation given multiple medical problems,

particularly with his breathing difficulties, chronic neck and back pain, and bilateral knee pain with left being worse than right (contained in PX 13, RX 33).

The Arbitrator notes that Petitioner filled out a disability form on 12-12-98 stating that he had low back pain, left hip and leg pain, and depression (PX 13). The Arbitrator notes that Petitioner filled out a form on 10-1-07 for Social Security stating that pain limits his ADLs, that it affects his memory, that he has pain and spasms (PX 14).

After reviewing the Social Security records that both parties produced at arbitration on 3-21-13 and comparing them to the records produced at arbitration on 9-11-08, the Arbitrator finds that there is no adverse new information which would affect the Arbitrator's 9-22-08 decision finding that the 8-23-07 accident caused an aggravation of a pre-existing cervical, SI and left knee condition which contributed to Petitioner's temporary total disability and need for medical care. The Arbitrator finds that he had the relevant past medical treatment records at arbitration to make a determination of causal connection, temporary total disability and penalties.

F. IS PETITIONER'S CURRENT CONDITION OF ILL BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that no new relevant evidence was produced through the Social Security record which would affect his opinions of causation on Petitioner's left knee, cervical area, or SI joint problems. The Arbitrator notes that the medical records, with the exception of the forms generated by a Social Security doctor evaluating the records, were available to the Arbitrator at arbitration on 9-11-08.

The Arbitrator therefore restates and reiterates his findings on causal connection in his 9-22-08 decision as follows:

Petitioner testified that he was employed as a registered nurse for Respondent, a nursing home, on 8-20-07. Petitioner testified that on that date, a resident began to fall out of his wheelchair and Petitioner caught him from behind. Petitioner said that, as he caught the resident, his right foot hooked on the resident's wheelchair and he twisted his left knee. Petitioner said that the resident weighed approximately 210 pounds and was over 6 foot tall. Petitioner said that after this incident, he noticed immediate left knee, low back and SI pain as well as neck pain into his left shoulder.

Petitioner filled out an incident form on 8-20-07 which described an incident consistent with his testimony. The incident form states that Petitioner had left knee, low back and SI pain (PX 23).

Petitioner treated with Dr. Benyamin, a pain specialist, on 8-23-07. Dr. Benyamin recorded a history of accident consistent with Petitioner's testimony. Dr. Benyamin's record of 8-23-07 states that Petitioner sprained his left knee and injured his low back and SI joint. The record also states that Petitioner had "DDD-spurring-neck." Petitioner testified, and Dr. Benyamin's record indicates, that Petitioner informed Dr. Benyamin of his neck, left knee and back pain in a pain diagram that Petitioner filled out when he met with Dr. Benyamin on 8-23-07 (PX 9).

Dr. Benyamin took an x-ray of Petitioner's left knee and injected his SI joint on 8-23-07. Dr. Benyamin performed an SI joint injection on 9-5-07. On 9-26-07, Dr. Benyamin stated that Petitioner had neck pain with muscle spasm as well as low back and left knee pain (PX 9, 9-26-07 entry).

Petitioner treated with his family physician, Dr. Williams, on 10-5-07. Dr. Williams took a history of Petitioner reinjuring himself at work trying to keep someone from falling over (PX 7). Dr. Williams ordered an MRI of Petitioner's cervical area on 10-23-07. The radiologist, Dr. Yousuf, stated that Petitioner had a satisfactory appearance of a previous fusion from the C5 to C7 level and that there was a suggestion of a mild to moderate broad-based central and slightly left paracentral disc herniation at the C3-4 level resulting in mild to moderate central stenosis without cord impingement. Dr. Yousuf stated that the left neural foramen was narrowed and may produce left C4 symptoms (PX 3).

Dr. Williams referred Petitioner to Dr. Kattner, a neurosurgeon who had previously treated Petitioner, on 11-19-07. Dr. Kattner's record on that date states that Petitioner had a previous cervical fusion at C5-6 and C6-7 in 2002. Dr. Kattner's record on 11-19-07 states that Petitioner presented with symptoms that began on 8-20-07 when Petitioner was helping a patient out of a wheelchair and developed left knee and neck pain that radiated into Petitioner's left shoulder and left hand (PX 11). Dr. Kattner performed surgery on Petitioner's cervical area on 12-19-07 consisting of a posterior cervical foraminotomy at C3-4 (PX 12).

As it relates to Petitioner's left knee, Dr. Benyamin referred Petitioner to Dr. Bratberg, Petitioner's treating orthopedic surgeon, on 9-27-07. Dr. Bratberg recorded a history of accident consistent with

Petitioner's testimony. Dr. Bratberg stated on 9-27-07 that Petitioner's 8-20-07 accident was a twisting type of injury to his left knee and that Petitioner had been quite uncomfortable since that time. Dr. Bratberg stated that Petitioner also injured his sacroiliac in the accident (PX 6).

Upon exam on 9-27-07, Dr. Bratberg stated that Petitioner had some crepitation with flexion in the patellar region and that he had pain and tenderness along the medial joint line in his left knee. Dr. Bratberg stated that an x-ray taken on 9-27-07 showed 90% loss of the medial joint space. Dr. Bratberg's record indicates that Petitioner had a tibial osteotomy for osteoarthritis of the medial compartment nine years ago, but he had done fairly well prior to his recent injury at work (PX 6).

Dr. Bratberg injected Petitioner's left knee with depromedrol and Marcaine on 9-27-07. Dr. Bratberg performed a synvisc injection on 12-6-07, 12-13-07 and 12-17-07 (PX 6).

In a 1-23-08 report, Dr. Bratberg stated that Petitioner had osteoarthritis in his left knee for a considerable period of time, but he was functioning reasonably well until an episode where Petitioner caught a patient falling out of a wheelchair. Dr. Bratberg opined that Petitioner aggravated the arthritic condition in his left knee at the time of the accident (PX 2).

Respondent's examining physician, Dr. Li, stated in a 2-5-08 report that he examined Petitioner and that he reviewed medical records. Dr. Li concluded that Petitioner had a significant underlying arthritis with an acute aggravation during his work accident. Dr. Li stated that Petitioner's current left leg condition may have had some aggravation from the work accident, but the underlying pathology was so significant that the current symptoms mostly pre-existed. Dr. Li stated that he reviewed some surveillance tapes (RX 1) and some concluded that Petitioner did not need a total knee replacement. Dr. Li opined that Petitioner's work accident of 8-20-07 was a temporary aggravation of his left knee arthritis (RX 19).

Petitioner testified that prior to 8-20-07, he had treatment to his left knee from a work accident beginning in 1997. The records reflect that Dr. Bratberg performed surgery on 9-23-97 to remove multiple loose bodies in Petitioner's left knee; that he performed an osteotomy of Petitioner's left proximal tibia with segmental osteotomy of the fibula on 3-3-98; and he performed surgery on 3-30-99 to remove the staples from Petitioner's left knee with a partial medial meniscectomy and shaving of the femur at the patellofemoral joint (RX 9, 12). The records reflect that Petitioner treated nonoperatively

with Dr. Bratberg in 2002 for his left knee and that he did not treat with Dr. Bratberg again until 9-27-07 although he did report symptoms of left knee pain to Dr. Benyamin on 2-5-07 and Dr. Lam on 6-8-07. At that time, he treated with Dr. Bratberg for symptoms of increased left knee pain after his 8-20-07 accident (PX 6, RX 12).

Petitioner testified that his left knee was relatively asymptomatic prior to his 8-20-07 accident. Petitioner testified that prior to 8-20-07 he was able to do all of his job functions as a nurse for a nursing home without any difficulties with his left knee and that his job was very physical and required a lot of walking. Petitioner testified that after his 8-20-07 accident, his knee pain increased and became constant. Dr. Bratberg's records reflect that Petitioner's treatment has been consistent since his 8-20-07 work accident (PX 6, PX 22). On 3-17-08, Dr. Bratberg stated that Petitioner would have difficulty continuing his current nursing duties without severe restrictions (PX 6). Dr. Bratberg performed injections to Petitioner's left knee on 5-7-08 and 7-30-08 and kept Petitioner off work for his left knee (PX 22).

The Arbitrator therefore finds that Petitioner's current left knee condition, and resulting disability, is causally related to his 8-20-07 work accident. The Arbitrator finds that Petitioner sustained a significant aggravation of his pre-existing arthritis as a result of his work accident.

The Arbitrator also finds that Petitioner aggravated his low back and SI joint as a result of his 8-20-07 accident. The Arbitrator finds that, consistent with the medical records presented at arbitration (RX 2, RX 6, RX 7, RX 9, RX 10, RX 11, RX 17, RX 18) and Petitioner's testimony, Petitioner had a pre-existing lumbar condition, which required surgical procedures in the 1990s, and left him with a degenerative condition at several levels in his lumbar spine. The Arbitrator finds that the 8-20-07 work accident aggravated Petitioner's degenerative low back condition and that it aggravated his SI joint pain.

The Arbitrator further finds that Petitioner's work accident of 8-20-07 contributed to the need for Petitioner to undergo cervical surgery on 12-19-07.

The records indicate that Petitioner underwent a cervical fusion at C5-6 and C6-7 on 5-21-02 with Dr. Amaral, Dr. Kattner's partner. Petitioner was not treated at Dr. Kattner's office after he was released by Dr. Amaral on 8-14-02 until 11-19-07, after his 8-20-07 work accident (PX 11, RX 3). Petitioner's testimony, and Dr. Benyamin's records, reflect that he had some ongoing cervical pain which Dr.

Benyamin had managed with botox injections in 2003 intermittently through 3-28-07 (PX 9, RX 14). Petitioner testified that he intended to continue with Botox treatments from Dr. Benyamin.

Petitioner testified that the injections improved his cervical pain and that he was able to perform his nursing duties for Respondent without difficulties until his 8-20-07 accident.

Petitioner subpoenaed a co-worker, Deb Garrells, an LPN who worked for Respondent at the time of Petitioner's work accident on 8-20-07, to testify at arbitration. Ms. Garrells testified that she had had the opportunity to observe Petitioner at work numerous times before his work accident. Ms. Garrells testified that doing nursing work for Respondent is physically demanding, but that Petitioner did not appear to experience any difficulties performing it. Ms. Garrells testified that after Petitioner's work accident, he had difficulty turning his head and he walked with a limp.

In a 4-9-08 report, Dr. Kattner, Petitioner's treating neurosurgeon, stated that Petitioner had a previous foraminal stenosis at C3-4 which was aggravated from the trauma of his 8-20-07 accident and that Petitioner underwent a posterior cervical foraminotomy on 12-19-07. Dr. Kattner stated that Petitioner developed neck pain which radiated down his left shoulder as a result of his lifting accident on 8-20-07 and that he needed a follow up MRI (PX 1).

Respondent's Section 12 doctor, Dr. Delheimer, examined Petitioner on 3-3-08 and authored two reports on 3-3-08 and 4-11-08 (PX 15, 16, RX 21). In his 3-3-08 report, Dr. Delheimer opined that Petitioner had significant pre-existing cervical degeneration and that he sustained a soft tissue injury to his cervical spine as a result of his 8-20-07 accident (PX 15). In his 4-11-08 report, Dr. Delheimer opined that Petitioner did not have a cervical injury as a result of his 8-20-07 accident and that he had extensive treatment to his neck prior to his work accident (PX 16, RX 21). During his 6-18-08 deposition, Dr. Delheimer confirmed that he changed his 3-3-08 opinion based on new information he received and opined that Petitioner did not sustain a cervical injury as a result of his 8-20-07 accident, but that he did have a lumbar strain from it (RX 22, p.p. 16-18).

The Arbitrator relies on the records, Petitioner's testimony, and Dr. Kattner's opinion and finds that Petitioner aggravated a pre-existing cervical condition which required surgery on 12-19-07, as a result of his 8-20-07 accident. The Arbitrator finds that the work accident contributed to Petitioner's current cervical pain with radiating pain into his left shoulder. The Arbitrator further finds that Petitioner

aggravated his SI joint, his pre-existing arthritis in his left knee and that he aggravated a degenerative condition in his lumbar spine as a result of his work accident. The Arbitrator finds that the accident caused or contributed to Petitioner's current condition temporary total disability. The Arbitrator specifically wishes to stress that although Petitioner had varying degrees of degenerative conditions ongoing in the body parts that are the subject of this claim at the time of the accident alleged herein, he was in fact working full duty at a job that required heavy lifting and was able to do said job. Further, it does not appear from the voluminous medical record introduced by both Respondent and Petitioner that as of the date of accident, any medical provider had recommended any of the surgeries that Petitioner subsequently underwent. It is clear from the records that Petitioner had a full duty medical release on the date he was injured and that nothing in those records indicates that the release was conditional or temporary. The only area in which the issue of a conditional work status arises is with regards to Petitioner's social security disability status, and it is clear that at the time he was injured Petitioner was participating in a Social Security Administration program that allowed Petitioner to return to work for a trial period of 9 months before being permanently terminated from the SSDI program. This had no effect on his work status at the time of his accident as alleged herein.

J. WHAT MEDICAL BILLS ARE CAUSALLY RELATED TO THE INJURY?

For reasons stated in (F) Causal Connection, above, Respondent is ordered to pay the following reasonable and necessary medical expenses under the Fee Schedule:

Millennium Pain Center	$5008.82; $8157.00
McLean County Orthopedics	$1666.72
Clinton Internal Medicine (Dr. Williams)	$255.90
Central Illinois Neurohealth Sciences	$423.00
Diagnostic Neuro Technology	$2797.43
BroMenn	$17,197.81
Anesthesia Consultants	$2625.13
RX Third Party	$800.06
Bloomington Radiology	$441.23
John Warner Hospital	$5330.69
Total:	$44,703.79.

In addition, Respondent is ordered to re-pay Medicare in the amount of $3,655.26 and to reimburse Petitioner in the amount of $111.08.

K. WHAT TEMPORARY TOTAL DISABILITY BENEFITS ARE DUE PETITIONER?

The parties stipulated that Petitioner became temporarily disabled on 8-23-07. The Arbitrator finds that Petitioner remained temporarily disabled through the date of arbitration on 9-11-08 and that he had not reached MMI for either his cervical or left knee condition (PX 8).

Dr. Bratberg treated Petitioner on 7-30-08 and kept Petitioner off work (off work slip 7-30-08, PX 22).

In his 4-9-08 report, Dr. Kattner recommended an MRI for Petitioner. Petitioner testified that he has not been able to schedule the MRI because of insurance issues. Petitioner has been undergoing physical therapy through Dr. Kattner's orders at John Warner with the last appointment on 9-2-08 (PX 20).

The Arbitrator reviewed the surveillance videos and reports on Petitioner and does not find them inconsistent with a finding that Petitioner is temporarily disabled (RX 1, RX 27).

The Arbitrator therefore finds that Petitioner has been temporarily disabled from 8-23-07 through 9-11-08. Petitioner is not barred from further proceedings on TTD, medical and for permanency.

M. IS PETITIONER ENTITLED TO PENALTIES?

Petitioner has remained temporarily disabled from 8-23-07 through 9-11-08, or 54 5/7 weeks. At Petitioner's TTD rate of $604.29, this amounts to $33,063.29. Respondent has paid TTD and permanency advances in the amount of $11,136.31, or approximately 18 3/7 weeks of TTD benefits.

The Arbitrator finds that Respondent's reliance on its independent medical examiner's opinions is neither vexatious or unreasonable under the terms of the Workers' Compensation Act. The Arbitrator therefore denies Penalties and attorney fees in this case.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tony Pittman,

Petitioner,

14IWCC0401

vs.

NO: 11 WC 46989
11 WC 46988
11 WC 46990

Joliet School District #86,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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: MAY 30 2014

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

MJB:bjg
0-5/20/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0401

PITTMAN, TONY
Employee/Petitioner

Case# **11WC046989**

11WC046988
11WC046990

JOLIET SCHOOL DISTRICT #86
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4213 LAW OFFICE OF THOMAS P NAUGHTON
23 W JEFFERSON ST
JOLIET, IL 60432

5001 GAIDO & FINTZEN
JUSTIN KANTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TONY PITTMAN
Employee/Petitioner

v.

JOLIET DISTRICT #86
Employer/Respondent

Case # **11** WC **46989**

Consolidated cases: **11 WC 46988**
11 WC 46990

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 **New Lenox**, on **July 22, 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. [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. [ ] 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, **7/7/2010**, 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 **$47,138.00**; the average weekly wage was **$906.50**.

On the date of accident, Petitioner was **40** years of age, *single* with **0** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

ORDER

Respondent is ordered to authorize and pay for the reasonable and necessary medical services prescribed by Dr. Urbanosky.

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.

\# 01 George J. Andros

Signature of Arbitrator

August 15th, 2013
Date

ICArbDec19(b)

AUG 29 2013

FINDINGS OF FACT & CONCLUSIONS OF LAW

With regard to "C", whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent; with regard to "D", what was the date of the accident; and with regard to "E", was timely notice of the accident given to Respondent, the Arbitrator finds the following:

The Petitioner was employed by Respondent as a Building Superintendent providing custodial services at Washington Jr. High, and had been so employed for five years. Based upon the Petitioner's testimony, which the Arbitrator specifically finds to be credible, on July 7, 2010, two female co-workers were attempting to move a heavy file cabinet and requested the Petitioner's assistance. As the Petitioner was moving the file cabinet it tipped to the left. The Petitioner grabbed the heavy file cabinet with his left hand and arm in an attempt to keep it from falling over, and as he did so, he immediately heard a "pop" in his left shoulder and noticed pain across the top of his left shoulder and the top of his left arm. The Petitioner testified that he told his co-workers that he hurt his arm and immediately went to the principal's office where he filled out a form 45. This document is in evidence as Petitioner's exhibit 1. Respondent offered no credible or reliable evidence to contradict or rebut Petitioner's credible testimony.

The Arbitrator therefore finds that the Petitioner sustained an accidental injury arising out of and in the course of his employment on July 7, 2010; and that timely notice of this accidental injury was given to Respondent.

With regard to "F", whether the Petitioner's current condition of ill-being is causally related to the injury; and with regard to "K", whether the Petitioner is entitled to any prospective medical care, the Arbitrator finds the following:

Petitioner sought treatment from his employer for his work related left shoulder injury and the employer sent him to Meridian Medical Associates on July 21, 2010. According to the records of this facility, in evidence as Petitioner's Exhibit 2, when Petitioner was seen on July 21, 2010, he gave a consistent history of his work injury, demonstrated objective findings of shoulder strain and was prescribed muscle relaxers and an x-ray. He was also placed on work restrictions of no lifting more than ten pounds and no lifting above shoulder level.

At the follow-up with Meridian Medical Associates on July 28, 2010, a resolving left shoulder strain was diagnosed by Dr. Papaliou, and one week of physical therapy with three visits per week was prescribed. (PX2) Also, upon Petitioner's request, a full duty work release was given to accommodate Petitioner's employer. By the time Petitioner returned for a recheck at Meridian Medical Associates on August 5, 2010, however, it was documented that Petitioner's left shoulder was feeling "worse" and that "heavy lifting" at work seemed to exacerbate the discomfort. A possible rotator cuff tear was suspected and an MRI was ordered by Dr. Papaliou. (PX2)

Petitioner underwent the MRI, following which he was diagnosed with a "partial tear left rotator cuff" by Dr. Papaliou as of August 19, 2010. An additional week of physical therapy was prescribed, as was an orthopedic consultation with Dr. Dorning on August 26, 2010. (PX2)

After examining Petitioner on August 26, 2010, Dr. Dorning diagnosed "left shoulder impingement syndrome with partial rotator cuff tear". A subacromial injection was performed, two additional weeks of physical therapy were prescribed, and Petitioner was restricted from all work until his follow up with Dr. Dorning on September 13, 2010. (PX2)
By September 13, 2010, Dr. Dorning noted some improvement after physical therapy and the injection. An additional two weeks of physical therapy was recommended, and Petitioner was released to return to work with a 20 pound lifting restriction below shoulder level. At a subsequent examination on September 30, 2010, Dr. Dorning released Petitioner to return work without restrictions and instructed him to return on an as-needed basis. (PX2)

Petitioner then came under the care of Dr. Cohen on October 2, 2010 for complaints related to carpal tunnel syndrome. Petitioner was sent to Dr. Cohen at Meridian by his employer. According to Dr. Cohen's office note of May 4, 2011, Dr. Cohen stated: "He (Petitioner) has had some problems with his shoulder again which Dr. Dorning has taken care of in the past. *We don't have worker's compensation approval to see him for that.*" (PX2, emphasis added) Based upon this notation, the Arbitrator infers Dr. Cohen had not addressed any shoulder complaints since worker's compensation did not authorize him to do so.

Dr. Cohen thereafter provided some minimal left shoulder care. On June 7, 2011, after noting that Petitioner had "some recurrent impingement syndrome involving his left shoulder which probably is associated with lifting at work", Dr. Cohen performed a left shoulder subacromial injection. By June 28, 2011, however, Petitioner reported to Dr. Cohen that his shoulder was feeling good, he could tolerate the occasional achiness in the shoulder, and he was not looking to do anything further with it. (PX2)

Petitioner sought a second opinion from his primary care physician, Dr. Sanjay Pethkar. Petitioner was ultimately referred by Dr. Sanjay Pethkar to Dr. Urbanosky at Hinsdale Orthopaedics for a second opinion regarding his left shoulder on May 23, 2012. (PX3) Upon examination of Petitioner's left shoulder, Dr. Urbanosky documented the following findings: posterior glenohumeral joint tenderness, positive Neer's impingement test, positive Hawkins impingement test, positive Speed's test, positive Yergason's test, and pain with resisted shoulder abduction. Another MRI of the left shoulder was performed on June 12, 2012, following which Dr. Urbanosky diagnosed a superior glenoid labrum lesion and a partial tear of the rotator cuff. Dr. Urbanosky recommended surgery as of July 11, 2012.

Respondent's Section 12 evaluator was Dr. Aron Bare. Dr. Bare examined petitioner on October 10, 2012. Dr. Bare was admittedly not provided with complete medical records for review. He was not provided with any medical records referencing Petitioner's history of injury lifting the file cabinet in 2010. (See p. 4, par 1 Dr. Bare's report) Even more significantly, he was not provided with Dr. Urbanosky's office note of July 11, 2012 recommending surgery. The selective issuance of background records to Dr. Bare gives his opinion less weight as to both completeness and content.

Apparently due to his lack of complete, correct information, Dr. Bare erroneously reported a date of accident of May 26, 2010, a date of accident which is not supported by the records in evidence. He erroneously attributed Petitioner's symptoms to repetitive lifting based upon on Dr. Cohen's office note of June 2, 2011, rather than to the injury lifting a file cabinet in 2010.

Dr. Bare further erroneously concluded that from Petitioner's return to full duty in 2010 to the time he sought active care for his left shoulder in 2011 Petitioner was "essentially asymptomatic." In so finding, Dr. Bare overlooked Dr. Cohen's specific statement in his records that he was not authorized by the workers' compensation carrier to treat Petitioner for any shoulder problems.

The fact that Dr. Cohen did not treat Petitioner's left shoulder does not, however, mean the left shoulder was asymptomatic; it simply meant he was not authorized to treat the condition; therefore his records were silent regarding the shoulder. The Arbitrator finds this does not mean that Petitioner's left shoulder was asymptomatic; it only means Dr. Cohen was not treating Petitioner for his left shoulder, and Dr. Bare's opinion to the contrary was by inference, speculation. Dr. Bare does acknowledge, however, the petitioner's need for surgery; he just disputes its causal connection to his employment.

Based upon the above, the Arbitrator finds Dr. Bare's report is based upon incomplete information and to a certain extent when determining the preponderance of the evidence - speculation, and is, therefore unreliable. The Arbitrator instead adopts the opinions, findings and treatment recommendations of Dr. Leah Urbanosky, orthopedic surgeon, including the recommendation for surgery.

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

Kevin Logan,

Petitioner,

14IWCC0402

vs. NO: 11 WC 11860

City of Lincoln,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin M. Lamborn

MJB:bjg
0-4/21/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0402

LOGAN, KEVIN
Employee/Petitioner

Case# **11WC011860**

CITY OF LINCOLN
Employer/Respondent

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
DIRK MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0180 EVANS & DIXON LLC
JAMES M GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

14IWCC0402

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KEVIN LOGAN
Employee/Petitioner

Case # **11** WC **11860**

v.

CITY OF LINCOLN
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [ ] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] 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 **December 8, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injuries, Petitioner earned **$48,712.82**; the average weekly wage was **$936.79**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to all applicable credit under Section 8(j) of the Act.

ORDER

No medical expenses are awarded in the instant claim.

Respondent shall pay Petitioner permanent partial disability benefits of $562.07/week for 12.5 weeks, because the injuries sustained caused the 2.5% loss of the person as a whole as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

07/09/2013
Date

JUL 15 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

14IWCC0402

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KEVIN LOGAN
Employee/Petitioner

v. Case # 11 WC 11860

CITY OF LINCOLN
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The only issues in dispute in the present claim are liability for medical expenses and nature and extent of the injury. Petitioner, Kevin Logan, has been employed by Respondent, the City of Lincoln, as a laborer in its street department division since 1999. A decision concerning Petitioner's neck injuries was issued separately. (See Case Numbers 09 WC 2849; 10 WC 7375; and 10 WC 7376). On December 8, 2009, Petitioner was lifting 55 gallon barrels in the course of his work. When lifting a barrel, he testified that he twisted in a fashion that caused a low back spasm. An accident report was completed on December 14, 2009. (Petitioner's Exhibit (PX) 1). Petitioner had undergone two low back surgeries prior to the accident, including a lumbar spine fusion in 2001, and confirmed he had consistent low back pain following his prior surgeries.

On December 14, 2009, Petitioner presented to Dr. Joseph Williams, the orthopedic surgeon who performed his two-level cervical fusion that is the subject of the three referenced claims above. Petitioner saw the doctor on this date for a follow-up evaluation concerning his cervical condition. Dr. Williams ordered a MRI, which occurred on December 24, 2009. The lumbar MRI revealed minimal degenerative changes at L1-2, L2-3 and L3-4, with no evidence of canal or foraminal compromise. Dr. Williams' January 4, 2010 note mentions the status post L4-5 instrumented fusion performed by Dr. Pineda years ago. At the time of that visit, Petitioner complained of predominantly low back pain with occasional pain down the lower extremities. Dr. Williams' assessment included chronic low back pain and mild lumbar degenerative disc disease. (PX 6).

Petitioner underwent a course of pain management treatment for his low back in 2010 and 2011 at Memorial Medical Center – Spineworks Pain Center with Dr. Ferdinand Salvacion. This treatment also involved pain management for his cervical, shoulder and hip conditions, which are not a part of this claim. (PX 7). Petitioner testified that the pain medications he currently takes for his cervical condition doubles as medication to help with his low back issues. Petitioner testified he currently experiences persistent low back pain, and must perform extensive stretching exercises to assist with his condition. Petitioner entered into evidence a series of medical bills he claims Respondent is liable for as a result of both his neck and low back injuries. (PX 9). As noted, the neck injuries are not at issue here.

CONCLUSIONS OF LAW

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner claims to be entitled to unpaid medical expenses as a result of the stipulated low back injury at issue. However, Petitioner made no effort to indicate what invoices he claims are a result of the claim at bar. (See PX 9; Arbitrator's Exhibit 4). Upon reviewing the medical invoices in Petitioner's Exhibit 9, it is apparent that some expenses are a result of the pain management Petitioner received from the Spineworks Pain Center. As noted *supra*, that pain management also involved treatment for Petitioner's neck condition, which is the subject of Case Numbers 09 WC 2849,10 WC 7375, and 10 WC 7376. A decision was issued in those cases awarding Petitioner unpaid medical expenses set forth in Petitioner's Exhibit 9. Further, Petitioner noted that the medication he receives for his neck condition also constitutes medication to help with his low back problems. Therefore, the Arbitrator declines to award Petitioner double the amount of medical expenses to which he is entitled.

Issue (L): What is the nature and extent of the injury?

As a result of the stipulated work injury at issue, Petitioner aggravated his pre-existing low back condition. Petitioner had undergone two prior low back surgeries before the December 8, 2009 work accident. Dr. Williams diagnosed Petitioner as having chronic low back pain and mild lumbar degenerative disc disease. Petitioner confirmed he did indeed have chronic low back pain since his lumbar surgeries. Accordingly, Petitioner suffered a "strain-type" injury on December 8, 2009, that simply aggravated his pre-existing condition. His low back pain persists.

Based on the foregoing, the Arbitrator finds that Petitioner has sustained the 2.5% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act as a result of his work injury, and awards permanent partial disability benefits accordingly.

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

Kevin Logan,

Petitioner,

14IWCC0403

vs.

NO: 09 WC 2849
10 WC 7375
10 WC 7376

City of Lincolon,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of accident, causal connection, medical expenses, permanent disability and notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 15, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 30 2014

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB:bjg
0-4/21/2014
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0403

LOGAN, KEVIN
Employee/Petitioner

Case# **09WC002849**

10WC007375
10WC007376

CITY OF LINCOLN
Employer/Respondent

On 7/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0564 WILLIAMS & SWEE LTD
DIRK MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0180 EVANS & DIXON LLC
JAMES M GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

14IWCC0403

- [ ] 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

KEVIN LOGAN
Employee/Petitioner

v.

CITY OF LINCOLN
Employer/Respondent

Case # 09 WC 2849

Consolidated cases: 10 WC 7375; 10 WC 7376

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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 **08/08/2008**, **11/13/2008** and **12/03/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injuries, Petitioner earned **$46,480.53**; the average weekly wage was **$893.86**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit for **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to all applicable credit under Section 8(j) of the Act.

ORDER

Respondent shall pay for all reasonable and related medical services, as set forth in Petitioner's Exhibit 9 (and as more fully discussed in the Memorandum of Decision of Arbitrator), as provided in Section 8(a) of the Act, and subject to the medical fee schedule, Section 8.2 of the Act. Respondent shall have credit for all medical bills paid by it or through its group plan pursuant to Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $595.91/week for 12 2/7 weeks, commencing January 8, 2009 through April 4, 2009, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $536.32/week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

07/09/2013
Date

JUL 15 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KEVIN LOGAN
Employee/Petitioner

v.

Case # 09 WC 2849
Consolidated Cases: 10 WC 7375; 10 WC 7376

CITY OF LINCOLN
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Kevin Logan, has been employed with Respondent, the City of Lincoln, in its street department division as a laborer since 1999. Petitioner reviewed a job description form, which he testified was accurate and consistent. (See Petitioner's Exhibit (PX) 2, Petitioner's Deposition Exhibit 3). Petitioner testified that he lifts frequently with his job, and this involves lifting an average of 50-80 pounds. He also operates several types of motor vehicles on a regular basis with his job, such as dump trucks, back hoes, snow plows, lawn mowers, and street sweeper trucks. Petitioner also regularly uses tools with his job, such as chainsaws, jackhammers, drills, hammers and concrete saws.

In early August 2008, Petitioner testified that he noticed his hands were getting more numb, particularly the left hand. He noticed increased problems during this time at work when he was driving dump trucks (in that his head was bobbing frequently), when shoveling, and when driving the street sweeper, as he was frequently looking down and to the right. He also noticed the aforementioned activities made his arms numb. Petitioner testified that he called the City Hall during this time and reported that he was going to see a doctor.

On August 8, 2008, Petitioner presented to Dr. John Wahab at the Orthopaedic Center of Illinois, complaining of, *inter alia*, numbness in his left hand. Petitioner reported that his work activities were aggravating this condition. Dr. Wahab suggested a nerve conduction study to determine if Petitioner was suffering from carpal tunnel syndrome. (PX 6).

In early November 2008, Petitioner noticed that his hands were continuing to be numb. The numbness would not alleviate during this time, as opposed to previous times when he testified the numbness would "come and go." When this numbness persisted and did not alleviate, Petitioner testified he was determined to learn its cause. During this time period, Petitioner testified he called the assistant to the City Clerk at Respondent's City Hall. He knew her surname was McCann, and that she is presently the secretary for Respondent's police department. He testified that he told Ms. McCann that he was having issues with his hands, in that they were numb and tingling. He testified that he told her he would be going to a doctor for this condition.

On November 5, 2008, Petitioner underwent an EMG/NCV with Dr. John Watson to further evaluate for carpal tunnel syndrome versus radiculopathy. Dr. Watson's history indicated that Petitioner was complaining of left hand numbness and pain for the past several months, as well as neck pain and occasional shooting pain down the arm. Dr. Watson interpreted left upper extremity C6 radiculopathy, and recommended a cervical MRI. Petitioner underwent the cervical MRI on November 10, 2008. The MRI revealed the following: pronounced degenerative change with significant canal and foraminal stenosis at C5-C6; and a broad-based disc herniation with significant canal and foraminal stenosis at C6-C7, more pronounced on the left than the right. (PX 6).

Petitioner returned to Dr. Watson on November 13, 2008, noting neck and bilateral arm pain. Dr. Watson reported that Petitioner was a surgical candidate, and referred him to Dr. Williams for a surgical consultation. (PX 6).

Petitioner presented to Dr. Joseph Williams on November 18, 2008. The doctor's diagnoses were chronic axial neck pain, chronic bilateral shoulder pain (left greater than right), and C5-C6 and C6-C7 disc degeneration with central stenosis. Dr. Williams noted that there was a "tremendous amount" of stenosis at the aforementioned two cervical levels. Due to an artifact being present on the previous films, new MRI films were ordered. The new MRI revealed severe canal and foraminal stenosis at C5-C6 and significant canal stenosis at C6-C7. (PX 6).

In early December 2008, Petitioner again noted he was experiencing continued hand numbness, as well as pain between his shoulder blades. Petitioner testified that following this most recent episode, he contacted Ms. McCann again in December 2008, and told her that he was still having the issues he reported in November 2008, and that he was again seeking medical treatment for the condition. He continued to work through the end of 2008.

Petitioner again presented to Dr. Williams on December 3, 2008, complaining of the continued neck pain, numbness and tingling in his hands, and pain into the bilateral shoulders. He also complained of pain radiating into the left scapula on this date. Dr. Williams recommended cervical fusion. (PX 6). Petitioner underwent this cervical fusion on January 8, 2009. The operative procedure was listed as a "C5-C6, C6-C7 anterior cervical diskectomy and fusion with instrumentation and autograft." The bone graft used in the fusion was taken from Petitioner's pelvis area. The pre- and post-operative diagnoses were: 1. C5-C6, C6-C7 degenerative disc disease; 2. C5-C6, C6-C7 cervical stenosis; 3. Chronic axial neck pain; and 4. Chronic cervical radiculopathy. (PX 5). Petitioner underwent a course of post-operative physical therapy, and received what Dr. Williams described as "significant improvement" following the surgery and resulting conservative follow-up care. (PX 2, p. 13). Dr. Williams released Petitioner to return to work on April 8, 2009. (PX 2, p. 19).

Dr. Williams authored a letter to Petitioner's counsel dated April 16, 2009, and stated in that letter the following: "I have reviewed Mr. Kevin Logan's medical records as well as my recollection of his complaints and condition. I feel that it is possible that the work related activities that he participated in could very well have aggravated a chronic condition within his cervical spine." (PX 2). Dr. Williams' deposition testimony was taken on May 31, 2011. (PX 2). Dr. Williams reviewed Petitioner's job description and demands form, mentioned *supra*. Dr. Williams also discussed Petitioner's job activities with him. (PX 2, pp. 11-12). Dr. Williams testified that it was within reason that Petitioner's job demands could have exacerbated his symptoms. (PX 2, p. 12). Dr. Williams recalled that Petitioner reported he had been holding flags, driving a truck (and complaining of bouncing and holding his head in one position

while driving said truck), using a rake, and engaging in repetitive lifting of objects at work. (PX 2, p. 15). When asked what type of mechanisms or strains were necessary to aggravate Petitioner's cervical condition, Dr. Williams answered, "[r]epetitive motions where he's having to strain to rotate his head in one direction; having to maintain his head in a fixed position for any length of time; straining with his upper extremities and neck." (PX 2, p. 12). Dr. Williams testified that Petitioner's neck surgery was necessary due to the chronic nature of his symptoms, the fact that he had not seen improvement with conservative measures, and due to his MRI and EMG results. (PX 2, p. 14).

Petitioner testified to previous neck problems before his claimed 2008 work accidents. MRI films taken on August 5, 2002 indicated mild right paracentral disc osteophyte complex with narrowing of the right C5-6 foramina and minimal flattening of the right cord at C5-C6; and a small central disc osteophytic complex with no significant central canal stenosis or foraminal narrowing at C6-C7. (RX 4). On January 26, 2005, a box fell on Petitioner's head while at work. He sought medical treatment immediately following the accident, and subsequently received chiropractic treatment following the injury with Daniel Freesmeier, D.C. (PX 8; RX 5-7). Medical records from Family Medical Center indicate Petitioner was diagnosed with left shoulder supraspinatus tendonitis and a cervical strain as a result of this incident. (PX 3). On January 31, 2005, the medical records indicate that Petitioner had no radicular pain coming from his neck. (PX 2, Respondent's Dep. Exh. 1). On February 14, 2005, the medical records indicate that Petitioner regained full cervical range of motion, and a diagnosis was made of "[r]esolved cervical strain." (PX 3). Petitioner testified that he continued to work his normal duties following this episode. However, he testified that he has had continued neck pain since the box fell on him in 2005. The chiropractic records of April 30, 2007 indicate that Petitioner reported neck pain and that he believed his neck had never "felt right" since his accident from several years prior. (PX 8; RX 5). Chiropractic records from mid-to-late June 2008 (less than two months before Petitioner's first claimed work injury) indicate that Petitioner was experiencing neck pain that radiated into the arm. Those records indicate Petitioner began seeing some signs of symptom improvement with that care. (PX 8; RX 6).

Petitioner was evaluated at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act") with Dr. David Lange on July 12, 2011. Dr. Lange took a history from Petitioner, reviewed medical records, and conducted a physical examination. Dr. Lange diagnosed the following: 1. Degenerative disc disease at C5-6 and C6-7; 2. Herniated disc at C6-7; 3. Left upper extremity radiculopathy; and 4. Chronic/recurrent symptoms suggestive for Lhermitte's phenomenon. Dr. Lange noted that Petitioner's MRI from 2002 "suggested simply degenerative changes [at] C5-6 and C6-7, obviously common in the general population." Dr. Lange opined that it was "reasonable to assume" that Petitioner's condition for which the present claims are at issue resulted from the "box incident of January 2005." Dr. Lange believed that Petitioner's symptoms suggested C6-7 pathology "likely continuing from the incident in January 2005." He reported that it was "reasonable to assume that Mr. Logan sustained a herniation at C6-7" as a result of the 2005 box incident. (RX 1).

Dr. Lange also reported that the treatment Petitioner received, including the cervical surgery, was reasonable and necessary to address the C6-7 herniation. He opined that the surgery would have been causally associated with the January 2005 box incident. (RX 1).

Petitioner further testified concerning the disputed issue of "notice" during cross-examination. When asked whether he told the assistant at the City Hall that he believed his problems were work related when he called on the three occasions discussed above, he testified that there would have been no other

reason to have called them if it was indeed not work related, and that it was his understanding that the agents in the City Hall knew he was reporting a work injury. Petitioner also testified that he does not recall formally reporting his injuries to his supervisor, Tracy Jackson, but that he mentioned these injuries to Mr. Jackson and told him he believed they were work related.

Tracy Jackson testified at Respondent's request. Mr. Jackson is Respondent's street and alley superintendant, and was Petitioner's direct supervisor during all relevant times discussed herein. Mr. Jackson testified that Petitioner never made a formal report to him regarding a work accident from August 2008 through January 2009. He further did not recall Petitioner ever discussing a work injury with him during that time. Mr. Jackson testified that injuries can be reported to him or his assistant. He also testified that injuries can be reported to the Deputy City Clerk in Respondent's City Hall. On cross-examination, Mr. Jackson testified that Petitioner told him he was having a neck surgery in January 2009, and that this was told to Mr. Jackson approximately two days before the surgery occurred.

Petitioner testified that he currently experiences stiffness in his neck, and gets migraine headaches about one time per month. If he lifts something too heavy, like buckets of concrete, or engages in shoveling, he experiences symptoms. He testified that the range of motion in his neck is not as free as it used to be. If he moves his neck frequently, it becomes sore. He also experiences numbness in his hip area where bone was taken out for grafting in his neck fusion. He currently takes pain medications and uses ice/heat therapy. Petitioner is currently engaging in the same job duties he performed before the claimed work injuries.

Petitioner offered into evidence a series of medical invoices he claims he incurred as a result of the claimed work accidents, with an outstanding balance of $3,629.35. (See PX 9). He testified that most if not all of these bills were paid through the group insurance plan he had with Respondent. It was stipulated that Respondent would get all applicable credit under Section 8(j) of the Act.

CONCLUSIONS OF LAW

<u>Issue (C)</u>: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; and

<u>Issue (F)</u>: Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner had a pre-existing cervical condition prior to 2008. According to Dr. Lange, Respondent's examining physician, Petitioner's MRI from 2002 "suggested simply degenerative changes…common in the general population." According to the medical records, the episode in January 2005 where a box fell on Petitioner caused a cervical strain. That strain was diagnosed as "resolved" about a month later. Petitioner continued to complain of neck pain throughout the years leading up to 2008, and freely admitted as such at trial. He sought chiropractic treatment intermittently from 2005 until about two months prior to his claimed work accident in 2008. Petitioner testified that he continued to work his normal duties following the January 2005 box episode. Petitioner then began complaining to his chiropractor of neck pain that radiated into the arm in mid-June 2008, less than two months before the first claimed date of accident.

In August 2008, Petitioner testified that his hand numbness was being aggravated by his conditions at work. He decided to seek treatment for this symptom on August 8, 2008. Dr. Wahab

recommended electrodiagnostic studies at this time to rule out possible carpal tunnel syndrome. In November 2008, Petitioner noticed that his hands were continuing to be numb, and that the numbness would not alleviate during this time, as opposed to previous times when he testified the numbness would "come and go." He underwent the electrodiagnostic testing on November 5, 2008, which ruled out carpal tunnel syndrome but revealed cervical radiculopathy. In early December 2008, Petitioner further experienced radiating pain into the left scapula, as well as pain between his shoulder blades. Petitioner underwent a cervical fusion per Dr. Williams on January 8, 2009. The pre- and post-operative diagnoses were: 1. C5-C6, C6-C7 degenerative disc disease; 2. C5-C6, C6-C7 cervical stenosis; 3. Chronic axial neck pain; and 4. Chronic cervical radiculopathy. Dr. Lange's diagnoses of Petitioner were, *inter alia*, degenerative disc disease at C5-6 and C6-7; herniated disc at C6-7; and left upper extremity radiculopathy. Petitioner underwent conservative care following surgery, and was released to return to work with good results noted. He still experiences some residual symptoms in his neck.

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 672-673 (2003). The Arbitrator finds that Petitioner suffered an aggravation of his pre-existing cervical condition as a result of the work accidents at issue, and further that his current condition of ill-being is causally related to those accidents.

While Petitioner had pre-existing neck problems, it was not until August 2008 that he began complaining of persistent hand numbness that necessitated him seeking medical care from an orthopedic surgeon. Petitioner credibly testified that these symptoms were made worse with his work duties, which the Arbitrator notes are physically demanding per Petitioner's testimony and the job description form in evidence. In November 2008, Petitioner's numbness was continually present, as opposed to prior times when it would "come and go." Finally, in December 2008, Petitioner was complaining of the same persistent pain, with further radiating pain into the area between his shoulder blades.

Dr. Williams noted specific work duties that aggravated Petitioner's condition. Dr. Williams discussed Petitioner's work activities with him, as well as reviewed the job description form. Dr. Williams testified that it was within reason that Petitioner's job demands exacerbated his symptoms, necessitating a surgical fusion. Dr. Lange agreed that all care and treatment rendered to Petitioner, including the cervical fusion, was reasonable and necessary. Dr. Lange, however, believed Petitioner's symptoms were simply a continuation from the January 2005 incident. The Arbitrator notes that Petitioner's cervical strain from January 2005 was diagnosed as "resolved," and while Petitioner complained of intermittent problems throughout the time between 2005 and 2008, it was not until August 2008 when Petitioner noted that his condition began to be exacerbated with work activities, and further until November 2008 when these symptoms became so persistent that surgery was necessitated. The Arbitrator finds the opinions of Dr. Williams more realistic and more persuasive than the opinion of Dr. Lange that Petitioner's symptoms in 2008 were nothing more than continued symptoms from the box incident in 2005.

The Arbitrator finds that Petitioner was a credible witness at trial. Petitioner took his time to thoughtfully answer questions posed to him in a truthful and forthcoming manner, including during his cross-examination testimony. The Arbitrator notes this credibility when taking into account Petitioner's history given at trial.

The Arbitrator finds that Petitioner has satisfied his burden of proof that his exacerbation injury was at least in part caused by his work activities, and thus he has suffered a compensable injury. Based on the foregoing, the Arbitrator finds that Petitioner suffered an exacerbation to his pre-existing neck condition that led to surgical fusion as a result of his work activities, and further that his current condition of ill-being is causally related to that injury.

Issue (E): Was timely notice of the accident given to Respondent?

The present three filed claims each indicate a separate injury date with a corresponding case filing number. However, for all intents and purposes, each claimed injury date involves the same injury. Each date simply indicates three separate timeframes where Petitioner noted his injuries were work related and sought medical treatment.

Mr. Jackson, Petitioner's supervisor, indicated that proper notice could be given to the Deputy City Clerk at Respondent's City Hall. Petitioner testified that for all three accident dates, he called Ms. McCann, the assistant to the City Clerk. For the August 2008 accident, Petitioner claimed he called her and told her he was going to see a doctor. For the November and December 2008 accidents, Petitioner claimed he called Ms. McCann and told her that he was having issues with his hands, in that they were numb and tingling, and that he would be seeking medical treatment for these symptoms. Petitioner testified that there would have been no other reason for him to have called the Clerk's office if what he was reporting was not for a work related injury. It was his understanding that the Clerk's office knew why he was calling with this information.

Petitioner's beliefs in this regard are reasonable. Mr. Jackson confirmed that reporting injuries to the Clerk's office constituted proper notice. No one from the Clerk's office was present to testify at trial and rebut Petitioner's claims. Further, while the information given to the Clerk's office could constitute defective or inaccurate notice, Respondent has not shown it was prejudiced by any such inaccuracy or defect. *See Luckenbill v. Industrial Comm'n*, 155 Ill. App. 3d 106, 113-114, 507 N.E.2d 1185 (4th Dist. 1987); *S&H Floor Covering, Inc. v. Workers' Comp. Comm'n*, 373 Ill. App. 3d 259, 264-265, 870 N.E.2d 821 (4th Dist. 2007).

Further, concerning reporting specifically for the December 2008 claim, the Arbitrator finds that proper notice was given. Petitioner is claiming a date of accident for that claim of December 3, 2008. The Application for Adjustment of Claim on that matter was received by the Illinois Workers' Compensation Commission on January 20, 2009, and was filed on January 22, 2009. (See Arbitrator's Exhibit 7). While the Application for Adjustment of Claim entered into evidence concerning that claim indicates Petitioner signed this document on January 9, 2009, the back side of this form is not copied on the exhibit. However, the Arbitrator takes judicial notice of this document in the Illinois Workers' Compensation Commission file on that claim (Case No. 09 WC 2849), and notes on the back side that the "Proof of Service" completed by Petitioner's attorney avers that said Application was sent to Respondent on January 14, 2009. It is therefore reasonable to conclude that Respondent received this Application within the 45 day reporting requirement set forth in the Act. See 820 ILCS 305/6(c).

It should also be noted that Mr. Jackson testified he knew Petitioner was having his surgery at least two days before the surgery occurred, which was January 8, 2009. Therefore, Mr. Jackson would have known about Petitioner's surgery well within the 45 day reporting requirement. As stated, while this constructive notice may be defective and inaccurate, Respondent has not shown prejudice in this regard.

Finally, and further in the alternative, the Arbitrator notes that statutory and proper notice was given as set forth by Section 8(j) of the Act. Petitioner testified that most, if not all, of his medical bills at issue were paid through Respondent's group insurance. The medical bills in Petitioner's Exhibit 9 confirm that many payments were made through insurance payments. Section 8(j) of the Act extends the period of notice of accident. Section 8(j) provides, in pertinent part:

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act. *In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments.*

820 ILCS 305/8(j). (emphasis added).

The Arbitrator thus finds that Section 8(j) of the Act extended the Section 6(c) notice period well past any of the notice dates evidenced by testimony or documentation, as referred to above. The Commission had occasion to consider a similar fact pattern in *Rudd v. Harris Corporation*, 11 IWCC 45 (Jan. 13, 2011), and reached the same legal conclusion.

<u>Issue (J)</u>: 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?

Both Dr. Williams and Respondent's examining physician, Dr. Lange, agree that the treatment Petitioner received, including the cervical fusion, was reasonable and necessary. Because of those opinions, and in conjunction with the findings above concerning accident and causation, the Arbitrator awards Petitioner the medical expenses set forth in Petitioner's Exhibit 9, totaling $3,629.35. It was established that some, if not all, of the medical bills have been paid. Respondent accordingly shall have a credit for all medical bills paid by it or through its group provider pursuant to Section 8(j) of the Act.

<u>Issue (K)</u>: What temporary benefits are in dispute? (TTD)

Petitioner was taken off work for his two-level cervical fusion on January 8, 2009, and was released to return to work from Dr. Williams on April 8, 2009. However, Petitioner is claiming that he returned to work earlier, and should only be entitled to temporary total disability benefits through April 4, 2009. (See Arbitrator's Exhibits 1-3). Based on the foregoing conclusions pertaining to accident, causation, and medical treatment, the Arbitrator finds that Petitioner is entitled to TTD benefits from January 8, 2009 through April 4, 2009, a period of 12 2/7 weeks.

Issue (L): What is the nature and extent of the injury?

As a result of the work injury at issue, Petitioner underwent a two-level cervical discectomy and fusion with instrumentation and autograft. The bone graft used in the fusion was taken from Petitioner's pelvis area. The pre- and post-operative diagnoses were: 1. C5-C6, C6-C7 degenerative disc disease; 2. C5-C6, C6-C7 cervical stenosis; 3. Chronic axial neck pain; and 4. Chronic cervical radiculopathy. Petitioner had a good result from surgery, and underwent a course of post-operative physical therapy before returning to work performing the same duties he did as before the accident at issue.

Petitioner currently experiences stiffness in his neck, and gets migraine headaches about one time per month. Lifting heavy items exacerbates his symptoms. The range of motion in his neck is not as free as it used to be. If he moves his neck frequently, it becomes sore. He also experiences numbness in his hip area where bone was taken out for grafting in his neck fusion surgery. He currently takes pain medications and uses ice/heat therapy.

Based on the foregoing, the Arbitrator finds that Petitioner has sustained the 25% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act as a result of his work injury, and awards permanent partial disability benefits accordingly.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rene Diaz,

Petitioner,

vs. NO: 06 WC 19721

14IWCC0404

Supreme Catering,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of Petitioner's disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 4, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAY 2 9 2014
TJT:yl
o 4/8/14
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DIAZ, RENE
Employee/Petitioner

Case# **06WC019721**

SUPREME CATERING
Employer/Respondent

14IWCC0404

On 1/4/2013, 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 0.12% 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:

0404 STEWART C ORZOFF
450 SKOKIE BLVD
SUITE 502
NORTHBROOK, IL 60062

0445 RODDY LEAHY GUILL & ZIMA LTD
RICHARD S ZENZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RENE DIAZ,
Employee/Petitioner

v.

SUPREME CATERING,
Employer/Respondent

Case # 06 WC 19721

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Bloomington**, on **12/14/12**. 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. [ ] 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. [x] Other _____

FINDINGS

On **May 16, 2005**, the respondent **Supreme Catering** *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between the petitioner and respondent.

On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.

Timely notice of this accident *was* given to the respondent.

In the year preceding the injury, Petitioner earned $**15,600.00**; the average weekly wage was $**300.00**.

At the time of injury, the petitioner was **55** years of age, *single* with **4** children under 18.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $**180.00**/week for **150** weeks, because the injuries sustained caused the **30%** loss of the **petitioner's person as a whole**, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

12/31/12
Date

ICArbDec p. 2

JAN 4 - 2013

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

This claim proceeded to an arbitration hearing under the Worker's Compensation Act on 2/20/08 before this arbitrator. The issues in dispute were employer-employee, accident, wages, medical expenses, temporary total disability and the nature and extent of the injury. Respondent did not dispute the fact of petitioner's injury. Its' sole defense to the payment of compensation was based on its position that the claimant was an independent contractor rather than an employee of respondent. In a decision filed 3/12/08 this arbitrator found that the petitioner had failed to prove by a preponderance of the credible evidence that the petitioner and respondent were operating under the Illinois Workers' Compensation Act, and their relationship was one of employer and employee. Since compensation was denied on this basis, the arbitrator found the remaining issues moot.

Petitioner sought review of the arbitrator's decision. On 5/11/09 the Commission filed its decision and opinion on review. The Commission reversed the decision of the arbitrator and found that an employee-employer relationship did exist between petitioner and respondent. The Commission ordered respondent to pay petitioner TTD benefits in the amount of $200 per week for 52-2/7 weeks. The Commission further ordered respondent to pay $141,917.72 for necessary medical expenses. The Commission reached no decision on the issue of "nature and extent of the injury". It noted that petitioner's treating physician had recommended a functional capacity evaluation and that respondent's IME "indicated the likelihood that (the claimant) would need to undergo rehabilitation" and that after such rehabilitation he "may be able to return to work." Accordingly, the Commission remanded the case to the arbitrator for a determination of the petitioner's "need for vocational rehabilitation and/or maintenance" as well as any need for further treatment, and a determination of the nature and extent of petitioner's disability purportedly pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

Respondent appealed the Commission's decision to the circuit court. On 4/19/10 the circuit court determined the Commission's reversal on credibility grounds was not sufficiently explained, and remanded the case to the Commission to explain the basis for its credibility findings. On 2/9/11, the Commission entered its decision on remand, explaining the basis for its ruling. On 3/31/11 the circuit court entered an order confirming the Commission's decision.

The respondent filed a timely notice of appeal. The Appellate Court held that a decision of the Commission which remands the case to the arbitrator for further proceedings on the issue of vocational rehabilitation is not a final order. It further held that further proceedings are required before an administrative decision is final. The Appellate Court held that the decision of the circuit court requiring the Commission to explain its credibility findings, the Commission decision on remand, and the circuit court's judgment confirming the Commission should each be vacated on this cause remanded to the arbitrator, as the Commission originally ordered, for further proceedings. The circuit court ordered entered on 4/19/10, the Commission's decision on remand entered on

2/9/11, and the judgment of the circuit court confirming the Commission entered on 3/31/11, were all vacated by the Appellate Court for lack of jurisdiction, and remanded the matter to the arbitrator for further proceedings.

This matter is now before this arbitrator for further proceedings on petitioner's "need for vocational rehabilitation and/or maintenance" as well as any need for further treatment, and a determination of the nature and extent of petitioner's disability purportedly pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

On May 16, 2005, petitioner loaded his truck and was on his way to his first stop. As he was getting off Interstate 290 and onto Interstate 90 he took the ramp to quickly and could not slow down. Petitioner lost control of the catering truck and flipped it over. After the truck came to rest, petitioner unbuckled himself and crawled out of the truck. He was taken by ambulance to St. Alexis Medical Center. He was hospitalized from May 16, 2005 through May 24, 2005. While admitted petitioner underwent an open reduction/internal fixation of L4-L5 fracture-dislocation, L3-L6 posterolateral spine fusion utilizing segmental pedicle screw fixation and autogenous iliac crest bone graft harvested through a separate fascial incision. This procedure was performed by Dr. Richard Rabinowicz. Petitioner's post-operative diagnosis was a fracture-dislocation of L4-L5 with osseoligamentous injury involving the vertebral body in front and disruption of the interspinous ligament and ligamentum flavum at the L4-L5 level. Post-operatively petitioner followed-up with Dr. Rabinowicz.

On November 11, 2005 petitioner last followed-up with Dr. Rabinowicz. Petitioner had no severe complaints and overall had been progressing well. Dr. Rabinowicz noted that petitioner was still limited by his injury and had not been able to pursue gainful employment. On physical examination Dr. Rabinowitz noted that petitioner was ambulating independently, his wounds were benign, there were no nerve tension signs, his neurological exam was unchanged, and he had painless range of motion through short flexion extension. Dr. Rabinowicz discussed with petitioner information on activity and restrictions, back care, brace use and care, exercise, disease management, home exercise program, and postop surgery instructions. He noted that petitioner was on complete temporary disability. He was of the opinion petitioner was still temporarily totally disabled. He was of the opinion that petitioner may need an FCE to determine his ultimate disability. Dr. Rabinowitz recommended that petitioner continue with his home exercise and return on an as needed basis.

Petitioner testified that he worked a few days in the summer of 2006 selling ice cream.

On April 4, 2007, petitioner underwent a Section 12 examination with Dr. David Robertson, at the request of the respondent. Petitioner complained of constant back pain with numbness down both legs, the left worse than the right. He stated that the pain radiates down the lateral thigh to his knees and down the L5 dermatome on the left. He stated that the pain increases from a 4/10 to an 8/10 with mild activity. He wakes up frequently during the night because of the pain. Following a detailed medical history, an examination and record review Dr. Robertson opined that petitioner's injuries were related to the motor vehicle accident on May 16, 2005. He further opined

that petitioner remained symptomatic because he had become severely deconditioned due in part to the injuries and to the surgery, compounded by the lack of postoperative rehabilitation. Dr. Robertson was of the opinion petitioner should undergo an extensive physical therapy and work hardening program after which he may be able to return to work.

On December 5, 2007, petitioner underwent a Section 12 examination with Dr. Michael Gross that was set up by his attorney. Petitioner stated that he was restricted by his doctor from lifting no more than five pounds. He stated that he takes 2 aspirins a day for pain. Petitioner told Dr. Gross that he was released to work but has been unable to find work because he cannot pass the physicals. Petitioner complained of low back pain all the time. He stated that he does not drive a lot, due to low back pain that wakes him when sleeping. He complained of low back pain with bending, lifting and walking more than three blocks, followed by low back stiffness that causes him to take a couple minutes to straighten. He complained of low back numbness in his left and right thighs, and weakness in his left leg. He stated that he does not do anything, and that he has difficulty lifting heavy weights, due to his low back pain. Petitioner complained of pain in his ribs and upper back when he takes a deep breath, and some left hip pain. Following an examination and x-rays of the lumbar, cervical and left hip, Dr. Gross diagnosed residuals of a low back injury, fracture dislocation of L4-L5 (post-operative state), and residuals of a cervical spine injury. Dr. Gross also performed a record review. Upon completion of the examination and record review, Dr. Gross opined a causal connection between petitioner's current condition of ill-being and the accident on 5/16/05. He was further of the opinion that petitioner's current condition of ill-being was permanent. H was of the opinion that petitioner has a major loss of use of the man as a whole, and moderate loss of use of the left lower extremity.

At trial petitioner reported complaints of pain in his back, left hip, left leg, neck and thoracic spine. Petitioner reported increased pain with bending and sitting or standing in excess of 10 minutes. Petitioner further testified that his pain affects his sleeping.

On 12/14/12 the attorneys for both petitioner (Stewart Orzoff) and respondent (Richard Zenz) appeared before this arbitrator for a hearing on remand. The petitioner's attorney stated that petitioner has since returned to work and he was not looking for any additional medical treatment or medical expenses, vocational rehabilitation, or temporary total disability benefits. The parties stipulated that the only issue they wanted this arbitrator to decide was the nature and the extent of the petitioner's injury. Additionally, the parties did not offer any additional evidence into the record and requested that the arbitrator base her findings as to the nature and extent of the petitioner's permanent disability on the original record and the fact that the petitioner has returned to work.

Having reviewed the entire record regarding this matter, the arbitrator finds the petitioner sustained a 30% loss of use of his person as a whole pursuant to Section 8(d)2 of the Act, as a result of the injuries he sustained on 5/16/05.