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

Lance Fancher,
Petitioner,
vs.

NO: 09WC 49710
11WC 32739

Big Muddy River Correctional Center,
Respondent,

16IWCC0128

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, medical, 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 April 14, 2015, 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: FEB 23 2016
o020916
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FANCHER, LANCE
Employee/Petitioner

Case# **09WC049710**
11WC032739

BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

16IWCC0128

On 4/14/2015, 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:

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

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 FL
CHICAGO, IL 60601-3227

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

APR 14 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

16IWCC0128

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lance Fancher
Employee/Petitioner

v.

Big Muddy River Correctional Center
Employer/Respondent

Case # **09** WC **49710**

Consolidated cases: **11 WC 32739**

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 **Mt. Vernon**, on **February 6, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS (CASE 09 WC 49710)

On **11/25/09**, 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 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 $**57,825.04**; the average weekly wage was $**1,112.02**.

On the date of accident, Petitioner was **39** years of age, *married* with **2** dependent children.

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

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

Respondent shall be given a credit of $**any amounts paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**any amounts paid**.

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

ORDER (CASE 09 WC 49710)

Petitioner failed to prove he sustained an accident on November 25, 2009 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his right elbow was causally related to his injury. Petitioner's claim for compensation is denied and no benefits are awarded.

FINDINGS (CASE 11 WC 032739)

On **8/17/11**, 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 $**57,825.04**; the average weekly wage was $**1,112.02**.

On the date of accident, Petitioner was **40** years of age, *married* with **2** dependent children.

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

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

Respondent shall be given a credit of $**any amounts paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**any amounts paid**.

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

ORDER (CASE 11 WC 032739)

Petitioner failed to prove he sustained an accident on August 17, 2011 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his left elbow was causally related to his injury. Petitioner's claim for compensation is denied and 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.

Henry Lindsay
Signature of Arbitrator

April 3, 2015
Date

APR 14 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner filed two separate claims for his injuries, which were consolidated and tried as one before the Arbitrator. The parties requested that one decision issue for both cases. Claim 09 WC 49710 alleges repetitive trauma to Petitioner's hands, right wrist, and right elbow. Claim 11 WC 32739 alleges repetitive trauma to Petitioner's left elbow. Each claim has its own Petitioner's Exhibit List and labeled group exhibits, beginning with Petitioner's Exhibit 1. These lists and their corresponding group exhibits were entered into evidence as Arbitrator's Exhibits 4 and 5. Respondent does not dispute notice/manifestation date or the dates of temporary total disability, but disputes accident, causation, liability for medical expenses and temporary total disability benefits, and the nature and extent of the injuries.

Two witnesses testified at the hearing: Petitioner and Respondent's representative, Lt. Harold Schuler.

The Arbitrator Finds:

Petitioner began working for Respondent in 1999. According to Respondent's Time Sheets, Petitioner worked for Respondent as a "Dietary Officer" from April 20, 2009 through May 9, 2009. He was then a "Relief 7" Officer from May 15, 2009 through September 17, 2009. Beginning on September 18, 2009 Petitioner continued working as a "Relief 7" Officer on Wednesdays, a "R-1 A & B" Wing Officer on Sundays and Mondays, a "R1 & 2 Escort" Officer on Tuesdays and an "R-2 Control" Officer on Saturdays. This continued through October 21, 2009. Petitioner was off work on Thursdays and Fridays. Beginning on October 22, 2009 Petitioner began working in the Infirmary. (RX 3)

According to the medical records, Petitioner sought treatment with Dr. David Brown on November 25, 2009. As part of the examination Petitioner completed a questionnaire acknowledging he had already retained an attorney and that he believed he had a work-related injury. Petitioner described his symptoms as "Hands wrist, numb. Elbow numb, comes and goes, but happens when turning keys, and writing reports, driving." (AX 4 -PX 3) He described his job as follows: "My job consists[s] of security of inmates which includes, turning keys to doors, hand cuffs, waist chains, leg restraints, control buttons, doors & cells, writing, I/M disciplinary reports, shake down reports, incident reports, [?] every 30 min., tower logs, control logs, tool log boos, hunger strike log every 15 min., suicide logs every 10 min. My current job, Infirmary Office, turning keyes [sic] , and writing is continuous." (AX 4- PX 3)

Petitioner told Dr. Brown that he was right hand dominant and worked as a correctional officer for Respondent over the preceding ten years. Petitioner worked eight hours a day, forty

hours per week. He told Dr. Brown his job involved the opening and closing of cell doors fifty times per hour and raps bars during the course of his work at Big Muddy River Correctional Center. Petitioner further represented to Dr. Brown that he did not participate in any hobbies or sports. Dr. Brown's note indicates that Petitioner's problems in his hands had evolved over the preceding two years with some pain over the medial aspect of both elbows (right more than the left) and some right wrist pain. He recalled no traumatic injury. On examination Dr. Brown noted good active range of motion of both elbows, wrists, and all digits of his hands. Petitioner was noted to have a partial subluxing ulnar nerve over both elbows but negative Tinel's signs at his elbows. Tinel's was painful over the carpal tunnels bilaterally. Phalen's tests were negative bilaterally. Direct compression produced some discomfort bilaterally. Dr. Brown suspected Petitioner had some symptoms and findings consistent with a "bilateral peripheral compression neuropathy." He recommended a nerve conduction test. In the interim, Dr. Brown suggested Petitioner wear pillow splints at night and take nonsteroidal anti-inflammatory medication. He was to return after the studies were completed. Dr. Brown further noted his belief that Petitioner's work duties for Respondent were in part a contributing and/or aggravating factor in the development of a "possible peripheral compression neuropathy such as carpal tunnel syndrome and/or cubital tunnel syndrome." Petitioner was allowed to continue working full duty without any restrictions. (PX 3)

Petitioner underwent nerve conduction studies with Dr. Phillips on November 25, 2009. They were within normal limits. Petitioner had completed a Patient Questionnaire as part of the exam/testing process. He indicated symptoms of numbness, right and left hands and elbow. His pain drawing reflected these complaints, too. (PX 3, PX 4) After reviewing these studies, Dr. Brown recommended splinting, anti-inflammatory medications and observation. (PX 3)

Petitioner signed his Application for Adjustment of Claim in 09 WC 49710 on November 30, 2009, alleging bilateral hand, right wrist and right elbow injuries. (AX 2)

On January 14, 2010 Petitioner was no longer assigned to the Infirmary and he began working in "Segregation Control." He stayed there until February 3, 2010. (RX 3)

As of February 4, 2010 Petitioner began working as a "Dietary Officer" and he remained in that position through April 7, 2010. (RX 3)

Petitioner returned to Dr. Brown on April 7, 2010, with ongoing complaints of numbness and tingling in both of his hands. All testing was negative except for some discomfort on direct compression. Dr. Brown again suspected Petitioner's symptoms were consistent with a possible peripheral compression neuropathy. A repeat nerve conduction study was ordered and Petitioner was again allowed to continue working full duty without any restrictions. (AX 4- PX 3)

Repeat studies were performed on April 7, 2010 by Dr. Phillips and were normal. As part of the test Petitioner completed a Patient Questionnaire and drawing. Petitioner's symptoms included numbness, right hand and elbow, pain in right elbow, and left hand numbness. His left

elbow was not marked on the pain drawing. (PX 4) After reviewing the repeat testing, Dr. Brown wrote, "At this point I have no further recommendations from a hand surgical point of view." (AX 4-PX 3) Petitioner was to return as needed. (AX 4- PX 3)

As of April 8, 2010 Petitioner was assigned to "R-4 Escort." (RX 3)

Petitioner returned to see Dr. Brown on June 16, 2010 with the primary complaint of ongoing numbness and tingling in the right hand, mainly the little and ring fingers and some right medial elbow pain. Petitioner had good range of motion of his right elbow with partial subluxation of his ulnar nerve. Tinel's induced some discomfort. Dr. Brown felt Petitioner had symptoms consistent with an ulnar neuropathy and again noted he had a partial subluxing ulnar nerve. He recommended continued conservative treatment. No work restrictions were given. Petitioner was to return in three months. (AX 4 -PX 3)

On June 30, 2010 Petitioner began working in the "Visiting Room." (RX 3) He remained there until August 7, 2010. (RX 3)

Petitioner took a leave of absence from his job beginning on August 17, 2010. This continued through May 31, 2011. (AX 5 - PX 7) According to Respondent's Time Sheets (RX 3) Petitioner was not assigned to any position between August 7, 2010 and November 16, 2010. (RX 3)

On September 15, 2010, Petitioner again presented to Dr. Brown with complaints of numbness and tingling in his right little and ring fingers with medial elbow pain. (AX4 -PX3, 9/15/10). On examination, Petitioner continued to have a subluxing ulnar nerve as well as positive Tinel's and direct compression test over the right elbow. *Id.* As Petitioner was recovering from knee surgery Dr. Brown again recommended conservative care. *Id.*

On October 26, 2010, Petitioner saw Dr. Brown with continued complaints of pain and popping over the medial aspect of his right elbow, associated with numbness and tingling in his right little and ring fingers. (AX4 -PX3, 10/26/10). Petitioner continued to show signs of his subluxing ulnar nerve in the right elbow, a positive Tinel's sign, and positive direct compression and elbow flexion tests. Dr. Brown noted that when Petitioner flexed his elbow, his ulnar nerve moved/subluxed out of the condylar groove across the medial epicondyle, causing irritation of his nerve. *Id.* Dr. Brown's impression was chronic ulnar neuropathy of the right elbow with an associated subluxing ulnar nerve. Dr. Brown further noted that this was a "dynamic ulnar neuropathy" that would not necessarily be identified on a nerve conduction study. *Id.* Since Petitioner suffered had from this condition for over three years and failed a year of conservative measures, Dr. Brown recommended surgery. *Id.*

Petitioner was assigned to "R-3 A & B" on November 17, 2010. The next day he was assigned to "Tower 3." (RX 3)

A copy of the communication from Respondent dated November 18, 2010, approving surgery was entered into evidence as Petitioner's Exhibit 6. This correspondence from Respondent's adjustor, Sue Zellers, stated:

> Fyi.....we had previously denied Mr. Lance Fancher's repetitive motion claim (date of injury: 11/25/09). After reviewing Dr. Brown's report, we have changed it to a compensable claim. Work Comp will pay for treatment related to this injury. (AX4 - PX6).

On December 7, 2010, Petitioner underwent a right cubital tunnel release with anterior submuscular transposition of the ulnar nerve and myofascial lengthening of the flexor pronator tendon origin. (AX4 -PX5). Objective intra-operative findings included tight fascial bands at the proximal edge of the cubital tunnel. *Id.* Petitioner's myofascial flaps had to be sutured in a lengthened, loosened fashion over the ulnar nerve to keep the nerve anterior to the medial epicondyle. *Id.* Dr. Brown noted that Petitioner had a good recovery and referred him for physical therapy. (AX4 -PX3, 12/20/10, 1/19/11). Petitioner was off work as of December 7, 2010 until December 20, 2010 when he was released with restrictions. (AX 4 - PX 3)

Petitioner underwent therapy at DuQuoin Health Center for his right elbow beginning December 10, 2010 and ending on January 14, 2011. (AX 4 - PX 7)

Petitioner returned to see Dr. Brown on January 19, 2011. He reported the numbness was gone, he had no pain, and he was doing well. He had good active range of motion of the elbow, wrists, and all digits as well as good grip strength and sensation. He was to continue with his home therapy for an additional four to six weeks and return to full duty work as of January 24, 2011. Petitioner was otherwise released from care with instructions to return on an as needed basis. (AX 4 - PX 3)

According to RX 3, Petitioner did not return to work until January 25, 2011 at which time he was assigned to "Leave Relief 11." He remained in that position through February 18, 2011. (RX 3)

Petitioner did not work between February 18, 2011 and March 1, 2011. As of March 1, 2011 Petitioner worked "R-4 C & D" on Saturdays and Sundays, "R-4 Escort" on Wednesdays, and "R- 4 A & B" on Thursdays and Fridays. He had Mondays and Tuesdays off. This schedule remained in effect through April 10, 2011. (RX 3)

As of April 12, 2011 Petitioner worked the following schedule: "R-4 Escort" on Thursdays; "R-3 Escort" on Sundays and Mondays; and "R-4 Control" on Fridays and Saturdays. Tuesdays and Wednesdays were his days off. This schedule remained in effect through July 27, 2011. (RX 3)

Effective July 29, 2011 Petitioner worked as an "R1 Escort" officer through August 15, 2011. (RX 3)

On August 17, 2011 Petitioner presented to Dr. George Paletta. According to the doctor's notes, Petitioner was a correctional officer for Respondent, having been there for twelve years. Dr. Paletta wrote:

> . . . His job involves the typical duties of a correctional officer including cuffing and un-cuffing inmates, locking and unlocking cell doors, opening and closing cell doors, and at times having to restrain inmates. He presents for evaluation of a chief complaint of left elbow pain as well as numbness and tingling into the lateral digits of the hand. He has a significant past medical history that this has been going on for at least three years. He initially saw Dr. David Brown several years ago. He had initial EMG and nerve conduction studies that were negative. Dr. Brown treated him conservatively, but ultimately he had continued complaints particularly with regard to the right elbow. He underwent ulnar nerve transposition of the right elbow in December 2010. He returned to work after about six weeks. He has done well on the right side. However, he has had continued symptoms on the left side. (AX5 - PX3, 8/17/11).

Petitioner complained of medial elbow pain as well as pain and numbness radiating down into the ulnar border of his hand and into the lateral fingers. Petitioner reported that his symptoms were aggravated by repetitive use of his hand, particularly his job duties, and that he was taking over-the-counter medication as necessary to manage his symptoms. (AX5 -PX3, 8/17/11).

Physical examination of Petitioner's left elbow revealed tenderness at the cubital tunnel, positive Tinel's sign, positive ulnar nerve compression test and positive elbow flexion test. *Id.* Grip strength in Petitioner's left upper extremity was 60 versus 110 on his right surgically repaired side. *Id.* Pinch strength on his left side was also reduced as opposed to his right side. *Id.* Dr. Paletta noted Petitioner had evidence of a "clearly hypermobile subluxing nerve." Petitioner's right elbow was noted to be fine. Dr. Paletta's impression was recurrent left ulnar neuritis in the setting of a hypermobile subluxing ulnar nerve, which he believed was aggravated by Petitioner's repetitive job duties. *Id.* Dr. Paletta made the following recommendations based on his impression:

> Clearly the patient has had persistent ongoing symptoms secondary to hypermobile subluxing ulnar nerve. His previous EMG and nerve conduction studies done a year-and-a-half ago were normal. I recommend that he undergo repeat EMG and nerve conduction studies. However, I would recommend that he consider ulnar nerve transposition irregardless [sic] of what the nerve conduction study show [sic]. This is a mechanical issue due to instability of the ulnar nerve. The ulnar nerve is repeatedly irritated based on his reparative [sic] work activities. The purpose of the EMG and nerve conduction studies is to document whether there has been any interval change in the nerve and to

> document that preoperatively. This would help predict potential recovery. Nonetheless, irregardless [sic] of what the nerve conduction study show [sic], I would recommend he undergo ulnar nerve transposition similar to what was performed on the opposite site [sic]. . . *Id.*

Dr. Paletta stated that Petitioner's left elbow complaints were causally related to Petitioner's job activities, and noted that Petitioner's left elbow condition and symptoms was almost identical to what Petitioner suffered in his right upper extremity. *Id.* Dr. Paletta recommended that Petitioner proceed with surgery, based in part on the success Petitioner had in obtaining relief from his right-sided complaints with same. *Id.* Petitioner was allowed to continue working full duty. *Id.*

Petitioner underwent an EMG and Nerve Conduction Study with Dr. Phillips on August 17, 2011. They were normal. Dr. Paletta reviewed the studies himself on August 25th. His diagnosis remained intermittent ulnar neuritis in the setting of a hypermobile subluxing ulnar nerve and he further described it as a mechanical problem. He again recommended surgery to eliminate the instability of the ulnar nerve and the tendency for recurrent irritation of the nerve. (AX 5 - PX 3)

On August 17, 2011 Petitioner also authored a letter "To Whom It May Concern" discussing his work duties in Dietary, Control Rooms, the Infirmary, the Visiting Room, and Administrative Back Room. He also mentioned writing of reports and cuffing of inmates. (AX 5 - PX 8)

Petitioner completed a Notice of Injury form on August 18, 2011 reporting an injury to his left elbow on August 17, 2011 due to correctional officer duties which had involved "twelve years of keying doors, pushing buttons, cuffing, writing reports and log books." A First Report of Injury form was completed by Respondent on August 18, 2011. (AX 5 - PX 7)

On August 19, 2011 a Demands of the Job form was completed for Petitioner's job. According to it, Petitioner used his hands for fine manipulation less than three times per week and for gross manipulation zero to two hours per day. (AX 5 - PX 7)

From August 19, 2011 through August 24, 2011 Petitioner was assigned to "Tower 3." (RX 3)

Petitioner signed his Application for Adjustment of Claim in 11 WC 032739 on August 23, 2011. (AX 3; AX 5 - PX 7)

On August 25, 2011, Petitioner underwent a subcutaneous ulnar nerve transposition. (AX5 -PX5, PX 6) Intra-operative findings noted a generally normal left elbow except for evidence of a "hypermobile snapping ulnar nerve" which snapped with every cycle of flexion and extension and subluxed over the medial epicondyle. *Id.* Petitioner was taken off work as of August 25, 2011.

Dr. Paletta's post-surgery follow-up note documented significant elbow pain with numbness and tingling into the lateral border of Petitioner's hand in the fourth and fifth fingers. (AX5 -PX3, 9/12/11). Dr. Paletta prescribed Lyrica and Vicodin and began Petitioner's physical therapy. *Id.* Petitioner was returned to full duty work on December 8, 2011, and released from care on January 11, 2012. At the time of his last visit with Dr. Paletta, Petitioner was doing "great" with no significant pain and only a "tiny bit" of numbness at the tip of his fifth finger. Any fourth finger numbness had completely resolved. Petitioner had no swelling and full range of motion. The ulnar nerve was nice and mobile. Dr. Paletta described Petitioner's outcome as "excellent." (AX5 -PX3, 11/30/11, 1/11/12).

Petitioner was off work from August 25, 2011 through January 28, 2012. He returned to work on January 29, 2012 as a "Gym Officer." He remained in that position through February 28, 2012. He was then off work until April 23, 2012 at which time he returned to the Infirmary where he worked through September 1, 2012. (RX 3)

Dr. Paletta testified by way of deposition on February 8, 2013. (AX5 -PX9). Dr. Paletta testified that he was beginning his 16th season as the team physician for the Cardinals, and that he has performed independent medical examinations at the request of the State of Illinois. (AX5 -PX9, p.4). Dr. Paletta testified that Petitioner suffered from irritation of the ulnar nerve as a result of friction caused by hypermobility, and recommended ulnar nerve transposition. *Id.* at 8, 10, 11. Dr. Paletta explained that Petitioner's nerve was slipping in and out of its "groove" and rolling over the medial epicondyle, the bony prominence on the inner side of the elbow. *Id.* 10, 11. Following the transposition, Petitioner suffered from post-surgical causalgia, which was resolved conservatively with Lyrica. *Id.* at 9.

Dr. Paletta described the difference between ulnar neuritis and ulnar neuropathy:

> The basic difference between the two is in ulnar neuritis there will not be EMG and nerve conduction study changes, whereas in ulnar neuropathy there will be abnormalities on the nerve conduction changes. The clinical symptoms will be identical – pain in the elbow, numbness and tingling in the ulnar nerve distribution – but the nerve has not been adversely effected from a functional perspective yet. *Id.* at 11, 12.

Dr. Paletta testified, however, that if left untreated Petitioner's condition could worsen and create chronic changes in the nerve, which would affect the ability of the nerve to conduct signal. *Id.* at 11. Dr. Paletta testified that the condition is aggravated by repetitive flexion and extension under load; and in Petitioner's case, his cuffing and uncuffing inmates, locking and unlocking cells, and opening and closing cell doors qualified as repetitive flexion-extension under load. *Id.* at 12, 13. Dr. Paletta explained that "under load" did not mean heavy weight or significant force, but meant resistance, which could be created with as little as one pound. *Id.* at 15-17.

On cross-examination Dr. Paletta testified that he most commonly sees ulnar neuritis in athletes but, of course, his practice is sports medicine based. He has also seen it in industrial workers and "everyday folks." It's really a consequence of friction on the nerve because of the underlying instability. He further testified that if one just bends and straightens one's arm with out any resistive force against it, the nerve may sublux. However, in his experience the nerve becomes symptomatic when the elbow is being bent and straightened with some type of resistance such as when one throws a baseball or repetitively pushes and pulls a dolly or repetitively opening and closing cell doors where there is some resistance or increased force besides the weight of just their arm or their hand. Dr. Paletta noted, "I see this in little leaguers, too, who don't throw the ball very hard." *Id.* at 16, 17.

Dr. Paletta testified that he reviewed Respondent's materials pertaining to the job duties of a Correctional Officer at Big Muddy Correctional Center, and based on Petitioner's history, clinical examination findings, intraoperative findings and his recovery following his bilateral elbow surgeries, Dr. Paletta opined that Petitioner's job duties did contribute to symptomatic ulnar neuritis of the left elbow. *Id.* at 10. On cross he acknowledged that he hadn't reviewed the aforementioned materials (job site analysis, DVD of Big Muddy) in the last couple of weeks; rather, it had probably been within the last year. *Id. at 18.*

Petitioner attended an examination with Dr. Anthony Sudekum at the request of Respondent on August 29, 2013. Dr. Sudekum testified by way of deposition on December 23, 2013, and began his testimony by pointing out three errors in his report, one of which was substantive. (RX5, p.5, 6). Petitioner testified that the test performed by Dr. Sudekum was vastly different from the one performed by Dr. Phillips. (T.39). Unlike Dr. Brown and Dr. Paletta, Dr. Sudekum believed that evidence of a hypermobile/subluxing nerve should show up on electrodiagnostic studies. (RX5, p.11).

Dr. Sudekum's physical examination findings demonstrated positive Tinel's sign bilaterally over Petitioner's wrists, positive Tinel's sign over Petitioner's left elbow, and borderline Phalen's and grind test over the left wrist. (RX4, p.10). Dr. Sudekum stated that hypermobility and/or subluxation of the ulnar nerve was not caused by any specific accident, repetitive motion or work activity, and that usually, the condition is asymptomatic. (RX4, p.45). He acknowledged, however, that subluxation of the nerve from significant elbow movement can become symptomatic as a result of irritation inflammation and produce elbow pain and paresthesia in the ulnar nerve distribution. (RX4, p.45; RX5, p.7, 8, 11). He indicated that, "The more subluxation, potentially, the more likely the patient is to become symptomatic." (RX5, p.7, 8). Dr. Sudekum stated that very few patients are symptomatic and even fewer patients fail to improve with conservative measures and require surgery. (RX4, p.45-46).

Dr. Sudekum was under the impression that most of the opening and closing of cell doors at Big Muddy River Correctional Center was done electronically through the control pod rather

than manually by Correctional Officers. (RX4, p.13). Dr. Sudekum also indicated that he visited Respondent's Big Muddy facility and observed Correctional Officers performing their job duties; however, he did not indicate whether this was done during the busy day shift or one of the other shifts with less movement. (RX4, p.13, 17; RX5, p.16, 17, 19). Dr. Sudekum also indicated that he performed some of the tasks repeatedly performed by Correctional Officers; however, he failed to indicate how many times he did so or which areas of Respondent's facility he opened doors/chuckholes, turned keys or lifted property boxes. *Id.*

Based on Respondent's exhibits, his review of the video and his visit, Dr. Sudekum did not believe Petitioner's job activities caused or aggravate ulnar subluxation, or resulted in the need for any treatment for same. (RX4, p.50; RX5, p.20, 21). Dr. Sudekum suggested that Petitioner's condition could be related to his cervical spine. Despite stating that he believed Petitioner's persistent left-sided complaints were related to his cervical spine, he testified that they could also be related to the type of surgery performed on Petitioner's left elbow (subcutaneous ulnar nerve transposition), which was different than the procedure performed on Petitioner's right side (submuscular ulnar nerve transposition). (RX4, p.48, 49; RX5, p.14, 15). Rather than recommending cervical intervention, Dr. Sudekum testified that he would recommend revision ulnar nerve surgery with submuscular transposition if Petitioner's left side worsened. (RX5, p.15, 16).

On cross-examination, Dr. Sudekum testified that in the past 3 years, he has performed 138 IMEs, given 71 depositions, and made over $944,000.00 performing medical legal services for the State of Illinois. *Id.* at 21, 22. He testified that he did not believe that the fact that the video provided to him by Respondent was filmed on a different shift than the one worked by Petitioner would impact is causation opinion, even when provided with evidence that the Illinois Workers' Compensation Commission felt differently. *Id.* at 30, 37-40. However, given the fact that he believed that the video was an accurate representation of what he saw, and the testimony of Petitioner and Respondent's witness that the day shift is different than the other shifts, it is evident that Dr. Sudekum did not visit during Petitioner's day shift. *Id.* at 39. He acknowledged that sticking doors would be difficult to operate and pull open, that property boxes are often heavy, and that repetitive motion of the arms and hands is needed to perform property box searches. *Id.* at 26-28. Dr. Sudekum was unaware that the strength demands in Respondent's Job Site Analysis indicated that Petitioner frequently lifted up to 25 pounds, frequent being defined as up to 5 ½ hours per day. *Id.* at 33. He admitted to opining in the case of *Branden Schrader v. SOI/Big Muddy River Corr. Ctr.* that the job duties of a Correctional Officer did not contribute "significantly" to the etiology or exacerbation of bilateral repetitive injury. *Id.* at 36.

Dr. Brown testified by way of deposition taken on February 25, 2014 (09 WC 49710). (AX4-PX8) Dr. Brown trained under Dr. Susan Mackinnon, an internationally recognized expert in the field of peripheral nerve injury and head of the plastic surgery program at Washington University, and Dr. David Green, president of the Hand Society and senior editor of the

international standard textbook on hand surgery, Green's Operative Hand Surgery. (AX4-PX8, p.5). In addition to his practice, Dr. Brown currently serves as the hand specialist for the St. Louis Cardinals, and frequently lectures before medical facilities, judicial bodies, insurance agencies and both petitioner and respondent oriented groups. *Id.* at 6-8. Dr. Brown testified that 95% of his patient referrals come from insurance companies, employers, occupational medical clinics or defense attorneys. *Id.* at 8, 9. Dr. Brown also performed IMEs at the request of the State of Illinois. *Id.* at 9, 10.

Dr. Brown further explained the etiology of a symptomatic subluxing ulnar nerve:

> Subluxing ulnar nerve. Another word for subluxation is dislocation, and if you look at the literature on the subject, sixteen to twenty percent of the population actually has subluxing ulnar nerves. And what that is is the ulnar nerve runs along the inside of the elbow and it runs in a groove between two bones at the elbow and that groove is called the condylar groove. It's between the medial epicondyle and a piece of the olecranon and it is an actual groove. And patients with subluxing ulnar nerves, when they move from extension to flexion, the nerve will actually move out of that groove or dislocate and go over the bony prominence called the medial epicondyle. . . *Id.* at 10, 11.

Dr. Brown testified that there are no comorbid risk factors that can lead to the development of subluxing ulnar neuropathy. *Id.* at 12. The condition is an anatomical abnormality. *Id.* at 12. Hence, his opinion focuses on the specific common factors that exist in the patients that become symptomatic as a result of the condition. *Id.* at 10-12.

Dr. Brown testified that while the majority of patients with this condition are asymptomatic, "A smaller percentage of them are symptomatic and it's a dynamic process that is activity related." *Id.* at 11. He testified that the patients that come to him with symptomatic subluxing ulnar nerves "are either athletes or they're in arm-intensive type jobs." *Id.* at 11. He stated, "They're doing something that is causing it to become symptomatic and so those are the patients that I see with symptomatic subluxing ulnar nerves." *Id.* at 11. When asked what specific type of motion caused the condition to become symptomatic, he stated:

> It's moving from extension to flexion and the nerve will then sublux or dislocate out of the condylar groove over the medial epicondyle and that causes trauma to the nerve, and if they're doing that on a frequent basis, it becomes symptomatic. . . *Id.* at 11, 12.
>
> . . . I see it in athletes or I see it in the industrial Work Comp setting in individuals who are doing arm-intensive type of activities. The come in with symptomatic subluxing ulnar nerves from using their arms all day long. *Id.* at 12.

Dr. Brown testified that Petitioner's attorney's office furnished him with a two page handwritten job description with additional details concerning Petitioner's job. *Id.* 23, 26. He also

reviewed a Job Site Analysis and some videos. The latter items were not that significant to him as they didn't provide much useful information pertaining to Petitioner's job. They did not address the frequency of the activities Petitioner stated he repetitively performed -- key turning and cell door opening/closing. They were silent as to the forces involved also. *Id. 24 - 26.*

Although Dr. Brown testified that this condition in symptomatic form is seen in patients who perform frequent strenuous activities, Dr. Brown did not indicate that the arm-intensive activity had to be forceful activity, and he also indicated that it is seen in individuals who simply use their arms repetitively. *Id.* at 12, 41. Dr. Brown testified that the relevant factors were activity, frequency and duration of exposure. *Id.* at 54, 55. He testified, however, that resistance or added force would add to the irritation sustained. *Id.* at 56.

Dr. Brown also testified that symptomatic nerve irritation resulting from hypermobility of the ulnar nerve does *not* typically show up on nerve conduction studies:

> His answer to paraphrase is basically he's saying that you typically expect to see a nerve conduction study would be positive for changes on it and that's absolutely not true. He doesn't know the medical literature on the subject. As I stated before, in the published series on subluxing ulnar nerves, all of the patients in the most recent series had completely normal nerve conduction studies, so it's extremely uncommon for them to have a positive nerve conduction study no matter how symptomatic they are because it's a dynamic process. It's a dynamic pathology where the nerve is subluxing out of the condylar groove, being irritated by the medial epicondyle and that produces symptoms, so it's very uncommon for them to have positive nerve conduction studies . . . so that statement in his answer is just not true. It's not – it's not consistent with what the medical literature says. *Id.* at 34-35.

Dr. Brown explained why the nerve conduction studies obtained were reasonably necessary:

> . . . The reason I obtained them in this case is basically a way to monitor the patient and if I see any changes on the nerve conduction studies when I'm treating them conservatively, I will tend to operate on them sooner, but in this case, they were negative, so I felt I had time to treat this gentleman conservatively for a whole year, but he failed the year of conservative treatment so we eventually offered him surgery, but normally they're going to be normal. . . *Id.* at 34-35.

Dr. Brown testified that Dr. Phillips did not physically examine Petitioner for a subluxing ulnar nerve because it is an uncommon diagnosis and that was not the indication for the referral. *Id.* at 17, 18.

Dr. Brown found it significant that Respondent's video was taken on a different shift than the day shift which Petitioner most frequently worked, because more activity occurs during the first/day shift. *Id.* at 25. Dr. Brown testified that there were no other activities performed on a frequent enough basis to aggravate his subluxing ulnar nerve outside of his employment

activities, which Petitioner frequently performed for more than 10 years. *Id.* at 27. Hence, Dr. Brown concluded that Petitioner's employment was the only plausible explanation for Petitioner's subluxing ulnar nerve, which is typically asymptomatic, becoming symptomatic and requiring surgical intervention. *Id.* at 27. Dr. Brown noted that the arm-intensive activity performed by Petitioner at Big Muddy River Correctional Center throughout his work day as he repeatedly lifted/flexed his arm to turn keys, open and close doors and cuff and uncuff inmates was beyond the normal "everyday" level of activity, and when done over a prolonged period of time, would aggravate a subluxing ulnar nerve. *Id.* at 43, 44, 53.

Dr. Brown disagreed with Dr. Sudekum's testimony that the procedure performed by Dr. Paletta was somehow inferior to the procedure which he performed, and stated that it was simply a matter of personal preference. *Id.* at 29. Dr. Brown also pointed out that the Neurometrix test performed by Dr. Sudekum was substandard and does not even measure nerve conduction across the elbow. *Id.* at 30-32. He also noted that Dr. Sudekum did not offer a credible explanation for the symptomatic manifestation of a typically asymptomatic condition. *Id.* at 33.

On cross-examination Dr. Brown acknowledged that Dr. Sudekum's Neurometrix testing results were normal as were Dr. Phillips. He also stated that Petitioner's nerve is an anatomical variant that he was born with. He typically sees it in athletes or workers with arm-intensive types of jobs. It's also prevalent with weight lifters. Dr. Brown acknowledged that Petitioner denied any sports activities or hobbies outside of work. *Id. 39 - 42* Dr. Brown felt Petitioner's job was fairly arm intensive in that he turned locks several hundred times a day, pushed and pulled on doors to sure they were locked several hundred times a day, cuffed and uncuffed inmates that were struggling throughout the day and over a prolonged period of time could aggravate someone with a subluxing ulnar nerve. Dr. Brown was told by Petitioner that he turned keys to open and close doors fifty times an hour but based upon Petitioner's handwritten description he didn't think it was every hour. He thought it was 200 to 300 times per day. *Id. at 44.* Dr. Brown agreed that there are various different job assignments with Respondent and that the hand intensity of the assignments could vary. He agreed that there wouldn't be turning of 300 keys per hour on tower duty. Dr. Brown testified that when he saw Petitioner Petitioner was working in the Infirmary on the first shift where he was turning keys fifty times and an hour. Dr. Brown didn't think that was inconsistent with what he read in other reports, referencing the Job Site Analysis in which it was noted that was one of the areas where keys were manually turned. He had also worked in dietary where he turned a lot of keys and did morning counts and property box checks with keying of two hundred cells per day. Petitioner didn't include tower work in the written job description. *Id. 44, 45* Dr. Brown further acknowledged that when he first saw Petitioner, Petitioner provided him with a general job description. Thereafter, Petitioner provided him with more details but he didn't go through an exhaustive, detailed list of every activity he has done for the past ten years with Respondent. Dr. Brown testified that Petitioner gave him a general description that he turned keys and opened/closed cell doors. Petitioner also denied any outside activities or hobbies. He was generally healthy. *Id. 47-48.*

With regard to Petitioner's case, Dr. Brown did not know how Petitioner turned the keys; however, his understanding from other officers was that it was commonplace to use both arms. *Id. 48-49.* He believed different types of keys were used at Respondent's facility and that chuckholes are found in segregation and in the infirmary. Bar rapping is found in segregation and the showers. Petitioner would not have been rapping bars in the infirmary. Dr. Brown was unaware of any bars in the Infirmary. He did not know how long Petitioner had worked in segregation. Dr. Brown felt it took more force to open the chuckholes with the Folger Adams keys. *Id. 49 - 54*

Dr. Brown further testified that the only plausible explanation he had for Petitioner's subluxing ulnar nerve was his work activity because there was nothing non-occupational he could point to as an aggravating factor. *Id. 54* Dr. Brown also testified that any activity, whether at work or weight lifting, can have the same effect on the nerve so it becomes important how frequent one performs the activity and what's the exposure. He explained that his daughter is a volleyball player and has a subluxing ulnar nerve that bothers her when she's playing and then stops after she quits playing. *Id. 55*

At the arbitration hearing Petitioner testified that he began his career with the State of Illinois on September 27, 1999, as a Correctional Officer at Big Muddy River Correctional Center. Petitioner testified that neither his job title nor his job duties have changed in any way since he was hired in 1999. Prior to 2010, Petitioner never missed any time from work because of a workers' compensation injury for his hands or elbows, nor did he require any care or treatment for his hands, wrists or elbows. Petitioner's weight has been consistent for the last 10 to 15 years, and that he does not suffer from diabetes, gout, hypothyroidism or rheumatoid arthritis.

Petitioner testified that he has spent the overwhelming majority of his time working Respondent's 7 to 3 shift, working in the infirmary unit (35%) and in the housing gallery unit (40%). Petitioner testified that there is a distinction between the healthcare unit and the infirmary. The infirmary, which is located in the back part of the unit, is where inmates are kept because of illness or disability. Petitioner used the remaining percentage of his time working as a relief officer in other positions, including segregation (an isolation wing) and dietary. Petitioner testified that working dietary also requires that he open "quite a few doors with bigger keys," because of frequent inmate movement from the kitchen, dish room and bathrooms. Petitioner testified that Respondent's job post roster was not an accurate representation of his actual assignment history, because shift commanders frequently change the assignments indicated on the roster.

Petitioner testified that he reviewed the video of a Big Muddy Correctional Officer offered into evidence by Respondent and testified that it was not taken on the day shift which he most frequently worked. Petitioner testified that most of the movement in Respondent's facility

takes place on the day shift, and the video did not depict any of the activity occurring on the 7-3 day shift.

Petitioner testified that the keys used at the facility were approximately 3 inches in length, which is smaller than a Folger Adams key, but larger than the regular key used by the general public. Petitioner testified that the keys are large enough to require all 5 of his fingers to turn them.

The first thing Petitioner did when he arrived on day shift while working in the infirmary was key open all of the doors for count. When working on the gallery, Petitioner began his day by keying open doors for property box checks. Petitioner described opening the locks as, "You put in the key, and you've got to twist almost 180 degrees, sometimes sticking and then turning it back trying to get that door to unlock." Petitioner testified that the doors at the facility are hinged doors made of heavy steel. Petitioner testified that the doors and locks stick, and on occasions require both hands to open. Petitioner testified that he opens over 100 doors in the first 90 minutes of his shift alone on his gallery assignment. Petitioner testified that he was individually responsible for two wings, each containing 50 cells.

After opening the doors, Petitioner performed property box checks, which involved lifting up the boxes and searching its contents using his upper extremities. Petitioner testified that the property boxes are heavy, because all of the inmates' items are stored in them, including food, clothes, legal materials, magazines and books. Petitioner also lifts mattresses and moves furniture during his search for contraband.

After compliance checks are complete, and he has confirmed that the inmate counts check, Petitioner began running lines for gym, school, and work assignments. Petitioner testified that inmates are sometimes searched and cuffed, and the destination of each inmate must be logged. Petitioner testified that he cuffs and uncuffs inmates on a daily basis, and that it takes 5 separate motions with his upper extremities to do so. Petitioner testified that the locks do not work all of the time, and when they do not work he has to try operating the lock in different positions and/or put in a work order to get the equipment replaced. Respondent employs a full-time locksmith at its Big Muddy River correctional facility. Petitioner also performed wing checks every 30 minutes. Petitioner testified that he pulled on the doors to open them and make sure the inmates were compliant, confirmed the doors were secure, and logged the results.

Petitioner testified that he operated chuckholes on a daily basis throughout the course of his career while working in the infirmary and segregation units. Petitioner testified that the chuckholes at Big Muddy are opened by Folger Adams keys. Petitioner testified that the Folger Adams keys must be turned 180 degrees and require force and grip to operate. Petitioner testified that the chuckholes work "sometimes," but fail to work on other occasions due to paint, rust or inactivity. Petitioner used chuckholes to deliver food and mail, and in the infirmary, for the psychiatrist or staff could talk to the inmate through the chuckhole. Petitioner also restrained

inmates as necessary. Petitioner testified that there was no part of his job as a wing officer that does not involve the use of his arms and hands. Petitioner testified that he has never had a negative performance review in his 15 years of employment. Petitioner testified that the heaviest thing he had to lift was actual inmates.

Petitioner testified that despite the improvement resulting from surgery, he continues to experience symptoms depending on his level of activity. Petitioner testified that his elbows are bothered by performing lengthy chores around the house and driving for long distances. Petitioner testified that he begins to experience pain after driving more than an hour and a half. Petitioner takes Ibuprofen and/or Aspirin as needed for his symptoms. Petitioner testified that his hobbies of archery and fishing have been adversely affected. Petitioner testified that he continues to fish since his surgeries, but that he finds himself having to switch hands a lot. The pictures submitted by Respondent show Petitioner fishing and hunting. (RX6). Petitioner testified that his loss of strength has forced him to change the type of bow he uses.

Petitioner testified that he improved following his right elbow surgery, and returned to work performing the same job duties responsible for his right elbow injury. After returning to work from his right elbow surgery and working full duty for some time, Petitioner began to notice an increase in the intensity of the same symptoms in his left upper extremity. When these increased over time, Petitioner sought treatment with Dr. George Paletta.

On cross-examination Petitioner acknowledged that Respondent's facility opened in 1992 and is 20 - 23 years old. He also voiced no disagreement with RX 3, his staff assignment history. Petitioner agreed that he had probably worked every assignment in Respondent's facility at one time or another and that his job duties varied with some jobs involving more upper extremity activity than others. Petitioner believed that his job as a wing officer was the most hand intensive duty with it taking up approximately 30 to 40 percent of his time. The "Tower Officer" position was only hand intensive ten percent of the time as it mainly involves standing and watching for security breaches. As a "Dietary Officer" Petitioner explained that he maintained the safety and sanitation of the dietary and helped the lieutenants with chow lines. He would open quite a few doors with bigger keys to the dish room and to let inmates go to the bathroom. He worked solely in the dietary unit when assigned there.

Petitioner testified that his work as a "Relief Officer" was the most varied because he would be substituting for someone who was sick or off work. "Escort Officers" help the wing officers if requested and involves staging, walking and escorting inmate lines to and from the housing unit to the gym, yard, school, or health care. Doors at the beginning and end of the line would need to be unlocked but sometimes that was handled by buzzers in the Control Room. According to Petitioner, he primarily walked, used his eyes, and maintained good order in the line. It could be hand intensive if there was a physical altercation but on a day to day basis Petitioner agreed that it did not involve repetitive upper extremity motions.

Petitioner also testified that when working in "R2 Control" he would be the "bubble officer" in a housing unit/control room and keep an eye on the wings and control the panel's toggle switches for opening and closing doors. He agreed that it takes about four ounces of force to push one of the toggle switches which isn't a significant amount of force and he usually pushed it with his thumb.

When assigned to the Visiting Room Petitioner monitored visits between inmates and visitor and provided security. It, too, involves no significant amount of repetitive upper extremity use. Petitioner also explained that as a "Gym Officer" he was essentially providing security within the gym and involved no intensive upper extremity activity.

Petitioner called Lieutenant Harold Schuler, who was present on behalf of Respondent, to testify. Lt. Schuler testified that although he has worked on the same shift as Petitioner, he never worked as Petitioner's supervisor. Lt. Schuler worked in a separate division, internal affairs. Lt. Schuler agreed with Petitioner's testimony that the 7 to 3 shift is a lot busier than the 3 to 11 shift. He also agreed that it takes significantly more wrist turning movement to perform a 180 degree key turn. He also agreed that some of the locks and/or keys and chuckholes stick. Lt. Schuler clarified that the infirmary contains an open ward where the majority of the inmates/patients stay as well as three isolation cells for inmates/patients in segregation status. He further testified that an officer assigned to segregation control would be assigned to a control room and would not open/close chuckholes. Lt. Schuler also testified that he does not trust or respect Petitioner.

Results for the Illinois Team Trail were marked as RX 7. They are not dated. (RX 7)

Respondent's Job Site Analysis dated December 17, 2010 shows that Correctional Officers perform frequent lifting up to 50 pounds and frequent carrying of up to 25 pounds (frequent being defined as up to 5 ½ hours per day); horizontal reaching up to 2 ½ hours per day; pulling up to 2 ½ hours per day; pushing up to 2 ½ hours per day; pinching up to 2 ½ hours per day; grasping up to 2 ½ hours per day; wrist turning up to 2 ½ hours per day; and frequent finger manipulation up to 5 ½ hours per day. The Analysis further notes that the physical work demands are going to vary depending upon shift and assigned position. For more specifics per employee, one is told to refer to their individual locations, job descriptions, and log sheets. The Analysis also indicates that Respondent's facility is a Level 3 high medium security facility in which the inmates are allowed to move freely in and out of their cells for approximately six hours every day to allow them to use facilities such as the yard, gym, school, dining hall and day room. (RX1).

Respondent's Exhibit 2 is compromised of various position description summaries for "SEG Control Officer," Health Care Unit Officer," "Housing Unit Control Officer," "Housing

Unit Wing Officer," "Housing Unit Escort Officer," "Infirmary Officer," "Receiving Wing Officer," and "Segregation Wing Officer." (RX 2)

With regard to Case # 09 WC 49710, The Arbitrator concludes:

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

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

Petitioner failed to prove he sustained an accident on November 25, 2009 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to that injury. In particular, Petitioner failed to prove that any accident "arose out of" his employment or that his right elbow condition was causally related to his employment duties for Respondent. While Petitioner's Application for Adjustment of Claim alleges bilateral hand and right wrist injuries, Petitioner failed to prove he sustained any injury to his bilateral hands or right wrist as a result of an alleged accident on November 25, 2009.

In cases such as this one where a claimant's theory of liability is based upon repetitive trauma, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987), citing *Westinghouse Electric Co. v. Industrial Commission*, 64 Ill.2d 257 (1976)

Petitioner herein has failed to prove to a medical and surgical certainty via expert testimony that he suffered accidental injuries with a causal link to his duties as a correctional officer for Respondent. Petitioner's case relies upon the opinion of Dr. Brown who has relied on incomplete and incorrect information. Most significantly, Dr. Brown did no have a complete and accurate understanding of Petitioner's work assignments for Respondent. As Petitioner acknowledged on cross-examination he has worked almost all of the available jobs at Big Muddy. His assignments varied and his duties within those assignments varied. Petitioner readily acknowledged that many of them were not upper extremity intensive whatsoever. Looking at Petitioner's job assignments prior to his initial visit with Dr. Brown, it is clear that Petitioner worked as a dietary officer, relief officer, wing officer, escort officer, and control room officer. Some of these positions varied within the work week itself. When initially presenting to Dr. Brown, he was assigned to the Infirmary. Even if

one focuses on the job assignments that involved cell doors and keys, Dr. Brown did not have correct information. Dr. Brown was told that Petitioner opened fifty doors per hour throughout an average workday which is an assertion wholly absent from Petitioner's trial testimony. Dr. Brown related that Petitioner opened two hundred doors every morning as a wing officer, contrary to that of Petitioner at trial. Additionally, Petitioner testified about property box checks. He never discussed that job duty with Dr. Brown, however.

Further troubling is the fact that after the initial visit with Dr. Brown in November of 2009 Petitioner did not return to see him until April 7, 2010. At that time he was assigned as a "Dietary Officer." No definitive diagnosis was reached at either visit. Petitioner then returned to see Dr. Brown on June 16, 2010 at which time he was working as an "Escort Officer." Dr. Brown's records contain no discussion of the job duties associated with these positions. Interestingly, when Petitioner then returned to see Dr. Brown in September and October of 2010, Petitioner was not even working for Respondent as he was on a leave of absence beginning back in August of 2010.

While Respondent has contended in its proposed decision that Dr. Brown's opinion is further unpersuasive because the doctor was misled regarding Petitioner's activities outside of work, the Arbitrator notes that no direct evidence was presented showing that Petitioner was engaged in any recreational hobbies or pursuits during 2009 and 2010. While Petitioner acknowledged photographs of himself (RX 6) and acknowledged bow hunting and fishing, he testified that he did in 2012 and 2013. He was never asked if he was doing so prior to those years. Thus, she is unable to adopt Respondent's contention. However, the line of questioning and photographs did cast suspicion on Petitioner's credibility, especially when he testified that he had to "drop down" to a 50 lb. bow as a result of his surgery. Nevertheless, Dr. Brown's causation opinion in this case is not persuasive for the reasons outlined above. The multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. The fact that Petitioner performed at least ten different assignments during the period of time in which his upper extremity complaints manifested suggests that his activities were not sufficiently repetitive to constitute an aggravating factor for his congenital condition.

Petitioner's claim for compensation in 09WC 49710 is denied. All remaining issues are moot. No benefits are awarded.

With regard to Case # 11 WC 32739, The Arbitrator concludes:

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

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

Petitioner failed to prove he sustained an accident on August 17, 2011 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being is causally related to that injury. In particular, Petitioner failed to prove that any accident "arose out of" his employment or that his left elbow condition was causally related to his employment duties for Respondent.

In cases such as this one where a claimant's theory of liability is based upon repetitive trauma, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 478 (4th Dist. 1987), citing *Westinghouse Electric Co. v. Industrial Commission*, 64 Ill.2d 257 (1976)

Petitioner herein has failed to prove to a medical and surgical certainty via expert testimony that he suffered accidental injuries with a causal link to his duties as a correctional officer for Respondent. Petitioner's case relies upon the opinion of Dr. Paletta who has relied on incomplete and incorrect information. Dr. Paletta's opinions were based upon a job history and understanding of duties that were not based upon full knowledge of the totality of Petitioner's job assignments and duties for Respondent. Dr. Paletta did not have a complete and accurate understanding of Petitioner's work assignments for Respondent. As Petitioner acknowledged on cross-examination he has worked almost all of the available jobs at Big Muddy. His assignments varied and his duties within those assignments varied. Petitioner readily acknowledged that many of them were not upper extremity intensive whatsoever. Looking at Petitioner's job assignments prior to his initial visit with Dr. Paletta, it is clear that Petitioner worked as a dietary officer, relief officer, wing officer, escort officer, and control room officer. Some of these positions varied within the work week itself. Additionally, the Arbitrator notes that while Petitioner alleges repetitive injury to his left, non-dominant elbow, there was very little clear testimony or evidence as to how Petitioner used his left arm/elbow in a repetitive fashion at work. A careful review of Dr. Paletta's office records shows a complete absence of any specific detailed information as to how Petitioner used his non-dominant left arm/elbow at work.

The multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. The fact that Petitioner performed at least ten different assignments during the period of time in which his upper extremity complaints manifested suggests that his activities were

not sufficiently repetitive to constitute an aggravating factor for his congenital condition.

Petitioner's claim for compensation in 11WC 32739 is denied. All remaining issues are moot. No benefits are awarded.

****

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

Debra Rohman,
Petitioner,

vs. NO: 10 WC 34609

State of Illinois,
Dept. of Financial & Professional Regulation,
Respondent.

16IWCC0129

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, 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 January 21, 2015, 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.

16IWCC0129

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

DATED: FEB 2 3 2016

Joshua D. Luskin

o-01/20/16
jdl/wj
68

Ruth W. White

Charles J. DeVriendt

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

ROHMAN, DEBRA
Employee/Petitioner

Case# **10WC034609**

STATE OF ILLINOIS
Employer/Respondent

16IWCC0129

On 1/21/2015, 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:

0333 SHAY & ASSOC LAW FIRM LLC
TIMOTHY S SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

4993 ASSISTANT ATTORNEY GENERAL
AMY S OXLEY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 6M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 21 2015

Ronald A. Piccia, Acting 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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Debra Rohman
Employee/Petitioner

Case # 10 WC 34609

v.

Consolidated cases: n/a

State of Illinois
Employer/Respondent

16IWCC0129

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 Springfield, on November 19, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0129

FINDINGS

On the date of accident (manifestation), August 5, 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.

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

In the year preceding the injury, Petitioner earned $44,733.00; the average weekly wage was $860.25.

On the date of accident, Petitioner was 57 years of age, single 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 reasonable and necessary medical services as identified in Petitioner's Exhibit 23, limited to those bills for treatment of Petitioner's right hand, 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 authorize and pay for prospective medical treatment including right carpal tunnel release surgery as recommended by Dr. Mark Greatting and all reasonable and necessary treatment pertaining to same.

Petitioner's claim for TTD benefits 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)

January 16, 2015
Date

JAN 21 2015

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 August 5, 2010, and that Petitioner sustained repetitive trauma to the "Hands and Nerves" that caused bilateral carpal tunnel syndrome and an aggravation of a cervical injury (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner testified that she began working for the Department of Financial and Professional Regulation on March 1, 2007. Petitioner's job title was Office Coordinator and her job required her to sit as a desk in a cubicle for six to eight hours a day. Petitioner's job required her to deal with issues concerning licensing and regulation of various professions. When seated at her workstation, Petitioner would type, use a computer mouse, talk on the telephone and hand write. On direct examination, Petitioner reviewed a "Demands of the Job" form which stated that she was required to use her hands for fine manipulation six to eight hours per day (Respondent's Exhibit 3). Petitioner agreed that this was accurate.

Petitioner testified that her first workstation was an oak desk that had both the computer monitor and keyboard located on the top of the desk. There was not a keyboard drawer/extension. She also used an older chair that was not ergonomic. She worked at this workstation from March, 2007, to Fall, 2008.

Petitioner worked at her second workstation from Fall, 2008, to February 1, 2012. Petitioner tendered into evidence photos of this workstation (Petitioner's Exhibit 5). Petitioner testified that the keyboard pad and mouse pad shown in Exhibit were not present when she first started to work at the station and were not obtained until sometime close to January, 2012. The keyboard was on the top of the desk and not on a pullout drawer. Petitioner testified that when she typed, she would pull the keyboard to the edge of the desk and would pull the mouse pad closer to her when she would use the computer. When Petitioner would write, she would push the keyboard forward. The chair seen in the photo is an ergonomic chair; however, Petitioner did not receive this chair until mid December, 2011.

Petitioner began working at her third and current workstation on February 1, 2012. Petitioner tendered into evidence a photo of this workstation (Petitioner's Exhibit 25). The photo does show that the keyboard is located on a pullout drawer and the computer mouse is a "vertical" mouse. Petitioner testified that the extension for the keyboard was not installed until August, 2012.

Petitioner testified that her working at the workstations caused repetitive trauma to her neck and hands. In regard to the neck, Petitioner stated that she would be in one position looking at the computer screen all day and that she did not get up to move around or perform other tasks. In regard to her hands, she stated that excessive use of the mouse and the keyboard placement caused the problems in her hands. Petitioner is right hand dominant. While at work, Petitioner stated that she experienced swelling of her right hand which she attributed to its excessive use.

Petitioner testified that she sustained some prior injuries to her neck in 2003 and 2005 when she was in two motor vehicle accidents. Following both accidents, Petitioner was treated by Dr. David Fletcher, an occupational medicine specialist. Petitioner testified that she sustained "whiplash" type neck injuries following both accidents and did receive some physical therapy after one of them. She also had pain in her jaw and Dr. Fletcher referred Petitioner to a TMJ specialist. No neck surgery was either recommended or performed at that time. Petitioner testified that she recovered from these two prior car accidents, but she still was experiencing some achiness in her neck prior to August 5, 2010.

Dr. Fletcher ordered an MRI of Petitioner's cervical spine which was performed on December 31, 2009. This revealed disc bulges at C2-C3, C3-C4 and C6-C7 as well as disc osteophyte complex on the right side at C4-C5 and C5-C6. Dr. Fletcher saw Petitioner for neck pain on January 18, February 5, March 19, April 16, June 18, and July 16, 2010. With the singular exception of the record of January 8, 2010, Dr. Fletcher's records noted that Petitioner had chronic pain following several MVAs and that the cervical MRI showed objective pathology to explain her pain (Petitioner's Exhibit 9).

Dr. Fletcher referred Petitioner to Dr. Edward Trudeau, who performed EMG/nerve conduction studies on August 5, 2010 (the manifestation date alleged in the Application). The studies were positive for a right C6 radiculopathy and a mild to moderately severe right carpal tunnel syndrome. Left carpal tunnel syndrome was not diagnosed at that time (Petitioner's Exhibit 7).

Dr. Fletcher saw Petitioner on August 25, 2010, and diagnosed Petitioner with carpal tunnel syndrome and cervical radiculopathy. Dr. Fletcher again saw Petitioner on November 2, 2010, and, because of the neck and right upper extremity symptoms, diagnosed Petitioner with Double Crush Syndrome. He opined that Petitioner was a candidate for both right carpal tunnel surgery and a cervical fusion at C5-C6. He attributed both the neck and hand conditions to "cumulative trauma." (Petitioner's Exhibit 6).

Dr. Fletcher referred Petitioner to Dr. Lawrence Li, an orthopedic surgeon, who saw Petitioner on November 12, 2010. Dr. Li confirmed the diagnosis of right carpal tunnel syndrome and he recommended Petitioner have carpal tunnel release surgery. Petitioner was again seen by Dr. Li on August 25, 2011, and he again discussed treatment options with her; however, Petitioner wanted to defer obtaining any treatment for her right hand symptoms because she was waiting to obtain treatment for her neck (Petitioner's Exhibit 8).

Dr. Fletcher referred Petitioner to Dr. Kern Singh, an orthopedic surgeon, primarily for her neck symptoms. Dr. Singh saw Petitioner on December 13, 2010. In the intake form completed by Petitioner, she indicated that the hand problem was work-related but that the neck problem was pre-existing. In connection with his examination, Dr. Singh reviewed the December, 2009, MRI and August, 2010, EMG/nerve conduction studies. Dr. Singh opined that Petitioner had a C5-C6 disc protrusion and recommended that Petitioner have an MRI without contrast to determine if Petitioner's hand problems were from the cervical spine. He noted that Petitioner's pain increased while she was at work; however, he did not opine as to causality (Petitioner's Exhibit 9).

Dr. Fletcher continued to treat Petitioner for both her cervical and right hand conditions. When he saw Petitioner on November 30, 2010, he again opined that Petitioner should have a cervical fusion at C5-C6 and a right carpal tunnel release (Petitioner's Exhibit 6). Dr. Fletcher referred Petitioner to the Center for Living at St. John's Hospital for acupuncture treatment which she received from March 31, 2011, through June 24, 2012 (Petitioner's Exhibit 11). He also referred Petitioner to Dr. Louis DiStasio, a chiropractor, who treated her for neck symptoms from July 27, 2010, through January 18, 2011 (Petitioner's Exhibit 15). Dr. Fletcher also referred Petitioner to Dr. Mark Hale, a chiropractor, who treated Petitioner for neck symptoms from August 5, 2011, through January 9, 2012 (Petitioner's Exhibit 14).

At the direction of Respondent, Petitioner was examined by Dr. Joseph Williams, an orthopedic surgeon, on October 3, 2011. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent which included the MRI scan performed in December, 2009. Petitioner informed Dr. Williams of the prior neck problem she had subsequent to the motor vehicle accidents. Dr. Williams noted that Petitioner had right hand symptoms that were atypical for carpal tunnel syndrome; however, he opined that her symptoms may have been attributed to degenerative changes in the cervical spine and not to her repetitive activities at work. Further, he opined that Petitioner should have further conservative treatment prior to any surgical procedures being recommended (Respondent's Exhibit 4).

At the direction of the Respondent, Petitioner was examined by Dr. James Williams, an orthopedic surgeon, on October 5, 2011. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent as well as information regarding Petitioner's job duties. Dr. Williams opined that Petitioner had right carpal tunnel syndrome which was mild to moderately severe and right C6 radiculopathy. He opined that these conditions were not related to Petitioner's work, but rather to her previously diagnosed hypothyroidism, her post menopausal status, her increased BMI of 29, her elevated blood sugar and her two prior MVAs. He opined Petitioner should have both carpal tunnel release surgery and a C5-C6 fusion performed (Respondent's Exhibit 6).

Dr. Fletcher ordered another MRI of the cervical spine which was performed on June 28, 2011. The scan revealed disc osteophytes at C4-C5 and C5-C6 (Petitioner's Exhibit 17). In his medical record of that date, Dr. Fletcher opined that Petitioner had right cervical radiculopathy secondary to a right side C5-C6 disc herniation and severe right carpal tunnel syndrome and that both conditions were work-related (Petitioner's Exhibit 6).

Dr. Fletcher subsequently referred Petitioner back to Dr. Trudeau for EMG/nerve conduction studies which were performed on August 28, 2012. This study revealed right C6 radiculopathy increased when compared to the prior test of August 5, 2010; moderately severe right wrist carpal tunnel syndrome, also increased when compared to the prior test of August 5, 2010; and left C6 nerve root irritation relatively mild, but new since the prior study of August 5, 2010. There was no finding indicative of left carpal tunnel syndrome (Petitioner's Exhibit 18).

At trial, Petitioner acknowledged that it was recommended that she have a cervical fusion performed; however, she decided not to have the surgical procedure performed because she knew of other individuals who had fusion surgeries performed on them and she was not impressed with

the results that they obtained. On her own, Petitioner did some research and located a physician in Los Angeles, California, Dr. Michel Levesque, a neurosurgeon. At her request, Dr. Fletcher provided her with a referral to Dr. Levesque.

Dr. Levesque examined Petitioner on October 29, 2012, and reviewed all three MRI scans. He opined that Petitioner had cervical radiculopathy C4-C5 and C5-C6 that failed to respond to conservative measures. Dr. Levesque performed surgery on October 31, 2012, the procedure consisting of microdiscectomies at C5-C6 and C6-C7 (Petitioner's Exhibit 12). Following the surgery, Petitioner was off work for one week, October 31, 2012, through November 6, 2012.

Subsequent to the neck surgery, Petitioner returned to Dr. Fletcher who referred her to Dr. Claude Fortin, a neurosurgeon, who saw Petitioner on December 10, 2012. In regard to the neck, Dr. Fortin ordered Petitioner to continue the physical therapy that had been ordered by Dr. Levesque. In regard to the right carpal tunnel syndrome, Dr. Fortin ordered another EMG/nerve conduction study which was performed on October 18, 2013. This study was positive for mild to moderate bilateral carpal tunnel syndrome (Petitioner's Exhibit 16). This was the first time that carpal tunnel syndrome of the left hand had been diagnosed.

Dr. Fortin referred Petitioner to Dr. Mark Greatting, an orthopedic surgeon in that same office, who saw Petitioner on December 19, 2013. Dr. Greatting confirmed the diagnosis of bilateral carpal tunnel syndrome and recommended splinting, injections and possible surgery. At that time, Petitioner decided not to proceed with any further treatment and to monitor her symptoms (Petitioner's Exhibit 16).

Dr. Joseph Williams was deposed on January 31, 2012, and his deposition testimony was received into evidence at trial. Dr. Williams' testimony on direct examination was consistent with his medical report and he reaffirmed his opinions that Petitioner's conditions may have been solely related to her cervical pathology and that she did not necessarily have right carpal tunnel syndrome. He also testified that Petitioner's cervical condition was pre-existing and was not aggravated by her work activities (Respondent's Exhibit 5; pp 11-13).

On cross-examination, Dr. Joseph Williams agreed that the EMG/nerve conduction studies performed by Dr. Trudeau were consistent with a carpal tunnel syndrome and C6 radiculopathy and that he had no reason to dispute Dr. Trudeau's findings. He also agreed that the slowing of the median nerve at the wrist could be caused by Petitioner's repetitive tasks at work as indicated both by the history she provided and the information provided to him by Respondent. Dr. Williams also agreed that if someone sat at a desk in a "static" position for six to eight hours per day that this could cause an aggravation or exacerbation of a pre-existing degenerative disc disease (Respondent's Exhibit 5; pp 25-26; 30-32).

Dr. Fletcher was deposed on February 1, 2012, and his deposition testimony was received into evidence at trial. Dr. Fletcher reaffirmed his opinion that Petitioner had Double Crush Syndrome based on the C6 radiculopathy and right carpal tunnel syndrome. In regard to causality, Dr. Fletcher testified that he reviewed the photo of Petitioner's second workstation (Petitioner's Exhibit 5) and that the keyboard and mouse were in non-ergonomic locations and that the monitor needed to be closer. He further opined that an individual who was required to set as such

a workstation for six to eight hours per day would have a static posture of her neck and would develop right upper extremity symptoms. He opined that Petitioner's use of the mouse with her right hand was why Petitioner had carpal tunnel syndrome in her right, but not in her left wrist. Dr. Fletcher opined that the non-ergonomic arrangement of Petitioner's workstation and her job duties caused the right carpal tunnel syndrome and aggravated the cervical spine condition (Petitioner's Exhibit 3; pp 8-12; 19-20; 26-28).

On cross-examination, Dr. Fletcher agreed that for Petitioner to develop a carpal tunnel syndrome as a result of repetitive trauma she would need to be exposed to such repetitive trauma for more than two-thirds of the workday. He agreed that switching tasks every 15 minutes or so could reduce this effect (Petitioner's Exhibit 3; pp 41-43).

Dr. James Williams was deposed on April 5, 2012, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Williams' testimony was consistent with his medical report and he reaffirmed his opinions that Petitioner had right carpal tunnel syndrome and right C6 radiculopathy, but that neither condition was related to Petitioner's work activities. He attributed Petitioner's right carpal tunnel syndrome to other risk factors including hypothyroidism, her postmenopausal state, her BMI and the fact that Petitioner may have been diabetic. He opined that the C6 radiculopathy was related to Petitioner's pre-existing degenerative disc disease (Respondent's Exhibit 7; pp 20-27).

On cross-examination, Dr. James Williams agreed that keyboard usage, if repetitive, could cause or contribute to carpal tunnel syndrome if Petitioner was typing continuously six or more hours per day. He also agreed that the position of the keyboard and the absence of a gel pad could have been a contributing factor to the development of carpal tunnel syndrome (Respondent's Exhibit 7; pp 31-33).

At trial, Petitioner testified that the neck surgery relieved many of her symptoms but that she still has some complaints. In regard to the upper extremities, Petitioner still has complaints of tingling in both forearms and the thumbs/fingers of both hands. Petitioner does want to proceed with the bilateral carpal tunnel surgery as recommended by Dr. Greatting.

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 repetitive trauma injury arising out of and in the course of her employment for Respondent to her right hand that manifested itself on August 5, 2010.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony regarding her job duties and the non-ergonomic arrangement of her work station was unrebutted. When keyboarding, Petitioner was required to place her hands/arms in an awkward position because the keyboard was elevated and on the same plane as the computer

screen. Further, the computer mouse was likewise elevated and on the same plane as the computer screen.

Petitioner is right hand dominant and, over time, developed symptoms in her right hand. With the singular exception of Dr. Joseph Williams (one of Respondent's Section 12 examiner's), all of the physicians that have examined or treated Petitioner for her upper extremity symptoms have opined that she does have right carpal tunnel syndrome.

In regard to the etiology of Petitioner's right carpal tunnel syndrome, the Arbitrator finds the opinion of Dr. Fletcher to be more persuasive than that of Respondent's Section 12 examiners, Dr. Joseph Williams and Dr. James Williams. Further, Dr. James Williams agreed that the position of the keyboard could have been a contributing factor to the development of carpal tunnel syndrome.

In regard to the left carpal tunnel syndrome, this condition was not diagnosed until October 18, 2013. When deposed, Dr. Fletcher testified that Petitioner had carpal tunnel syndrome of the right wrist, but not of the left wrist. There is no evidence that Petitioner's left carpal tunnel syndrome condition manifested itself on August 5, 2010.

In regard to Petitioner's cervical spine condition, there is no question that Petitioner had symptoms that preexisted the alleged date of manifestation of August 5, 2010. An MRI was performed on December 31, 2009, and Petitioner received treatment for neck symptoms from January, 2010, through July, 2010. Dr. Fletcher noted in his medical record that the MRI revealed objective pathology to explain Petitioner's complaints. Further, the Arbitrator acknowledges Petitioner had other tasks she performed and it was unlikely that Petitioner kept her neck in a "static" position for six to eight hours per day.

In regard to the etiology of Petitioner's neck condition, the Arbitrator finds the opinion of Respondent's Section 12 examiner, Dr. James Williams, to be more persuasive than that of Dr. Fletcher.

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 regard to the right hand was reasonable and necessary and that Respondent is liable for payment of medical bills related to treatment of the right hand condition incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 23, limited to those bills for treatment of Petitioner's right hand, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including right carpal tunnel release surgery as recommended by Dr. Mark Greatting and all reasonable and necessary treatment pertaining to same.

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

The Arbitrator concludes Petitioner is not entitled to any temporary total disability benefits.

In support of this conclusion the Arbitrator notes the following:

Petitioner's lost time was related to Petitioner's neck condition which the Arbitrator has determined is not work-related.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

☐ 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

JESUS TRINIDAD,

Petitioner,

16IWCC0132

vs.

NOs: 10 WC 38873
12 WC 18080

CHILI'S & DAN RUTHERFORD AS STATE TREASURER
& EX-OFFICIO CUSTODIAN OF SECOND INJURY FUND,

Respondent.

DECISION AND OPINION ON REVIEW

These matters come before the Commission pursuant to timely filed Petition for Review filed by Respondent, Second Injury Fund. Respondent, Second Injury Fund, appeals the July 16, 2014 "Corrected Decision" of Arbitrator Andros entered in 12 WC 18080 finding that that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay

$414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22, 2013, the Second Injury Fund pay Petitioner $466.13 a week for life.

History of Applications for Adjustment of Claim:

On October 7, 2010, Attorney Mario Perez filed an Application for Adjustment of Claim, 10 WC 38873, on behalf of Petitioner alleging a date of accident of August 15, 2010, naming Chili's as Respondent, and alleging a "co-worker kicked a box and it flew up in the air and hit his right eye."

On May 24, 2012, Attorney Richard Hannigan filed an Application for Adjustment of Claim, 12 WC 18080, alleging a date of accident of August 15, 2010, naming Chili's as Respondent. The Application alleges that Petitioner "hit in right eye" and sustained injury to "both eyes."

On November 7, 2012, Arbitrator Lee granted Attorney Richard Hannigan's Motion to Substitute as Petitioner's attorney in 10 WC 38873, based upon the passing of Attorney Mario Perez.

On October 3, 2013, an Amended Application was filed in 12 WC 18080, naming the Second Injury Fund/Illinois State Treasurer as an additional Respondent.

On December 5, 2013, the Illinois Attorney General's Office filed an Appearance of Representative on behalf of Second Injury Fund/Illinois State Treasurer in 12 WC 18080.

On January 4, 2014, a hearing was held on Petitioner's Motion for Hearing and Respondent Attorney General's Motion for Continuance. Petitioner's attorney represented that he was prepared to proceed to hearing, and intended to prove up a statutory permanent total based upon 100% loss of use of an injured right eye, and pre-existing 100% loss of use of the left eye. Petitioner's attorney further indicated he agreed to the Attorney General's request for a continuance to prepare a defense. Arbitrator Andros granted Respondent Attorney General's Motion for Continuance, and the matter was continued to April 2, 2014 for hearing. (PX15).

On April 2, 2014, Arbitrator Andros conducted a hearing in 10 WC 38873 and 12 WC 18080. At that time, a discussion was held on the record whether to consolidate the two claims, or to dismiss the 10 WC 38873 claim, which was the claim former Attorney Perez had filed, and then have one decision issue only thereafter under case 12 WC 18080. Arbitrator Andros recommended that Petitioner dismiss 10 WC 38873, and proceed under case 12 WC 18080. Petitioner's attorney then made an oral Motion to Dismiss 10 WC 38873, and thereafter

Arbitrator Andros dismissed the Application for Adjustment of Claim filed in 10 WC 38873. (ARB 4/2/14, T81-86).

On May 15, 2014, 05/15/14 Arbitrator Andros issued a Decision in 10 WC 38873, despite having dismissed the matter at the time of the April 2, 2014 hearing. The Arbitrator further issued a Decision in 12 WC 18080.

In the 10 WC 38873 Decision issued on May 15, 2014, naming Respondent Chili's, Arbitrator Andros found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, and that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award.

In the 12 WC 18080 Decision issued on May 15, 2014, naming both Chili's and Second Injury Fund, Arbitrator Andros found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay $414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22, 2013, the Second Injury Fund pay Petitioner $466.13 a week for life.

On June 9, 2014, Petitioner's Attorney filed a Motion to Recall the Arbitrator's May 15, 2014 Decision issued under "10 WC 38873" for Clerical Error under Section 19(f). Petitioner's Attorney argued that the Decision May 15, 2014 Decision in 10 WC 38873 incorrectly listed the case number as "10 WC 38873," instead of "12 WC 18080," and that the case 10 WC 38873 was filed by Petitioner's former attorney and was dismissed orally at the beginning of the trial in 12 WC 18080.

On June 25, 2014, the Attorney General's Office filed a Petition For Review with respect to the May 15, 2014 Decision in 12 WC 18080.

On July 16, 2014, Arbitrator Andros Recalled the May 15, 2014 Decision issued in case 10 WC 38873, and issued a July 16, 2014 "Corrected Decision," which was then then renumbered as "12 WC 18080," and named Respondent Chili's. In the July 16, 2014 "Corrected Decision" the Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award.

On October 7, 2014, Petitioner's Attorney filed a Petition for Section 16 and Section 19(k) Penalties & Fees with respect to 12 WC 18080, against Respondent, Second Injury Fund, alleging they failed to pay the accrued and weekly statutory permanent total disability under Section 8(f). On November 10, 2014, Petitioner's Attorney withdrew the Petition for Penalties and Fees, per the Order of Commissioner Lamborn.

On December 2, 2014, Petitioner filed a Petition to Recall the July 16, 2014 "Corrected Decision" issued in 12 WC 18080, under Section 19(f). On December 2, 2014, a hearing was held on Petitioner's Petition to Recall the July 16, 2014 Decision in 12 WC 18080, before Arbitrator Andros. At that time the Arbitrator granted Petitioner's Motion to Recall the July 16, 2014 Decision issued in 12 WC 18080, and reopened proofs. (T8A-12A). On January 22, 2015, Arbitrator Andros recalled the July 16, 2014 "Corrected Decision" in 12 WC 18080 for correction clerical error under Section 19(f), and issued a January 22, 2015 "Amended Decision," naming Respondent Chili's and the Second Injury Fund, and finding that Petitioner sustained accidental injuries arising out of and in the course of his employment with Chili's, that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, that Petitioner is entitled to $4,015.00 in medical expenses, that Respondent is entitled to a credit of $1,493.31 for temporary total disability benefits paid, that Petitioner permanently lost 100% loss of use of the right eye under Sec 8(e), 162 weeks at $414.00, with credit to Respondent for payment of $67,068.00 previously paid satisfying the statutory permanent partial disability award, and finding that based upon Petitioner's previously sustaining 100% loss of use of the left eye, Petitioner is eligible for statutory permanent total disability benefits of $466.13 for life, commencing September 22, 2013, as provided under Section 8(e)18. Arbitrator Andros ordered Respondent Chili's to pay $414.00 per week for 162 weeks commencing August 15, 2010, and that the Second Injury Fund pay $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13, as provided in Section 8(f). Arbitrator Andros further ordered that commencing September 22,

2013, the Second Injury Fund pay Petitioner $466.13 a week for life. Therein the Arbitrator further stated that "This award and order supersedes all other awards including the original award and any corrected awards issued by this arbitrator."

Findings of Facts and Conclusions of Law:

1. Petitioner testified that on August 15, 2010, a co-worker was kicking a box, that the box hit him in his right eye. Petitioner testified he provided notice of the accident to Curtis. There are no disputes between Petitioner and Respondent's Chili's with respect to the alleged accident arising out of and in the course of his employment, or with respect to Petitioner providing timely notice. (T39)(ARB EX1).

2. Petitioner testified that prior to August 15, 2010, he had been working for Respondent, approximately 30 hours a week as a food prep employee, and for a second employer, Outback Steakhouse, on a full time basis for five years. Petitioner further testified that Respondent's owner, Curtis, knew about his concurrent employment with Outback Steakhouse at the time of his August 15, 2010 work-related injury, and that Curtis adjusted his schedule around his work at Outback. (T34-38). Petitioner testified that contained within PX12 are his concurrent employment pay stubs he received from Outback Steakhouse. (T37). There is no dispute between Petitioner and Respondent Chili's with respect to Petitioner's concurrent employment at Outback Steakhouse, or with respect to the inclusion of those concurrent wages in calculating Petitioner's average weekly wage, as the parties stipulated to an average weekly wage of $690.00. (ARB EX1, T50).

3. Petitioner testified that he was educated in Mexico up to the 6th grade, that he wore glasses in school, that he brought glasses with him when he came to the United States in 2002, and that his vision in his left eye both before and after his August 15, 2010 work-related injury was the same. Petitioner further testified that obtained new eye glasses from his mother when she was in Mexico, that she would send them to him, that he obtained his glasses and contacts without seeing any eye doctor, and that between 2002 and 2010 he regularly wore glasses and contacts but never saw an eye doctor. (T38-39, 76-79).

4. Petitioner testified that on August 19, 2010 he went to Lens Crafter. (T39). At that time Petitioner provided and history of being struck in the right eye, was diagnosed with retinal detachment of the right eye, and was referred to Dr. Shapiro for immediate follow-up. (PX2). Petitioner was examined by Dr. Shapiro, at Retina Consultants later that same day. Dr. Shapiro noted that Petitioner's corrected visual acuity in his left eye was 20/40-2 and pinhole was 20/30-3, and that Petitioner's uncorrected vision in his right eye was of counting fingers at 6 inches, with eccentric fixation. Dr. Shapiro diagnosed a total/subtotal retinal detachment with multiple relatively large retinal breaks of the right

eye, as well as mild lattice degeneration of the left eye. Dr. Shapiro opined Petitioner's retinal detachment was most likely related to his work injury, and that it required surgery. (PX2). Petitioner underwent retinal reattachment surgery on August 20, 2010 at Lutheran General. (PX1).

5. Petitioner continued to follow-up with Dr. Shapiro post-operatively, and was released to return to full duty work for Respondent Chili's on October 7, 2010. Petitioner returned to Dr. Shapiro on December 3, 2010 with complaints of floaters and blurry vision in his right eye, as well as 4/10 pain in both of his eyes. Dr. Shapiro opined that Petitioner's right eye likely required new glasses, that his left eye might need laser-preventative treatment, and that he follow-up in three months or as needed. (PX1).

6. On December 5, 2010, Petitioner was fitted for contact lenses at Lens Crafters. (PX2). Petitioner returned to Dr. Shapiro on May 14, 2012, and reported floaters in both eyes, in right eye greater than left. P also reported pain in both eyes, rated as 7/10, as well as blurring vision in his right eye. On that date Dr. Shapiro performed a laser retinopexy in his left eye for the multiple areas of lattice degeneration. On July 30, 2012 Petitioner followed-up with Dr. Shapiro, at which time he complained of longstanding poor vision in both eyes, with intermittent flashes of light in his right eye, and longstanding intermittent floaters in both eyes. Dr. Shapiro noted the left eye looked satisfactory post laser procedure, and advised Petitioner to follow-up in three months. (PX1).

7. On March 7, 2013 Petitioner underwent a Section 12 Examination with Dr. Gieser at the Wheaton Eye Clinic, at the request of Respondent Chili's. Dr. Gieser documented vision of counting fingers in the right eye and 20/400 in the left eye without correction, as well as atrophy in the right macular region and myopic macular degeneration. Dr. Gieser also noted high myopia in both eyes, and a significant cataract in the right eye related to Petitioner's vitrectomy surgery from retinal reattachment. Dr. Gieser opined that the cause of the decreased vision in Petitioner's eye was the cataract and the myopic macular degeneration. Dr. Gieser also noted that Petitioner's left eye was a very nearsighted eye with no sign of other significant pathology. Dr. Gieser opined a cataract operation would need to be performed in the right eye before the actual vison could be accurately determined, and that the right eye would never see normally regardless because of the myopic macular degeneration. Dr. Gieser also opined that Petitioner's left eye should allow him to function normally, except for night driving. (R Chili's EX2).

8. On August 26, 2013, Petitioner was examined by Dr. LaFranco, at Retina Services of Illinois, at request of his attorney. Dr. LaFranco noted a satisfactory reattachment of the right retina, definite myopic macular degeneration changes, and a significant cataract developing in the right eye. Dr. LaFranco also noted peripheral laser coagulation marks in the left eye with myopic changes in the posterior pole. Dr. LaFranco opined that Petitioner's traumatic right retinal detachment was the cause of the marked decrease in

his right eye vision to counting fingers (20/800), and that it was doubtful removing the cataract would improve his central visual acuity because of the macula detachment at the time of the retinal detachment and the myopic degeneration already present in the right eye. (PX3).

9. On March 12, 2014, Petitioner underwent a Section 12 Examination with Dr. Taub, at the request of the Illinois Assistant Attorney General. On examination, Dr. Taub documented: right eye vision to be limited to only light perception with light projection both with and without correction; left eye vision to be 20/400 without correction and 20/70 with correction. Dr. Taub noted that Petitioner's vision records pre-dating his work injury were not obtainable, and that Petitioner's left eye visual acuity had been stable since the date of the work injury. Dr. Taub diagnosed myopic degenerative changes in both eyes, a healed retinal detachment of the right eye, and prophylactic laser therapy to the left eye. Dr. Taub further opined that Petitioner's right eye is causally related to the August 15, 2010 work accident, that his left eye was not causally related to the accident, and that Petitioner was at maximum medical improvement for his right eye with no need for additional treatment. (R Asst. AG EX1).

10. On March 14, 2014 Dr. LaFranco was deposed. Dr. LaFranco testified that an individual with greater than 20/200 loss of vision is considered legally blind in the State of Illinois. Dr. LaFranco testified that based upon Petitioner's visual acuity of counting fingers, whether corrected or uncorrected vision, Petitioner was legally blind in his right eye as a result of his work-related injury, that the cause of his decreased vision in his right eye was the retinal detachment and subsequent repair. Dr. LaFranco further testified that based upon his review of the treating records from August 19, 2010, four days after Petitioner's right eye injury, Petitioner's left eye was noted to have degenerative myopic macula, meaning profound nearsightedness, and uncorrected vision of 20/400. Dr. LaFranco testified that based upon this August 19, 2010 finding with respect to his left eye vision, it was more likely than not that Petitioner's uncorrected vision would have been greater than 20/400 prior to his August 15, 2010 right eye injury. (PX13, T9-11).

11. Petitioner testified that prior to his August 15, 2010 work injury he could see a little better in his right eye, and that he could see beyond three feet, but that he could not read with his right eye without his glasses. (T43-44). On cross-examination, Petitioner testified he returned to work for Respondent Chili's and Outback Steakhouse for approximately two years, and then began began working only for Outback Steakshouse, full-time, approximately 35 hours a week performing same job as before his accident as a prep cook. (T67-69).

12. On cross-examination Petitioner testified that he continues to drive, that he still has floaters in both of his eyes, that he still has pain in his eyes, and that his eyesight in his left eye has not worsened since his accident. (T69-73).

13. Petitioner and Respondent Chili's stipulated at hearing that Petitioner received $1,493.31 in TTD benefits for the period of August 19, 2010, the date Petitioner was first taken off work, and October 6, 2010, at a weekly rate of $213.33, which did not take into account Petitioner's concurrent employment with Outback Steakhouse. Petitioner and Respondent Chili's further orally stipulated at hearing that Respondent Chili's had already satisfied its statutory obligation to pay permanent partial disability benefits representing 100% loss of use of Petitioner's right eye, totaling $67,068.00, based upon the applicable permanent partial disability rate of $414.00 per week. (ARB EX1, T30-33, 50-51).

14. Petitioner introduced medical bills into evidence, $2,530.00 from Park Ridge Anesthesiology and $1,485.00 from Retina Consultants. (PX4) Respondent Chili's orally stipulated at hearing those bills would be paid. Petitioner stipulated orally at hearing that Respondent Chili's should be entitled to a credit for any outstanding medical bills awarded that have already been paid by Respondent Chili's. (T47-48).

At the time of the April 2, 2014 Arbitration hearing, Petitioner's attorney made a Motion to Dismiss Petitioner's Application for Adjustment of Claim in 10 WC 38873. On that date, Arbitrator Andros granted Petitioner's Motion to Dismiss the Application for Adjustment of Claim in 10 WC 38873. Despite the dismissal of Petitioner's Application for Adjustment of claim in 10 WC 38873, the Arbitrator erroneously issued a Decision in 10 WC 38873 on May 15, 2014. The Commission finds that the Arbitration Decision issued in 10 WC 38873 is *void ab initio,* as it at no time had any legal validity. Accordingly, the Commission vacates the May 15, 2014 Arbitration Decision entered in 10 WC 38873 on May 15, 2014.

On July 16, 2014, the Arbitrator recalled the May 15, 2014 Decision in 10 WC 38873, and issued a "Corrected" Decision renumbering it as 12 WC 18080. The Commission finds that the Arbitrator's July 16, 2014 "Corrected Decision" issued as 12 WC 18080 is also *void ab initio*, as it at no time had any legal validity, given that the original May 15, 2014 Decision in 10 WC 38873 was erroneously entered by the Arbitrator on a claim that had already been dismissed. Accordingly, the July 16, 2014 "Corrected Decision" issued under 12 WC 18080 is hereby vacated.

On January 22, 2015, more than five months after the "Corrected" Decision was entered, the Arbitrator issued a letter recalling the July 16, 2014 Decision under Section 19(f), and issued an "Amended Decision." The Commission finds that the July 16, 2014 "Amended Decision" is *void ab initio* as the matter, 10 WC 38873, was dismissed at the time of the April 4, 2014 Arbitration hearing. The Commission further finds that the Arbitrator lacked jurisdiction to recall the July 16, 2014 "Corrected" Decision and to issue an "Amended Decision" under Section 19(f). Section 19(f) provides that the "Arbitrator or Commission may on his or its own

motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision." The Commission finds that the Arbitrator was without authority to recall the July 16, 2014 Decision under Section 19(f) of the Act, as the time for recalling the July 16, 2014 "Corrected Decision" had clearly ran by January 22, 2015, more than five months after the "Amended Decision" was issued. Accordingly, the Commission vacates the Arbitrator's January 22, 2015 "Amended Decision,"

Based upon a review of the record, the Commission concludes the only viable Decision entered in this matter is the May 15, 2014 Decision entered in 12 WC 18080.

With regard to the issue of temporary total disability benefits, the Commission finds that Petitioner was temporarily totally disabled for a period of 7 weeks, from August 19, 2010 through October 6, 2010, at the rate of $460.00 per week, totaling $3,220.00, under Section 8(b) of the Act, and that Respondent Chili's shall have a credit against the temporary total disability benefits in the amount of $1,493.31.

With regard to the issue of medical expenses, the Commission finds that Petitioner is entitled to an award of $4,015.00 for necessary medical expenses under Section 8(a) of the Act.

Under Section 8(e)18 of the Act, a "specific loss of both hands, both arms, or both leg, or both eyes, or of any two thereof, or the permanent and complete loss of the use thereof, constitutes total and permanent disability to be compensation according to the compensation fixed by paragraph (f) of this Section." The Section further provides: "Any employee who previously suffered the loss or permanent and complete loss of the use of any such members, and in a subsequent independent accident loses another or suffers the permanent and complete loss of the use of any one of such members the employer for whom the injured employee is working at the time of the last independent accident is liable to pay compensation only for the loss or permanent and complete loss of use of the member occasioned by the last independent accident."

Section 8(f) of the Act provides: "If an employee who had previously incurred loss or the permanent and complete loss of use of one member, through the loss or the permanent and complete loss of the use of one hand, one arm, one foot, one leg, or one eye, incurs permanent and complete disability through the loss or the permanent and complete loss of the use of another member, he shall receive, in addition to the compensation payable by the employer and after such payments have ceased, an amount from the Second Injury Fund provided for in paragraph (f) of Section 7, which, together with the compensation payable from the employer in whose employ he was when the last accidental injury was incurred, will equal the amount payable for permanent and complete disability as provided in this paragraph of this Section."

In Gilbert v. Shughart Painting Contractors v. Industrial Commission, 136 Ill.App.3d 163, 169(1985), the Court addressed a narrow question concerning the loss of use of an eye, where an industrial injury caused the uncorrected vision to be almost totally extinguished but was almost totally restored by the use of artificial lenses. The Court held stated the sum of all the case law is that "there is no mechanical standard and that the Commission may base an award for loss of vision on either corrected or uncorrected vision or a hybrid of both according to the particular circumstances of the case."

The record clearly indicates Petitioner wore glasses prior to leaving Mexico in 2002, and that it is not known what his corrected or uncorrected vision was when those glasses were prescribed. Petitioner testified that prior to his August 15, 2010 work-related injury he saw better with his right eye than his left eye. Presently his uncorrected vision in his right eye is limited to finger count at three feet. Based upon a review of the record as a whole, the Commission concludes that Petitioner has established that prior to his August 15, 2010 work-related injury, he suffered from the complete and permanent loss of use of the left eye. Furthermore, as a result of the August 15, 2010 work-related injury Petitioner sustained the complete and permanent loss of use of the right eye. Dr. LaFranco testified an individual with great than 20/200 loss of vision is considered legally blind in the State of Illinois, and that Petitioner has greater than 20/200 uncorrected vision in his right eye, as a result of his August 15, 2010 work-related injury, and 20/200 uncorrected vision in his left eye that pre-dated his work-related injury. Therefore, Petitioner has established that he has sustained permanent total disability as contemplated by Section 8(e)18 of the Act. Thus, the Second Injury Fund, and Dan Rutherford as State Treasurer and Ex-Officio Custodian of the Second Injury Fund have been made a party to this claim. On December 5, 2013, the Illinois Attorney General's Office filed an Appearance of Representative on behalf of Second Injury Fund/Illinois State Treasurer in 12 WC 18080.

Based upon the Commission's finding that Petitioner had previously sustained 100% loss of use of the left eye, and that as a result of his August 15, 2010 work-related accident Petitioner sustained 100% loss of use of the right eye, Petitioner is eligible for statutory permanent total disability benefits of $416.13 per week for life commencing September 22, 2013, as provided in §8(e)18 of the Act. Accordingly, Respondent Chilli's shall pay Petitioner $414.00 per week for 162 weeks, commencing August 15, 2010, for the loss of the second body part and, during this time, the Second Injury Fund shall pay Petitioner the sum of $ 8,445.06, representing $52.13 per week for 162 weeks, to equal the total permanent total disability rate of $466.13 per week, as provided in §8(f) of the Act. Commencing September 22, 2013, the Second Injury Fund shall pay to Petitioner $ 466.13, weekly, for the life of the Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in 10 WC 38873, filed on May 15, 2014, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the "Corrected Decision" of the Arbitrator in 12 WC 18080, filed on July 16, 2014, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the "Amended Decision" of the Arbitrator in 12 WC 18080, filed on January 22, 2015, is hereby vacated for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $4,015.00 for medical expenses under §8(a) and per §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $460.00 per week for a period of 7 weeks, from August 19, 2010 through October 6, 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 $414.00 per week for a period of 162 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 100% loss of use of the right eye.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Chili's is entitled to a credit of $67,068.00 for the statutory permanent partial disability benefits already paid under §8(e)13 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Second Injury Fund shall pay Petitioner $52.13 per week for 162 weeks, as provided in §8(f) of the Act, to equal the total permanent total disability rate of $466.13, and that commencing September 22, 2013, the Second Injury Fund shall pay Petitioner $466.13 for life.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and attorneys' fees under § 16, § 19(k), and § 19(l) of the Act is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent 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.

16IWCC0132

Bond for the removal of this cause to the Circuit Court by Respondent Chili's is hereby fixed at the sum of $5,500.00. 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: FEB 2 4 2016
KWL/kmt
O-01/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EVA WINTERS,

Petitioner,

vs. NO: 11 WC 41259

HARDIN COUNTY GENERAL HOSPITAL,

Respondent,

16IWCC0136

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, and nature and extent, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causation but adopts the Findings of Fact, which is attached hereto and made a part hereof, with the additions and modifications outlined below.

Petitioner sustained an accidental injury to her left knee on October 22, 2009, while transporting an obese patient into a bariatric bed. Respondent does not dispute that certain medical expenses, including arthroscopic surgery on January 28, 2011, are causally related to this injury. However, Respondent argues that Petitioner's need for a total knee replacement is causally related to her underlying osteoarthritis and not related to her work injury.

Petitioner testified that she had no history of left knee pain or treatment prior to her work injury and there are no medical records to dispute this. Dr. Young, who performed cortisone injections, an arthroscopy with tricompartmental chondroplasty and partial lateral meniscectomy on January 28, 2011, and a series of five Supartz injections, opined on October 13, 2011, that it is possible that Petitioner may have had some underlying arthrosis and this might have been exacerbated by her work injury.

Dr. Morgan, who Petitioner was referred to by Dr. Young, opined on November 4, 2011, that Petitioner has "at least aggravated her degenerative arthritis to the point that she needs a total knee." He performed the total knee replacement on December 19, 2011. He affirmed his

opinion in his deposition testimony that Petitioner's work injury aggravated her arthritis to the point that she became significantly more symptomatic necessitating surgery. He testified that Petitioner was "rather vague" in terms of her mechanism of injury but he thought it was during a lifting activity. He admitted that it could be very conceivable that Petitioner had an aggravation of her symptoms but not an actual change in her condition when she moved the patient. However, when asked if Petitioner could have had a temporary aggravation, he stated that Petitioner's symptoms were not temporary but, rather, ongoing and did not respond to therapy, arthroscopy, and viscoelastic therapy.

Respondent argues that Dr. Morgan did not have an adequate understanding of Petitioner's mechanism of injury to credibly opine that it had aggravated her osteoarthritis. Interestingly, Respondent had Petitioner examined, pursuant to §12 of the Act, by Dr. Odegard on April 26, 2010, about six months after her injury. He opined that Petitioner sustained a mild left knee injury and had knee pain consistent with mild osteoarthritis. He wrote, "Her current complaints do seem to be directly related to her injury of 10/22/09 as she had no symptoms prior to that point. She may have had some mild osteoarthritic changes, but we have no documentation of this." He felt that Petitioner had not reached maximum medical improvement and recommended another cortisone injection, continued physical therapy, and possible viscosupplementation injections "or eventually a knee arthroscopy as her symptoms do sound like they could be related to a meniscus tear despite her MRI," which only showed degenerative changes without a definite tear. In other words, Dr. Odegard found a causal connection between Petitioner's work injury and her increased symptoms after the work injury.

Instead of having Petitioner examined again by Dr. Odegard after her arthroscopic surgery on January 28, 2011, Respondent had her examined by a different §12 physician, Dr. Gross, on May 12, 2011. Dr. Gross opined that Petitioner sustained only a temporary aggravation of her pre-existing osteoarthritis and that her need for a total knee replacement is not related to the work injury. He believed that Petitioner lifting the patient with her left knee braced against the bed would not change the natural course of her arthritis and is similar to many activities of daily living such as putting groceries on your knee, opening your door with your knee, bringing groceries up the stairs, and taking a grocery bag and bracing it on your knee as you close the car door. He did not see any signs of acute trauma on Petitioner's MRI that would indicate a serious enough injury to permanently aggravate her arthritis.

We find two major problems with Dr. Gross' opinion. First, Petitioner's mechanism of injury at work is much more forceful than any of the activities of daily living that Dr. Gross compared it to. Second, it is undisputed that Petitioner did not have any left knee problems, pain, or treatment prior to her work injury. After the injury, she treated continually with physical therapy, medications, cortisone injections, and arthroscopic surgery (debriding and shaving the lateral meniscus, medial femoral condyle, and proximal tibia). These did not alleviate her condition and the records show that Petitioner's pain increased during "aggressive therapy" after the arthroscopy. (See Dr. Young, 3/24/11). When a series of five Supartz injections also gave no improvement, the next step was a total knee replacement. Dr. Gross admitted that it would be speculative to say that Petitioner would have needed treatment for her left knee in the absence of the work injury. The bottom line is that there was nothing "temporary" about her aggravation. Therefore, we find that Petitioner's work injury was a contributing factor in her need for the total knee replacement and reverse the Arbitrator's decision on the issue of causation.

Based on our finding regarding causation, we find that Petitioner is entitled to 70-1/7 weeks of temporary total disability from January 28, 2011, when Petitioner underwent her first

16IWCC0136

surgery, through June 1, 2012, which is the date that she was released by Dr. Morgan after her total knee replacement. We also award the outstanding medical bills contained in Petitioner's Exhibit 12, subject to the fee schedule in §8.2 of the Act. Finally, we find that Petitioner's injury has caused permanent partial disability to the extent of 45% loss of use of the left leg under §8(e) of the Act. Petitioner testified that standing makes her knee more painful and swells. Her pain is normally about a 4 or 5 out of 10. She takes prescribed pain medications occasionally when the pain is bad. Petitioner testified that she has issues with mobility and going up and down steps. She has difficulty squatting, pivoting, and running, which makes her unable to return to her previous job as an emergency room nurse. However, she is still able to work as a nurse in a different department.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $711.41 per week for a period of 70-1/7 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 $640.27 per week for a period of 96.75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 45% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the outstanding medical expenses contained in Petitioner's Exhibit 12 under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

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

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

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: FEB 29 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 2/10/16
49

[illegible]

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WINTERS, EVA
Employee/Petitioner

Case# **11WC041259**

HARDIN COUNTY GENERAL HOSPITAL
Employer/Respondent

16IWCC0136

On 2/25/2015, 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:

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG B TAYLOR
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

1109 GAROFALO SCHREIBER & STORM
JAMES CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eva Winters
Employee/Petitioner

v:

Hardin County General Hospital
Employer/Respondent

Case # **11** WC **41259**

Consolidated cases: _____

16IWCC0136

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 **Ed Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **1/8/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/22/2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,489.72**; the average weekly wage was **$1,067.11**.

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

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

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

Respondent shall be given a credit of **$37,298.73** for TTD, $ for TPD, $ for maintenance, and **$5,000.00** for other benefits, for a total credit of **$42,298.73**.

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

ORDER

The petitioner is entitled to an award of 40% loss of use of her left leg due to cartilage damage to the knee related to the accident in question. The ongoing condition of the left knee, the degeneration prompting the prescription for an additional surgery (knee replacement) beyond the surgery of January 28, 2011 is related to a preexisting degenerative condition personal to the petitioner, to which she returned to baseline; the degenerative condition not being caused or permanently aggravated by the accident. The petitioner is entitled to 51 & 3/7 weeks of temporary total disability from January 28, 2011 through January 23, 2012. The respondent shall receive credit for all benefits paid and all related medical care associated with the conclusions of the Arbitrator in the attached findings under paragraph "J" shall be subject to the provisions of 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

2/17/15
Date

FEB 25 2015

Findings of Fact:

The petitioner, Eva Winters, was working as a registered nurse at Hardin County General Hospital, on October 22, 2009. She was assisting in the movement of a patient when she felt pain in her left knee. The specific mechanism of injury was that the petitioner had her left leg on the ground and her knee pushed against the bed. Her right knee was on the bed itself.

The incident was at the end of her shift. She continued to work for months thereafter while she treated. She received as many as five injections and received therapy. The treatment did not restore the knee to be symptom-free so surgery was recommended.

On January 28, 2011 underwent a left knee arthroscopy by Dr. Young. This included a tricompartmental chondroplasty with partial lateral menisectomy. At the time of the surgery it was noted that the petitioner had significant degeneration and wear of the cartilage.

Subsequent steroid injections and viscosupplementation injections were prescribed post surgery. The petitioner continued to have discomfort. Dr. Morgan (PX 9) saw the petitioner on June 1, 2011 and concluded that a knee replacement would be an option for the petitioner.

The petitioner was evaluated by Dr. Gross (RX 1) pursuant to Section 12 of the Act. Dr. Gross reviewed all of the medical records and diagnostic films associated with the petitioner's care. Gross concluded that the petitioner's ongoing condition was related to her personal, degenerative, osteoarthritic condition and that she had fully recovered from the temporary aggravation she had experienced due to the minor accident of October 22, 2009. (RX 1, pp. 14, 16 -17, 18 -19)

The petitioner was referred to Dr. Morgan by Dr. Young. Dr. Morgan concluded that the petitioner aggravated her preexisting degenerative arthritis when she was transferring the patient. (PX 9, pp. 8 – 9) Dr. Morgan agreed that the cartilage tears he saw on the MRI film could have resulted from the petitioner's degenerative condition. (PX 9, pp. 18 – 19) Dr. Morgan did not know the mechanism of the petitioner's claimed injury when moving the patient, only that the petitioner complained of pain thereafter. (PX 9, pg. 19) Dr. Morgan could not distinguish between what the accident allegedly caused and what the degenerative process caused. (PX 9, pg. 21) Dr. Morgan also agreed that the petitioner could have had an increase in symptoms without a change in her degenerative condition. (PX9, pp. 22 – 23)

On December 19, 2011 the petitioner had a knee replacement. (PX 9, pg. 9) The petitioner has since returned to work as a registered nurse, but in a capacity as a psychiatric nurse with less physical activity.

Legal Standard:

A decision by the Commission cannot be based upon speculation or conjecture. Deere and Company v Industrial Commission, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. Three "D" Discount Store v Industrial Commission, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove, by a preponderance of credible evidence, all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. Martin vs. Industrial Commission, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. Smith v Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. U.S. Steel v Industrial Commission, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. Board of Trustees of the University of Illinois v. Industrial Commission, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v Industrial Commission, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991). "[A]lthough medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only, and not within the common knowledge or comprehension of laymen, expert testimony is necessary to show that a claimant's work activities caused the condition complained of." Interlake Steel v. Industrial Commission, 136 Ill. App. 3d 740 (1985). See also Ledbetter v State of Illinois, 13 IWCC 0131, regarding the relative knowledge of testifying experts.

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred.

However, that testimony must be proved credible. Caterpillar Tractor vs. Industrial Commission, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. Neal vs. Industrial Commission, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances [emphasis added] support the decision. See generally, Gallentine v. Industrial Commission, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also Seiber v Industrial Commission, 82 Ill.2d 87, 411 N.E.2d 249 (1980), and Caterpillar v Industrial Commission, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v Workers' Compensation Commission, 397 Ill.App. 3d 665, 674 (2009).

Conclusions of Law:

F.
Is Petitioner's current condition of ill-being causally related to the injury of October 22, 2009?

The petitioner sustained a knee strain on October 22, 2009 when she pressed her knee up against a bed while helping to move a patient. Conceivably this may have aggravated some underlying cartilage damage associated with the petitioner's preexisting left knee osteoarthritis. However, the nature of the alleged accident was so minor that her treating physician, Dr. Morgan (PX 9), agreed that she may merely have caused a symptom aggravation and did not necessarily aggravate her preexisting condition. In fact, Dr. Morgan conceded that he did not even know the nature or mechanism of her injury to give an opinion as to whether the accident could have aggravated her condition. Her relied on the petitioner's conclusion that she had injured herself in that fashion, having no independent knowledge of the accident himself from the petitioner or from other records.

Dr. Gross (RX 1) was very clear in his testimony about the lack of significant trauma and the nature of the significant trauma necessary to aggravate or permanently change a preexisting arthritic condition. Gross concluded that simply pressing one's knee against a hospital bed is an insufficient mechanism to aggravate a preexisting arthritic condition.

The Arbitrator agrees with the conclusions of Dr. Gross. The petitioner may have sustained a temporary exacerbation of her knee symptoms, but did not aggravate her arthritic condition. While the conservative care and the arthroscopy may have been related to the work event, the need for a knee replacement was not.

The preponderance of the evidence favors the opinions of Dr. Gross who had a greater knowledge of the facts associated with the accident and the diagnostics associated with the petitioner. The Arbitrator finds that the petitioner may have sustained an aggravation of some preexisting meniscal tears, but did not sustain an aggravation of the underlying arthritic condition. The degenerative process in the petitioner's knee was not aggravated or accelerated, but continued on and, independent of the work incident, was the precipitating factor in the need for the petitioner's knee replacement two years later.

J.

Were the medical services provided to the petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator agrees with the conclusions of Dr. Gross regarding the treatment needed for the results of the accident of October 22, 2009. The arthroscopic surgery, the steroid injections, and the physical therapy are all related to the effort to diagnose and treat the petitioner's knee injury and possible meniscal aggravations. The viscosupplementation is a treatment for arthritis which, in this petitioner, was a preexisting condition which was not permanently changed or altered, nor permanently aggravated, nor accelerated as a result of the minor work accident.

K.

What temporary benefits are in dispute?

The petitioner lost time from work, but only after her arthroscopy on January 11, 2011. She continued to treat thereafter, but any lost time after December 19, 2011 appears to have been related to the knee replacement surgery and not to the residuals of the original accident of October 22, 2009. The parties stipulated to lost time from January 28, 2011 to January 23, 2012, with the petitioner seeking additional lost time thereafter. Temporary total disability is confined to 51 & 3/7ths weeks from January 28, 2011 to January 23, 2012.

L.

What is the nature and extent of the injury?

The petitioner, per the testimony of Dr. Gross, may have aggravated, on a temporary basis, her preexisting knee condition that may have had within it some meniscal tears. Both Dr. Gross and Dr. Morgan agreed that the petitioner's symptoms could have manifested or been aggravated by the work accident. However, the preexisting degenerative condition accounted for the need for the knee replacement.

The petitioner appears to have sustained some meniscal fraying and tears that could have been related to the arthritic condition in her knee and could have

been aggravated by the work accident without an aggravation of the underlying osteoarthritis. The Arbitrator concludes that the petitioner sustained a 40% loss of use of her left knee as a result of the aggravation of the preexisting soft tissue damage in her left knee, but does not conclude that the petitioner aggravated the degenerative osteoarthritic condition itself.

12 WC 09191

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

Brett Briney,
Petitioner,

vs. NO: 12 WC 09191

16IWCC0135

Ameren,
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 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 February 10, 2015 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.

12 WC 09191

16IWCC0135

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: FEB 2 5 2016
MJB:ell
O-11/09/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

BRINEY, BRETT
Employee/Petitioner

Case# **12WC009191**

16IWCC0135

AMEREN
Employer/Respondent

On 2/10/2015, 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:

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
4242 N KNOXVILLE AVE
PEORIA, IL 61614

0080 PRUSAK WINNE & McKINLEY LTD
JOSEPH WINNE
300 N MAIN ST SUITE 300
PEORIA, IL 61603

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)

BRETT BRINEY
Employee/Petitioner

v.

AMEREN
Employer/Respondent

Case # 12 WC 09191

Consolidated cases: _____

16IWCC0135

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 DOUGLAS McCARTHY**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **01/16/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0135

FINDINGS

On the date of accident, **05/17/2010**, 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 $**69,086.05**; the average weekly wage was $**1,328.58**.

On the date of accident, Petitioner was **52** years of age, ***married*** 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 $**11,893.43** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**11,893.43**.

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

ORDER

Respondent shall authorize the proposed surgery recommended by Doctor Gibbons as the Petitioner's condition of ill being is causally related to his 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.

Signature of Arbitrator

Feb. 6, 2015
Date

ICArbDec19(b)

FEB 10 2015

ATTACHMENT TO ARBITRATOR'S DECISION

Brett Briney vs. Ameren

IWCC No.: 12 WC 09191

In support of the Arbitrator's decision regarding (F) **Is Petitioner's current condition of ill-being causally related to the injury**, the Arbitrator notes as follows:

Petitioner testified he worked for Respondent as a lineman. Petitioner alleged he sustained accidental injury on May 17, 2010 to his left knee. Petitioner testified he was sent to fix a light in a backyard. After assessing that the light was out, Petitioner descended a ladder attached to a pole and felt a pop in his left knee. Petitioner testified that his equipment at the time of the incident included strap hooks attached to his legs, a belt around his waist, and shoes with spikes to allow for climbing up and down poles. Petitioner testified he felt discomfort in the left knee on the way back to the truck followed by pain and swelling. Petitioner's testimony, along with histories he provided to his medical providers, established that his job required him to climb poles and ladders as well as into and out of lift buckets. He was required to lift and carry 15 to 20 pound ladders as a regular part of his job.

Petitioner testified he first sought treatment with Dr. Ayers, his family doctor, on May 19, 2010. (PX-1). X-rays of Petitioner's left knee were obtained on this date indicating no fracture or acute osseous abnormality, moderate sized joint effusion, an entheosphyte present at the insertion of the quadriceps tendon on the patella and an impression of moderate sized joint effusion, no acute osseous abnormality. (Id.). An MRI of Petitioner's left knee was performed on May 28, 2010, indicating probable tear of

the medial meniscus, moderate sized joint effusion, contusion in the medial proximal tibia, and degenerative arthritis. The history obtained by the radiologist at that visit was that petitioner had noticed his left knee popping while climbing down a power pole, with medial pain and instability since the occurrence. (Id)

The Petitioner was referred by his family physician, Dr. Clyde Grady to Dr. Michael Gibbons at Midwest Orthopedic Center. The Petitioner was first seen by Dr. Gibbons on June 7, 2010 and gave a history consistent with his testimony at Arbitration. (Petitioner Exhibit 2) Dr. Gibbons concluded that the Petitioner had a left knee medial meniscus tear and recommended a left knee arthroscopy. (Petitioner Exhibit 2) That procedure was authorized and performed by Dr. Gibbons on July 23, 2010. (Petitioner Exhibit 2)

Following the surgery, the Petitioner continued to have pain and swelling in his left knee and continued to treat with Dr. Gibbons. The Petitioner had his knee aspirated and received injections on multiple occasions throughout the following three months. (Petitioner Exhibit 2) On October 26, 2010 the Petitioner had a visit with Dr. Gibbons, during which he stated that his knee was feeling a lot better and that he had less pain and swelling. Dr. Gibbons still noted small effusion during his examination. He was still doing light duty work and had not been climbing any ladders or polls. Dr. Gibbons felt that the Petitioner had a favorable response to the previous Synvisc injection. The Petitioner stated he was anxious to get back to regular duty work and therefore Dr. Gibbons allowed him to return to work on October 27, 2010 without restrictions. Dr. Gibbons further stated that he felt that the Petitioner would be at maximum medical

improvement in about four weeks and the Petitioner was to follow-up with Dr. Gibbons as needed for any recurrent symptoms. (Petitioner Exhibit 2)

Unfortunately, the Petitioner required additional treatment following the October 26, 2010 release to work due to continued pain and swelling in the knee. On January 20, 2011 and again on February 14, 2011 he was given the same treatment of aspiration and injection that he received prior to his full duty release. (Petitioner Exhibit 2) On a May 23, 2011 visit a knee replacement procedure was discussed but ultimately decided that the Petitioner was not far enough along to consider. Instead, Dr. Gibbons recommended a repeat arthroscopy. On his next visit, August 22,2011, Dr. Gibbons had x-ray's performed which showed progression of his arthritis. The medial aspect of the knee was now graded at moderate to severe. Accordingly, Dr. Gibbons recommended conservative care as opposed to a repeat arthroscopy. (Petitioner Exhibit 2)

During his treatment with Dr. Gibbons the Petitioner also saw Dr. Myron Stachniw, an orthopedic surgeon, for a second opinion. The Petitioner saw Dr. Stachniw on February 20, 2012 and gave a history consistent with his testimony at arbitration. (Petitioner Exhibit 4) Dr. Stachniw stated that the Petitioner was doing as well as he could, was receiving full conservative treatment, and that the next modality would be a knee replacement. In his report Dr. Stachniw wrote that the Petitioner's torn meniscus had a significant role in aggravating and accelerating his knee problem. (Petitioner Exhibit 4) After some further continued treatment with Dr. Gibbons, in a May 12, 2014 visit it was finally decided that a knee replacement was appropriate. (Petitioner Exhibit 2)

The Petitioner testified at arbitration that he had no prior left knee complaints or treatment sought before the date of accident of May 17, 2010 and this is consistent with

his treatment records of the previous ten years with his family physician Dr. Grady. (Petitioner Exhibit 1) There is some mention of rheumatoid arthritis in a note from Dr. Grady dated June 4, 2014. The petitioner was being seen at the time for right knee pain. The doctor's note states " He has known rheumatoid arthritis that has affected multiple joints, including his knees." (RX 6) The petitioner denied treating for rheumatoid arthritis and, again, there is nothing in any of the medical records of treatment pre-dating the accident to rebut his denial.

In his evidence deposition, Dr. Gibbons was asked if he felt the incident caused the need for the knee replacement surgery to which he responded:

> Again, I think that would, based on the information I have, be the trigger or the first domino to start this process. So that would likely be the start of this or the cause of the subsequent problems, yes.
> (Petitioner Exhibit 5, p.31)

In his evidence deposition, Dr. Stachniw was asked, presuming the Petitioner had no prior knee problems and that he has had problems ever since the incident and surgery, whether he had an opinion as to whether the recommendation for a knee replacement is related to the incident on May 17th, 2010 and stated that he thought it was related. (Petitioner Exhibit 6, p.15) Dr. Stachniw went on further to state that if the Petitioner was asymptomatic before this injury, that the accident was an aggravating and accelerating cause. (Petitioner Exhibit 6, p.15) He also referenced dominos in explaining his opinion. He said that the accident was like knocking over the first domino in a line of dominos that kept going. (Id at 36) Upon repeated questioning by Respondent's attorney aimed at establishing that the accident was a temporary aggravation at best, the doctor said that once the first domino fell, the subsequent dominos, like the progression of the

Petitioner's arthritis, did not stop. (Id at 42) He was questioned again as to whether the Petitioner had returned to his pre accident baseline after his arthroscopic surgery. Dr. Stachniw said that while the Petitioner's abilities and ability to work had returned to baseline, his knee did not. His knee, he said, was worse as he was now without a medial meniscus. (Id at 37-38) The need for surgery, he opined, was due to both the accident and the pre existing arthritis. (Id at 44)

At the request of the Respondent, the Petitioner was examined by a Dr. John Hoffman on September 15, 2011. It was Dr. Hoffman's opinion that the Petitioner had arthritic changes to the knee prior to the incident at work and that the incident may have exacerbated his pain but did not lead to his arthritic changes. (Respondent Exhibit 3) Dr. Hoffman also stated that with the Petitioner being 53 years old he should continue with conservative care as long as possible and that the next surgery would be a total knee replacement arthroplasty. (Respondent Exhibit 3)

At the request of the Respondent, the Petitioner was examined by a Dr. Richard Rende on August 16, 2012. It was Dr. Rende's opinion that the Petitioner had longstanding severe degenerative osteoarthritis of the left knee predating the alleged work injury. (Respondent Exhibit 9) Dr. Rende stated that he found it inconceivable that someone with that degree of degenerative osteoarthritis could be asymptomatic prior to May 17, 2010. (Respondent Exhibit 9, p.33-34) This is in direct conflict with the testimony of the Petitioner who stated that he never had problems with his knee prior to the incident on May 17, 2010. The Petitioner also provided treatment records from his primary care physician going back roughly ten years which show absolutely no treatment or complaints pertaining to his left knee. (Petitioner Exhibit 1) Petitioner also provided

two contrasting opinions from Dr. Gibbons and Dr. Stachniw who both stated it was possible to have this level of degeneration and remain asymptomatic. (Petitioner Exhibit 5 and 6)

A large part of Dr. Rende's deposition testimony involved his interpretation of the MRI which was performed on the petitioner just ten days after his accident. Dr. Rende maintained that the MRI contained only chronic findings which predated the accident. The radiologist who actually performed the test noted findings of edema along the medial aspect of the medial femoral condyle which probably represented a contusion. (PX 3) While Dr. Rende acknowledged that there was edema, he would not concede that it could represent a contusion. While admitting that the edema could be acute, the doctor concluded that it was not in this case.

It is well settled in our law that an employer takes an employee as it finds him. On May 17, 2010, the Petitioner had substantial degenerative arthritis in his left knee but had no evidence of prior symptoms or treatment for that condition. He had an accident which produced acute symptoms as evidenced by the x-ray and MRI performed soon thereafter. His symptoms to some extent have continued without interruption to the present time. As Dr. Stachniw persuasively opined, his arthritis has significantly worsened since the accident to the point where he now needs a knee replacement. ((PX 6 at 9, 15) Dr. Rende's opinions are not persuasive. His reluctance to admit that the MRI findings referenced above show an acute injury seem to be based on his belief that the Petitioner was lying about his absence of pre-accident symptoms, a belief which has no support in the evidence. As the Supreme Court said in its decision in Sisbro, the question is whether the accident accelerated or aggravated the pre existing condition. See 207 Ill. 2d 193

(2003) The evidence here shows that it did, and the Petitioner's request for surgical authorization is granted.

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

LORRAINE ORMSBY,

Petitioner,

16IWCC0133

vs.

NO: 12 WC 29753

UNITED AIRLINES,

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 issue of permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Based upon a review of the record as a whole, and taking into account the criteria and factors pursuant to Section 8.1b of the Act, Petitioner's age, the impact on her ability to earn wages in the future, the AMA impairment rating provided by Dr. Cohen, the occupation of Petitioner, and evidence of disability contained within the medical records, the Commission modified the Arbitrator's permanent partial disability award from 7.5% loss of use of the man as a whole to 10% loss of use of the man as a whole under Section 8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2015, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

16IWCC0133

the sum of $508.79 per week for a period of 44 weeks, for the period of May 23, 2013 through March 26, 2014, 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 is given a credit of $22,387.61 for temporary total disability benefits paid to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $457.91 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 permanent partial disability to the extent of 10% loss of use of the man as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $23,000.00. 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: FEB 24 2016
KWL/kmt
02/22/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0133

ORMSBY, LORRAINE
Employee/Petitioner

Case# 12WC029753

UNITED AIRLINES INC
Employer/Respondent

On 7/9/2015, 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:

0365 BRIAN J McMANUS & ASSOC, LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
ASALYA I AKHMEROVA
ONE N FRAKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION **16 IWCC0133**

LORRAINE ORMSBY

Employee/Petitioner

v.

Case # 12 WC 29753

Consolidated cases: N/A

UNITED AIRLINES, IN

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago, IL** , on **April 13, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent

paid all appropriate charges for all reasonable and necessary medical services?

K. ☐ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

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

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **Possible nature and extent credit.**

FINDINGS

On **12/21/2011**, 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 $**39,685.36**; the average weekly wage was $**763.18**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** 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 $**22,387.64** 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

Credits

Respondent shall be given a credit of $**22,387.64** for TTD, $**N/A** for TPD, and $ **N/A** for maintenance benefits, for a total credit of $**N/A**.

Medical benefits

Respondent has paid all reasonable and necessary medical services as provided in Section 8(a) of the Act.

Temporary Partial Disability

Respondent shall pay Petitioner temporary total disability benefits of **$508.79**/week for **44** weeks, commencing **5/23/2013** through **3/26/2014**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$22,387.61** for temporary total disability benefits that have been paid.

Permanency

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 7.5 % loss of use of **use of man as a** whole or 37.5 weeks pursuant to **§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.

Ketki Stetten 7/9/15

Signature of Arbitrator Date

JUL 9 - 2015

ICArbDec p. 2

Procedural History

In 2005, Petitioner Lorraine Ormsby suffered a prior work related right shoulder injury which did not result in any surgery being undertaken. (Tr. p. 11-12). She returned to full duty capacity from 2006 until her current 12/21/2001 work related injury . (Tr p 12). Petitioner's Application for Adjustment of Claim for case 06 WC 05215 supports an April 18, 2005 date of accident involving the right arm/shoulder. (RX. 7) The Commission main frame for case 06 WC 05215 shows a settlement for 14% loss of use of the right arm. (RX. 5) The Illinois Workers' Compensation Commission Settlement Contract Lump Sum Petition and Order for case 06 WC 05215 supports injury to the right shoulder. (RX.6)

Petitioner testified that she had no difficulty with her right shoulder after the 2005 injury and prior to the December 2011 accident.

Factual History

In the case at bar, Petitioner was 55 years old at the time of her uncontested work accident of December 21, 2011 while employed by Respondent, United Arilines, Inc. She had been employed by United Airlines as a flight attendant for the last 24 years. (Tr p10-11)

On December 21, 2011 while trying to pull a stuck extended delay kit from the last row of seats, Ms. Ormsby experienced pain in her right shoulder due to the physical exertion employed trying to get this stuck kit dislodged. (Tr p12) The parties stipulated that Petitioner was involved in a work accident. Petitioner testified to experiencing pain

in her right shoulder following this incident. The parties stipulated to timely notice. The parties also stipulated to all TTD and medical being paid by Respondent.

On December 23, 2011, Petitioner sought medical care with her primary care physician, Dr. Brent Petersen. Dr. Petersen advised activity modification and anti-inflammatory medications. Dr. Petersen completed a United Airlines Workers' Compensation Employee Work Status Form releasing Petitioner to work without restrictions. (PX.1)

Petitioner came under the care of Dr. Justin Gent on June 29, 2012. Physical examination revealed near full range of motion except internal rotation that was diminished on the right when compared to the left, some mild loss of rotator cuff strength, and mild degenerative changes at the AC joint and Type II acromion and subacromial cysts in the greater tuberosity of the proximal humerus per X-rays. Dr. Gent recommended an MRI and released Petitioner to unrestricted duty work activities. (PX.2)

The right shoulder MRI, performed on July 2, 2012, revealed moderate hypertrophic degenerative changes of the distal acromioclavicular ("AC") joint; increased signal in the distal supraspinatus tendon at the point of insertion with a focal defect approximately 7 mm from the site of insertion compatible with a full-thickness tear; fluid in the subacromial/subdeltoid bursa; normal tendons of the infraspinatus and Teres minor; degenerative changes in the glenohumeral joint space with narrowing; normal subscapularis tendon; and no joint effusion. (PX. 3)

On July 9, 2012, Dr. Gent believed there was a small full-thickness tear in the supraspinatus tendon. He discussed non-operative versus operative management. Petitioner elected to undergo physical therapy. Dr. Gent released Petitioner to unrestricted duty work activities. (PX.2)

Petitioner followed up with Dr. Gent on October 5, 2012 with persistent complaints. The physical examination remained relatively unchanged. Secondary to persistent pain, Dr. Gent recommended surgical intervention. (PX.2) Dr. Gent's records contain correspondence dated October 24, 2012 requesting authorization for right shoulder arthroscopy rotator cuff repair and AC joint resection. (PX.2)

Ms. Ormsby also attended a number of section 12 exams with Dr. David Garelick. (Tr p15) Following examination and review of medical records, Dr. Garelick diagnosed right rotator cuff tendonitis with a high-grade partial-thickness (possible full-thickness) rotator cuff tear. He opined that the pathology of the right shoulder shown on MRI may have been present prior to the work accident, but that the injuries sustained while working were sufficient to cause the previously quiescent finding to become symptomatic. As such, he believed there was a causal connection between the work accident and Petitioner's present condition of ill-being. Further, he felt it was reasonable she undergo shoulder arthroscopy. (RX.1) Dr. David Garelick believed the right shoulder injury to have been severe enough that he was skeptical Ms. Ormsby would ever be able to return back to work as a flight attendant. (Tr p15)

On November 26, 2012 and February 22, 2013, Dr. Gent completed a United Airlines Workers' Compensation Employee Work Status Forms releasing Petitioner to work without restrictions. (PX.2) During the February 22, 2013 follow up, Dr. Gent discussed surgery with Petitioner. (PX.2)

On March 25, 2013, Petitioner came under the care of Dr. David Anderson. Petitioner testified that she elected to obtain a second opinion for Dr. Anderson. Dr. Anderson assessed shoulder pain with a partial-thickness rotator cuff tear and a rotator cuff sprain and strain. The doctor reviewed the MRI and opined it showed a high-grade, partial-thickness tear of the supraspinatus versus a full-thickness tear. Dr. Anderson discussed the diagnosis and treatment options with Petitioner. Petitioner was to follow up on a "prn" basis. Dr. Anderson also completed a United Airlines Workers' Compensation Employee Work Status Form releasing Petitioner to work without restrictions as of March 25, 2013. (PX. 5)

On May 23, 2013, Petitioner underwent right shoulder arthroscopy with an arthroscopic rotator cuff repair, an arthroscopic subacromial decompression, and an arthroscopic labral debridement, performed by Dr. Anderson. The post-operative diagnoses included a right shoulder rotator cuff tear and Grade 1 tearing of the superior labrum. The operative report confirms findings of a partial-thickness tear of the rotator cuff and Grade 1 fraying of the posterosuperior labrum. (PX.4) Post-operatively, Petitioner attended physical therapy at Accelerated Physical Therapy.

On August 19, 2013, Dr. Anderson recommended continued physical therapy twice a week. (PX.4) A Utilization Review ("UR") of September 3, 2013 does not support certification of physical therapy as Petitioner had exceeded the ODG-TWC

recommended therapy visits with limited evidence of exceptional factors that would support an extended course of care beyond the recommended guidelines. (RX. 4)

On October 11, 2013, Petitioner underwent a repeat IME with Dr. Garelick. At this juncture, the doctor opined that it is common for a patient to continue to have pain complaints and some stiffness four and a half months post-surgery. However, he concurred with the UR physician that additional therapy is probably not the best use of the insurer's resources at this time. Rather, Dr. Garelick recommended three to four weeks of work conditioning, four to five times per week, with concentration on strengthening and overhead lifting. Maximum medical improvement ("MMI") was anticipated in six to eight weeks. (RX.2)

Petitioner followed up with Dr. Anderson on November 11, 2013. Dr. Anderson agreed with the IME physician regarding initiation of work conditioning and instructed a follow up in four weeks. (PX.3-5) Petitioner underwent the course of work conditioning at Centegra Hospital, which was completed on January 3, 2014. (PX.7)

On February 14, 2014, Petitioner presented for a repeat IME with Dr. Garelick. She continued with occasional pain in the right shoulder and difficulty with overhead lifting. Petitioner's subjective complaints included weakness. Dr. Garelick explained that it is impossible to state whether or not the rotator cuff tear was caused by the work injury, but Petitioner did seem to become symptomatic following the work injury. At this juncture, Dr. Garelick recommended an FCE and saw no benefit in additional work conditioning. MMI was anticipated on the date of the FCE. (RX.3)

Petitioner testified that the FCE was never performed. Further, Petitioner testified that she asked Dr. Anderson to release her to full duty work as a flight attendant because she felt she was capable of fulfilling the guidelines of her job.

Petitioner submitted into evidence a United Description of Flight Attendant Job Duties. (PX.4) This document provides for physical requirements of working in aircraft aisles and galleys for periods of up to 14 hours or more, performing duties that require standing walking, climbing, stooping, crouching, squatting, kneeling, reaching, twisting and bending; pushing or pulling movable carts; frequent use of force up to 25 pounds to lift, push, or pull objects, such as beverage stowage bins; occasional use 25 to 55 pounds of force to lift, push, or pull objects; and at times use of forces greater than 55 pounds to lift, push, or pull objects. Some of these push, pull, or lifting forces must be performed with the arms at or above shoulder level, such as in the case of closing or opening overhead bins. (PX.4)

Petitioner testified that she was released to unrestricted duty work effective March 14, 2014. Petitioner testified to returning to work as a flight attendant without restrictions as of March 2014. She also testified that she had to undergo recurrent qualifications and meet the physical demands of the position as a flight attendant in order to return to unrestricted duty work. She testified that United Airlines would not allow her to return to work as a flight attendant if she had any sort of physical restrictions that did not meet the job requirements. Petitioner testified that she continues to work in her regular position as a flight attendant for United Airlines at the time of trial. This is the same position Petitioner held prior to the accident.

Further, Petitioner testified that her shoulder feels different and she has some limitations at work. She reported difficulty with work above the waist, weight-bearing activities and stowing luggage, as well as cleaning, yard work, and sleeping. She testified to experiencing aches, weakness and pain in her right shoulder. Petitioner testified she is right-hand dominant. Petitioner testified that she was not prescribed any additional formal treatment, surgery or medications by her treating physicians since completing care for the right shoulder in March of 2014.

On January 23, 2015, Petitioner underwent an impairment rating evaluation with Dr. James Cohen. Dr. Cohen diagnosed status post right rotator cuff repair. Dr. Cohen opined Petitioner is at MMI and therefore an impairment rating is appropriate. The doctor calculated an impairment rating according to the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition. Dr. Cohen computed 7% upper extremity impairment. This calculated to 4.2% whole person impairment, or up to 5% whole person impairment. (RX.8)

Findings/Analysis

In support of the Arbitrator's Decisions relating the issue of prior credit, the Arbitrator finds as follows:

Petitioner testified to a prior 2005 work injury involving the right shoulder. Petitioner's Application for Adjustment of Claim for case 06 WC 05215 supports an April 18, 2005 date of accident involving the right arm/shoulder. The Commission main frame for case 06 WC 05215 supports a settlement for 14% loss of use of the right arm.

The Illinois Workers' Compensation Commission Settlement Contract Lump Sum Petition and Order for case 06 WC 05215 supports injury to the right shoulder.

In the case at bar, Petitioner suffered an injury to the same right shoulder that she injured in 2005. Respondent argues that under the general rules of application of Section 8(e)17 of the Illinois Workers' Compensation Act ("Act") Respondent is entitled to a credit under section 8(e)17 which provides as follows:

> "In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury. For the permanent loss of use or the permanent partial loss of use of any such member or the partial loss of sight of an eye, for which compensation has been paid, then such loss shall be taken into consideration and deducted from any award for the subsequent injury." *820 ILCS 305.*

The Respondent further proposes that the statutory modification of the percentage awarded for an injury is not relevant in determining a credit. Respondent alleges that under the applicable rules of Section 8(e)17 Respondent is entitled to a credit of 35.42 weeks of compensation for the prior right shoulder settlement of 14% loss of use of the right arm against the PPD award in the current case.

The Arbitrator finds little disagreement with Respondent's argument that specific prior loss credit is appropriate and that the statutory modifications of the percentage award does not negate this requirement. The Arbitrator also agrees with Respondent that the calculation method should involve giving a credit for the number of weeks or PPD that was awarded and not the percentage. The Arbitrator, however, disagrees with

the position that Petitioner's permanency award should be reduced by the prior award for the arm or shoulder injury from her 2005 case as a matter of law.

In support thereof, the Arbitrator notes the holding in the case of *Will County Forest Preserve v. IWCC,* 2012 IL App 3(d) 110077WC (rehearing denied 7/5/12), the Illinois Appellate Court determined that shoulder injuries do not qualify as a specific loss under §8(e) but instead fall under the catch all provisions of §8(d)2 of the Act. Since §8(d)2 does not provide credit for prior awards, Respondent in this matter would not be entitled to a credit for a previous award under §8(e) of the Act. Based on the Court's findings, the Arbitrator finds that Petitioner's shoulder injury is not a specific loss but rather, falls under the man as a whole award and Respondent would not be entitled to credit under Sec. 8(e) of the act. Although Respondent's legal arguments regarding specific loss credit and the method of calculating this credit are correct, they are not applicable to the case at bar pursuant to the court's ruling in Will County, id.

Therefore, the Arbitrator denies the Respondent a prior credit of 35.42 weeks relating to the settlement of the April 18, 2005 work injury.

In support of the Arbitrator's Decisions relating to the nature and extent of the petitioner's injury under Section 8(d)2 of the Act, the Arbitrator finds as follows:

This case arises out of a December 21, 2011 accident, a date after the September 1, 2011 amendment of the Act. Post amendment, pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

"(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);

(ii) the occupation of the injured employee;

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

(iv) the employee's future earning capacity; and

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

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." *820 ILCS 305.*

Upon consideration of the above factors, the Arbitrator finds the following:

(i) The level of impairment pursuant to the AMA Guidelines: Dr. Cohen examined Petitioner on January 23, 2015 and issued an impairment rating of 7% upper extremity impairment. This calculated to 4.2% whole person impairment.

(ii) Petitioner's occupation: Petitioner was employed by Respondent as a flight attendant. Petitioner submitted into evidence a United Description of Flight Attendant Job Duties. This document provides for physical requirements of working in aircraft aisles and galleys for periods of up to 14 hours or more, performing duties that require

standing walking, climbing, stooping, crouching, squatting, kneeling, reaching, twisting and bending; pushing or pulling movable carts; frequent use of force up to 25 pounds to lift, push, or pull objects, such as beverage stowage bins; occasional use 25 to 55 pounds of force to lift, push, or pull objects; and at times use of forces greater than 55 pounds to lift, push, or pull objects. Some of these push, pull, or lifting forces must be performed with the arms at or above shoulder level, such as in the case of closing or opening overhead bins.

(iii) Petitioner's age: Petitioner was 55 years of age at the time of the injury. Arbitrator gives this factor less weight as Petitioner's has limited work life left ahead of her.

(iv) The Employee's Future Earning Capacity: Petitioner testified that she was released to unrestricted duty work effective March 14, 2014. Petitioner testified that she continues to work in her regular position as a flight attendant for Respondent at the time of trial. Furthermore, Petitioner's treating physician felt Petitioner was capable of performing her full duty activities as a flight attendant without any formal restrictions and Petitioner has demonstrated a capability to work in a full duty capacity for over a year. Petitioner also testified that she had to undergo recurrent qualifications and meet the physical demands of the position as a flight attendant in order to return to unrestricted duty work. She testified that Respondent would not allow her to return to work as a flight attendant if she had any sort of physical restrictions that did not meet the job requirements. This is the same position Petitioner held prior to the accident. The Arbitrator finds this a favorable factor for the Respondent.

(v) Evidence of Disability: Petitioner sustained a partial-thickness rotator cuff tear of the right shoulder secondary to the work accident of December 21, 2011. The Arbitrator

notes Petitioner reported some residual symptoms at the time of hearing. Petitioner testified her shoulder feels different and she has some limitations at work. She reported difficulty with work above the waist, weight-bearing activities and stowing luggage, as well as cleaning, yard work, and sleeping. She testified to experiencing aches, weakness and pain in her right shoulder. Petitioner testified she is right hand dominant. Petitioner also testified she last sought medical care over a year ago, or in March 2014, as it relates to the work injury.

Dr. Garelick, United's initial section 12 examiner opined in his 2/14/2014 report that "I read the United Airlines job description and it appears that flight attendant's need to on occasion lift up to 55 pounds overhead. This is clearly outside the Petitioner's physical limitations as indicated by the IME. However, Ms. Ormsby elected to forgo a prescribed functional capacity evaluation and returned back to work full duty on 3/27/2014 albeit with physical difficulty. The Arbitrators considers this a favorable factor for the Petitioner as she has chosen to return back to gainful employment.

Lastly, the Arbitrator has given due consideration to the fact that Petitioner did suffer a prior right shoulder injury in 2005, was treated (without surgery) and returned back to full duty work without restrictions. The Arbitrator further notes that the Petitioner was able to fulfill her full duties without restrictions for over 6 years and the Respondent's own IME has found that the Petitioner suffered a new injury and has restrictions that would prevent her from fulfilling some of her duties as a flight attendant.

Therefore, upon consideration of the above factors and in accordance with the facts presented at trial, the Arbitrator concludes Petitioner sustained 7.5 % loss of

person as a whole, or 37.5 weeks of PPD at the applicable PPD rate of $457.91 under Section 8(d)2 of the Act.

Ketki Steffen 7/9/15

Signature of Arbitrator Ketki Shroff Steffen Date

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

Stephanie Mabry,
Petitioner,

vs. NO: 13 WC 16133

Marshall Browning Hospital,
Respondent.

16IWCC0130

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

The Commission hereby corrects clerical errors in the Arbitrator's decision to show that Petitioner was temporarily totally disabled from 1/23/13 through 1/29/13, from 1/31/13 through 8/31/14 and from 12/12/14 through 2/4/15, for a period of 91-3/7 weeks.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $500.72 per week for a period of 91-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

16IWCC0130

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $21,363.89 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment in the form of fusion surgery as recommended by Dr. Kube, pursuant to §8(a) and the fee schedule provisions of §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 $54,000.00. 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: FEB 2 3 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-02/09/16
jdl/pmo
68

[illegible]

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

MABRY, STEPHANIE
Employee/Petitioner

Case# **13WC016133**

MARSHALL BROWNING HOSPITAL
Employer/Respondent

16IWCC0130

On 4/3/2015, 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:

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

1109 GAROFALO SCHREIBER HART ETAL
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Stephanie Mabry
Employee/Petitioner

v.

Marshall Browning Hospital
Employer/Respondent

Case # **13** WC **016133**

Consolidated cases: **N/A**

16IWCC0130

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 **Mt. Vernon**, on **February 4, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **01/19/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,056.16**; the average weekly wage was $**751.08**.

On the date of accident, Petitioner was **39** 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 $**13,407.90** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**13,407.90**.

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 **$500.72/week** for **91** weeks, commencing **01/23/13** through **01/29/13**; **01/31/14** through **08/31/14**; and **12/12/14** through **02/05/15**.

Respondent shall be given a credit of **$13,407.90** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$21,363.89**, as provided in Section 8(a) of the Act subject to the Medical Fee Schedule.

Respondent shall authorize and pay for prospective medical care in the form of fusion surgery as recommended by Dr. Kube.

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 31, 2015
Date

ICArbDec19(b)

APR 3 - 2015

STEPHANIE MABRY V. MARSHALL BROWNING HOSPITAL,
13 WC 016133 (19(b))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was involved in an undisputed accident on January 19, 2013. At the time of arbitration, the disputed issues included: causal connection; medical bills; temporary total disability benefits; and prospective medical care. Petitioner was the sole witness testifying at the hearing.

The Arbitrator finds:

Petitioner, age 39, was employed by Respondent as an emergency room registered trauma nurse. On January 19, 2013, she was walking in the hospital hallway in route to the laboratory to deliver blood vials, when she slipped on a wet floor. Petitioner testified she was coming around a corner and slipped in water. She attempted to catch herself to keep from falling all the way down. In doing so, Petitioner twisted her low back and inverted her left ankle. An accident report was completed. The accident report stated that Petitioner injured her left ankle and twisted her low back when she slipped on the wet floor. The injury occurred at approximately 4:30 p.m. (PX 1) Petitioner completed her shift, which ended at 11:00 p.m., and then went home. Upon arriving back to work the next day (January 20, 2013), Petitioner noticed she was in a lot of pain with respect to her left ankle. As a result she was seen in the emergency room. (PX 4)

On January 20, 2013 the emergency room doctor noted Petitioner's history of twisting her low back and left ankle. At that time, her chief complaint was left ankle pain. On physical examination, she had slight edema noted and there was bruising on the outer aspect of her left ankle. An x-ray of the left ankle was negative for fracture. She was given a differential diagnosis of fracture dislocation of the left ankle versus left ankle strain or sprain. She returned back to work and continued to have difficulty with her left ankle particularly swelling and pain. She was sent home and told to ice and elevate her left ankle. (PX 4)

Petitioner testified that she returned to work on January 23, 2013. In the interim she had remained at home as instructed and sat in a recliner with her ankle wrapped up and iced. When she returned to work on the 23rd Petitioner was again seen in the emergency room. Petitioner testified she was told she had a fracture. At that time, continued left ankle swelling and bruising was noted. Petitioner had no obvious deformity on examination. She complained of a pain level of 5/5 and constant throbbing of the left ankle. A stirrup splint was applied. She was given crutches and medications and taken off work until January 30, 2013. (PX 2; PX 4)

On January 28, 2013 Petitioner came under the care of her family doctor, Dr. Soheil Khan. Dr. Khan treated her conservatively with medications. Dr. Khan diagnosed her with a navicular left ankle bone fracture. He ordered a left ankle x-ray, but it was never done. He gave her a lidoderm patch for her left ankle pain and pain medication. (PX 5)

In a slip dated January 30, 2013 Petitioner was taken off work per Dr. Khan for another two weeks due to her foot fracture. (PX 2)

On February 12, 2013, Petitioner again complained of left ankle pain and back pain which Dr. Khan noted were both secondary to acute trauma. Petitioner was taken off work for two weeks. (PX 2; PX 5) On February 26, 2013, Dr. Khan examined Petitioner's low back and noted reduced range of motion, but no evidence of radiculitis. Dr. Khan also prescribed walking boots. He took her off work completely for another

two weeks. (PX 2; PX 5) She continued to treat with Dr. Khan for back pain, left ankle pain and was maintained on Norco and Flexeril for pain management.

Dr. Khan kept Petitioner off work as of March 19, 2013 due to her left foot being swollen secondary to her fracture. (PX 2; PX 5)

As of April 8, 2013, Dr. Khan kept Petitioner off work. (PX 2; PX 5)

On April 19, 2013, Petitioner was discharged from her employment with Respondent.

At the request of Respondent, Petitioner was examined by Dr. Petkovich on April 30, 2013, concerning her mid and lower back pain and right gluteal pain. Petitioner also had some left hindfoot pain. Petitioner was wearing a walking boot for her foot and was not working. Petitioner denied any prior back or left foot problems. In his written report dated May 2, 2013, Dr. Petkovich commented upon his physical examination, noting some tenderness upon palpation from L1 to L5 and mild restricted range of motion. X-ray reports were reviewed and new films taken. He noted sacralization of Petitioner's fifth lumbar vertebra, a normal variant in the general population. Dr. Petkovich also reviewed Dr. Khan's records and the Hospital radiology and emergency room records. His diagnoses included a muscular lumbar strain and left foot ligament strain (dorsal and lateral aspect) and he believed that both conditions were causally related to Petitioner's work accident. He felt her foot treatment had been excessive as he did not believe she had sustained a fracture. He did not feel Petitioner was at maximum medical improvement yet as she would benefit from four weeks of aggressive physical therapy. Dr. Petkovich also believed Petitioner needed lighter duty activities and he recommended that she not lift more than 20 pounds and that she should be allowed to sit down every hour for approximately ten minutes. She could work up to 6 hours a day. Dr. Petkovich "anticipated" that she would reach maximum medical improvement (MMI) for her spine after the physical therapy and that she could then resume full duty work. He did feel she was at MMI with respect to her left foot and ankle. (RX 1- Res. Ex. 2)

Dr. Khan issued a script for back physical therapy on May 8, 2013. (PX 5)

Petitioner signed her Application for Adjustment of Claim in this matter on May 8, 2013. (AX 2)

On May 13, 2013, Petitioner returned to see Dr. Khan requesting that she be referred to a back specialist as her back was hurting all the time. (PX 5)

Petitioner then underwent a lumbar spine MRI on May 30, 2013 at Advance Diagnostic Imaging. (PX 5) According to the radiologist's report, the MRI showed mild bilateral facet osteoarthritis at L3-4, mild degenerative disc disease at L4-5 along with slight retrolisthesis. The radiologist also thought there was a peripheral annular tear centrally with co-existent small, broad based central disc protrusion but no L5 nerve root displacement or compression. Mild bilateral facet osteoarthritis was also noted. L5-S1 was normal except for a congenital variation as further discussed in the report. (PX 5)

Dr. Khan re-examined Petitioner on June 5, 2013 noting they reviewed the MRI. Petitioner was not having any leg pain at that time. (PX 5) He again wrote a script for physical therapy. (PX 5)

On June 26, 2013, orthopedic spine surgeon, Dr. Richard Kube of Prairie Spine and Pain Institute, examined Petitioner in regard to her low back and left knee complaints. A "Work Flow Checklist" completed at the time of the appointment indicated "thoracic right side pain." Petitioner presented with a work injury history that she slipped on a wet floor and twisted her low back left ankle and left knee. Dr. Kube noted she was in a

left ankle boot and twisted her back while trying to catch herself from falling. Petitioner denied any numbness or tingling in her legs but did note pain in her left thigh, foot, and leg along with weakness in her left ankle, foot, and knee. According to her pain diagram, Petitioner's back pain was located in the center of her spine in the mid area (belt line) and also to the upper right. Petitioner indicated that her problem had worsened in the previous two weeks. On physical examination, Dr. Kube noted point tenderness of the SI joint on the right, positive right Fabers test and positive pelvic compression test. Dr. Kube charted Petitioner's back and left knee pain as at a medium level, and he noted she had problems with balance and tripping frequently due to imbalance dysfunction. Dr. Kube further noted that her back pain was localized in the mid back and right side. Dr. Kube reviewed the ADI L/S MRI of May 30, 2013 and noted that Petitioner had a grade 3 disc at L5, S1, a possible annular tear at this level, but noted no significant lesion on the MRI film.[1] (PX 6)

On July 2, 2013, L/S x-rays ordered by Dr. Kube at Franklin Hospital showed mild right convex mid lumbar curvature, with no acute bone abnormality. (PX 6)

Based upon his physical examination, Petitioner's complaints, and the persistent symptoms, Dr. Kube recommended more aggressive treatment. On July 3, 2013, Dr. Kube performed at SI Joint injection at Surgery Center for Southern Illinois. He gave her a light duty slip. (PX 6)

On July 24, 2013 Dr. Kube completed a "Patient Information" sheet in which he indicated Petitioner could perform light activity as of June 26, 2013. He noted that light duty included frequent lifting up to 10 lbs, no overhead work or floor to waist, rare bending and twisting, and no prolonged sitting or standing position. (PX 2; PX 6)

Dr. Kube re-examined Petitioner on July 29, 2013. Petitioner reported that the injection initially increased her pain but then it diminished the next day. Dr. Kube believed Petitioner's leg pain was more radicular than related to the sacroiliac joint. Given that, along with the L5-S1 annular tear, he recommended an epidural injection on the right at L5-S1. Dr. Kube further noted that Petitioner had been reaching out to her employer about returning to work because she had been eligible for re-hiring when she had been let go. She had tried on multiple occasions to contact Respondent but no one would respond to her and she was increasingly frustrated. Petitioner indicated she was going to look into trying to get her nurse practitioner's degree. (PX 6)

In an Intake Form dated August 21, 2013 Petitioner reported left leg pain. (PX 6)

On July 31, 2013, Dr. Kube performed a lumbar epidural steroid injection on the right at L5, S1 at Surgery Center for Southern Illinois. Injections were unsuccessful in achieving any significant relief of her back and right leg pain. Dr. Kube then charted "given the duration of the symptoms and failure of conservative measures, my recommendation is for a provocative discogram to determine if the L5, S1 disc is the pain generator." (PX 6)

Barbette Manna, "Territory Representative" for Illinois Risk Management Services (Respondent's workers' compensation claim administrator) wrote a letter to Petitioner's attorney on August 8, 2013. In it she wrote,

> Please be advised that your client's ttd benefits are suspended based on the opinion of our IME physician. The additional rec-

[1] Green highlighting in PX 6 was not done by the Arbitrator.

ommended treatment was for physical therapy. (PX 3)

Dr. Kube re-examined Petitioner on August 27, 2013. Petitioner stated the injection had done nothing for her. He recommended a provocative discogram to determine if the L5-S1 disk was the pain generator. (PX 6)

On August 28, 2013, Dr. Kube performed a provocative discogram at L4-5 and L5-S1 at the Surgery Center for Southern Illinois. Kube reported the L4-5 disc was normal. He further reported that the L5-S1 disc was positive with highly concordant pain in the annular tear rated as 9-10/10. He noted that Petitioner demonstrated concordant pain at low pressure starting at 12 or 13 and in the low 20s. He also noted that contrast material leaked out from the annular tear. Dr. Kube concluded that the results of the discogram were consistent with a very chemically irritated region from the disc annular tear and injury. (PX 6) Later that same day, Petitioner followed up with Dr. Kube regarding the discogram results. According to the doctor's notes, her discogram was "very positive" at L5-S1 and "very concordant at one of the lowest pressures I have every [sic] obtained a positive discorgram with." He further noted that the discogram showed contrast material leakage from the annular tear and chemical irritation from the disc at L5- S1 consistent with a very chemically irritated region from the disc tear and injury. Dr. Kube recommended surgical intervention consisting of a right side decompression and minimally invasive interbody fusion. In the interim he was going to try and get her a brace. (PX 6)

Petitioner was again examined by Dr. Petkovich on October 22, 2013 and a written report issued three days later. Dr. Petkovich stated in his written report that Petitioner updated him on events since their first visit with Petitioner reporting that she had returned to see Dr. Khan who did not believe that she needed any physical therapy and, therefore, she did not receive it. Dr. Petkovich also reviewed Petitioner's MRI report noting the findings were all consistent with a degenerative condition. He also commented that Petitioner's L5-S1 disc space was sacralized so there was no specific disc space. Petitioner also reported no relief with the injections given by Dr. Kube. Dr. Petkovich also reviewed the August 28, 2013 discogram. Dr. Petkovich noted Petitioner's primary complaint was persistent pain across her lower back starting at the midline and going slightly to the right. She denied any radicular symptoms throughout her left lower extremity, including numbness or tingling, and she reported no longer having any left foot or ankle pain. As a result of his examination and review of Petitioner's records, Dr. Petkovich diagnosed Petitioner with a muscular lumbar strain and degenerative disc disease at L4-5. He felt her lumbar stain was causally related to the accident at work but her degenerative lumbar disc disease was pre-existing. He wrote, "The degenerative lumbar disc condition may have been exacerbated by the [work accident]. However, I do not believe that the degenerative lumbar disc condition was aggravated or accelerated by [her work accident.]" (RX 1 - Resp. Ex. 3, p. 6) He still felt she should have a course of "intense physical therapy" and that if she had previously undergone the therapy with no relief, the injections would have been necessary. He did not feel the sacroiliac joint injections were necessary because she never had any tenderness in the sacroiliac joint area or signs of pathology in that area. Dr. Petkovich was very adamant that Petitioiner's therapy should be aggressive in nature (2 to 3 times a week for up to six weeks) and at a facility experienced in dealing with injured workers' lumbar spine conditions. He disagreed with the need for surgery at the present as she needs therapy first. He wrote, "If she would, in fact, have persistent pain following an intense physical therapy program, she may ultimately benefit from surgery on her lumbar spine for the degenerative condition in the L4-5 disc space." (RX 1 - Resp. Ex. 3, p. 7) He found her objective findings consistent with her subjective complaints. He did not feel she was yet at MMI. He felt she could continue working (although he noted she wasn't) at a light duty level. (RX 1 - Resp. Ex. 3)

Petitioner was re-examined by Dr. Kube on November 25, 2013. According to his office note, they were still trying to obtain surgical authorization. He noted Petitioner had undergone a "classic discogram" with results consistent with a disc problem. He further noted, "With the provocative discogram and with her symptom onset

and fact that she has a degenerative disk and annular tear is not relevant; however, the fact that she had no pain prior to this work injury suggests that it is likely that the injury occurred at that time. She had very minimal aggravation to the disk and quite possibly injured the disk specifically at that time. Either way, there is a causal relationship between the work injury and her current condition of wellbeing." (PX 2) Dr. Kube still felt a minimally invasive decompression fusion was appropriate. He noted her leg pain was intensifying. "In fact, her left leg is bothering her now quite a bit more so than the right side." He hoped approval would be forthcoming so that he could get her back to work soon. (PX 2; PX 6)

Petitioner returned to see Dr. Kube on April 16, 2014. According to the doctor's notes, surgical authorization was still pending and it appeared there might be some confusion regarding his thought process on the need for surgery. Dr. Kube noted he had expressed a causation opinion back in November and he still believed Petitioner had, at a minimum, an aggravation of her degenerative disc disease and "quite possibly cause of a disk injury at the time of the injury she described." While Petitioner's degenerative disc disease "in and of itself" would not explain her pain, her work accident would -- given the contemporaneous onset of her symptoms. Dr. Kube further noted he did not understand Respondent's continued delay and denial of patient care given Petitioner's desire to return to work and motivation. He wrote, "She has now lost her house as a result of this, and, of course, I grow concerned more and more all the time that the continued irritation she has in this are and the continued nerve compression can and will ultimately lead to chronic nerve damage, thereby creating a much higher level of permanence in this situation." (PX 6)

On June 11, 2014 Dr. Petkovich authored a letter to Ms. Jennifer Kaelin at Illinois Risk Management Services addressing additional questions she had posed to him regarding Petitioner. He did not examine Petitioner. It does not appear that he reviewed any further records subsequent to October 25, 2013. He believed that Petitioner sustained a muscular lumbar strain as a result of her work accident and that it should have resolved by this time. While Petitioner also has degenerative lumbar disc disease and it could have been exacerbated by the work accident it did not cause any aggravation or acceleration of the pre-existing disease as an "exacerbation" is by definition a "temporary phenomenon" as defined by the Sixth Edition AMA Guides. Thus, he felt any exacerbation Petitioner might have sustained should have resolved by this time also. Dr. Petkovich still believed Petitioner might need surgery but it would not be the result of her work accident. Finally, Dr. Petkovich stated, "I believe that [Petitioner] should have reached maximum medical improvement as a result of her work injury by this time.' (RX 1 - Resp. Ex. 4)

The evidence deposition of Dr. Richard Kube was taken on September 24, 2014. Dr. Kube, an orthopedic surgeon with the Prairie Spine and Pain Institute, testified that Petitioner's injury of January 19, 2013 aggravated, exacerbated and made worse Petitioner's degenerative disc at L5-S1 to the extent that fusion surgery was medically necessary. The recommendation for fusion was made to deal with Petitioner's low back complaints from the annular tear. Dr. Kube explained the medical necessity in his deposition was based upon the correlation of failed conservative care, the L/S MRI of Advanced Diagnostic Imaging, the failure of Petitioner to receive relief from the SI joint injection and the LESI at L5-S1, together with the very positive provocative discogram showing very highly concordant pain at the L5-S1 disc. Dr. Kube noted that Petitioner had remained symptomatic for nearly two years after the injury and that "far exceeds the time frame that most people consider adequate prior to entertaining surgical intervention." "We are dealing with someone that has low back pain which is resultant from an aggravated L5-S1 degenerative disc. And she does have some of these intermittent other leg symptoms and pains and things like that, but the predominant feature that we're dealing with is that low back pain coming from what I believe now our diagnostic imaging clearly demonstrates an L5-S1 disc condition." Dr. Kube explained that the contrast leakage from the annular tear showed extravazation at low pressure levels, and suggested a chemical irritation of the L5-S1 disc in general. In the discogram procedure, Dr. Kube observed contrast streaking up through the annular tear at the low pressure of 10 PSI.

Dr. Kube further testified the lower the pressure on discography the more significant that tends to be on determining a symptomatic disc. "It would suggest not only just a pressure component, but also suggest a chemical irritation of the disc in general." Dr. Kube explained that he observed the dye contrast streaking out during the fluoroscopic guided procedure of the discography at a low pressure of 10 psi with very severe concordant pain which was 9 out of 10 on a 1 to 10 point measure scale. (PX 7)

Dr. Kube also testified that the discogram was, in his opinion, objective. He visually observed the contrast leakage. We actually see the contrast material went from inside the disc to now flowing out of the annular tear. The leakage was visually confirmed by fluoroscopic images on the discogram. (PX 7)

The evidence deposition of Dr. Frank Petkovich was taken on October 30, 2014. (RX 1) Respondent had Petitioner examined by orthopedic surgeon Dr. Petkovich, of St. Louis, Missouri, on April 30, 2013 and October 25, 2013. Respondent also sought a clarification opinion on June 11, 2014.

Dr. Frank Petkovich testified that he has not performed spinal surgery in the past three (3) years due to a medical condition. He described his practice as clinical and after he stopped performing surgery he does routine orthopedic services and refers patients requiring surgery to other spine surgeons. In 2011, Dr. Petkovich sought and obtained credentials from the Academy of Independent Medical Examiners and is currently performing IMEs and has a clinical practice.

Dr. Petkovich testified that Petitioner as not at maximum medical improvement as of the dates of his two IME reports from the IME exams of 4/30/13 and 10/25/13 because she needed aggressive physical therapy. As of the date of his deposition he did not believe that physical therapy would be beneficial as he believed she should be "fully recovered." (PX 1, p. 49) Dr. Petkovich was unaware that Petitioner had been terminated from her employment with Respondent on 4/19/13, and was perplexed that her physical therapy recommendation had not been completed. Dr. Petkovich testified that Petitioner needed no further treatment for her back or her ankle as a result of her work accident. (RX 1)

Dr. Petkovich testified that Petitioner's left ankle ligament strain was causally related to her January 19, 2013 accident.

Dr. Petkovich further testified that the twisting mechanism of injury as described by Petitioner could have exacerbated Petitioner's low back degenerative condition. Upon examination in April of 2013, Dr. Petkovich found Petitioner had mildly reduced range of motion in her lumbar spine, forward flexion was reduced by 20 degrees, and extension was mildly decreased. He also found tenderness to palpation at L4-5.

Dr. Petkovich opined that with Petitioner's lack of any history of pre-existing problems, he felt her accident of January 19, 2013 caused an aggravation of her lumbar condition. Dr. Petkovich acknowledged that he did not review the L/S MRI film from Advanced Diagnostic Imaging and that he had no independent review of the actual film. On cross-examination he indicated that he felt the MRI annular tear was described in his interpretation of the radiologist's report as degenerative. He also did not report the radiologist's interpretation of the L/S MRI film stating that Petitioner had a co-existent small broad based central disc herniation because he interpreted that to be a degenerative finding. He said the discogram performed by Dr. Kube showing Petitioner had highly concordant pain with an annular tear could be consistent with the radiologist's interpretation of the L/S MRI dated May 30, 2013.

Dr. Petkovich agreed with Dr. Kube that Petitioner's lumbar disc condition may have been exacerbated by Petitioner's work accident. He also agreed with Dr. Kube that Petitioner may be a surgical candidate and might benefit from definitive surgery of her lumbar spine, if she failed physical therapy. He explained that in his opinion there is a difference of interpretation as to whether the disc was exacerbated, as opposed to aggravated, by the work injury. Dr. Petkovich also testified that in his clarification letter report of June 11, 2014, he clarified that, by definition, the word "exacerbation" implied a temporary phenomena. Upon further examination, he explained that in his opinion a temporary exacerbation would last for six (6) to eight (8) weeks. (RX 1)

Dr. Petkovich testified that Petitioner's annular tear could be an acute finding, but Petitioner's type of annular tear was degenerative. Dr. Petkovich testified there is "no such thing as a permanent exacerbation and that this injury she may have sustained on January 19, 2013 should have resolved, within six to eight weeks." However, he could not state the date the disc was torn.

Dr. Petkovich further testified he is performing 150 independent medical examinations a year. He is on an approved list of independent medical examining physicians and obtains referrals from various companies for second opinions and independent medical examinations. (RX 1)

Respondent requested an URL report regarding the medical necessity for the fusion surgery at L5-S1 as recommended by Dr. Richard Kube. A report by Dr. Aimee Hachigan Gould (hereinafter Dr. Gould) of Physician's Review Network was submitted on November 25, 2014. (RX 2, dep. ex. 2) Dr. Gould was of the opinion that the recommended surgery was not reasonable, necessary, or appropriate. In so concluding Dr. Gould relied upon the Official Disability Guidelines that do not recommend lumbar fusion surgery except in the case of demonstrated dynamic instability due to fracture, dislocation, infection, tumor, spondylolisthesis, anticipated iatrogenic instability as a result of a wide decompression, such as might occur with decompression of an area of lumbar stenosis, scoliosis greater than 50 degrees or spondylolisthesis with either lumbar stenosis or dynamic instability. Dr. Gould believed Petitioner had none of those diagnoses. (RX 2, dep. ex. 2)

As of December 3, 2014 Dr. Kube noted a significant change in Petitioner's left leg pain as it had recently gone numb. Pending surgery Petitioner was being managed on medication. She was being seen about every month and was still experiencing quite a bit of pain. She had recently had an event that kind of "set off her pain, specifically going down the left lower extremity." Petitioner reported lying in bed and feeling something pop and pull in her back and shoot down her left leg, resulting in a feeling of numbness. The numbness had stayed consistent since it occurred a week or two earlier. Meloxicam was added to her list of medications. and she was kept on light duty. (PX 2; PX 6)

On December 12, 2014 the deposition of Dr. Aimee Hachigian-Gould was taken. Dr. Gould, of Physicians Network, is a non- practicing orthopedic doctor from Great Falls Montana. She described herself as an independent contractor for Physicians Network, Inc which is a company located in Phoenix Arizona. She testified she does utilization reviews upon referral from Physicians Review Network. She also fills in on occasion as an administrator for Dr. Zipser, the medical director of Physicians Review Network. (RX 2)

Dr. Gould testified she does URL reviews for various companies but the majority of reviews she performs are in association with Physicians Network, Inc. She estimated that she is preparing about 200 URL reports every month, or about 2,400 URL reports per year on the high end. Her current practice is writing URL reports. She said she is home schooling her twin boys and "I'm not just seeing patients anymore." She does not perform spinal fusion surgeries, which is the procedure that is the subject at issue.

Dr. Gould explained that in the URL she performed, she used the *Official Disability Guidelines* published by the Work Loss Data Institute. She relied on the 18th edition of the *Official Disability Guidelines* in reaching her opinions. She admitted, on cross-examination, that the Work Loss Safety Data Institute Guidelines are not adopted by the state of Illinois Workers' Compensation Commission. Dr. Gould admitted that other guidelines are published including Intracorp, McKesson, American College of Occupational and Environmental Medicine, American Academy of Orthopedic Surgeons. Dr. Gould was unaware of how these guidelines compared to the *Official Disability Guidelines* she employed from the Work Loss Safety Data Institute. She chose to utilize the Work Loss Data Institute guidelines in her URL review concerning the medical necessity for the fusion surgery. (RX 2)

In relying on the Official Disability Guidelines, Dr. Gould was of the opinion that the spinal fusion recommended by Dr. Richard Kube was not medically necessary because the "*Official Disability Guidelines* do not recommend lumbar fusion except in the case of demonstrated dynamic instability due to fracture, dislocation, infection, tumor, spondylolisthesis, anticipated iatrogenic instability as a result of wide compression." She explained, "that is what the guidelines require in order for a lumbar fusion surgery to be medically reasonable and necessary or appropriate." Dr. Gould also states that the guidelines do not recommend minimally invasive fusion surgery for any reason. (RX 2)

Dr. Gould admitted that she was aware that both Dr. Kube, the treating orthopedic surgeon, and IME Dr. Frank Petkovich, opined that fusion surgery may be medically necessary or possibly indicated consisting of a lumbar spine fusion. She was unaware of whether either Dr. Kube or Dr. Petkovich relied on any of the various disability guidelines or the *Official Disability Guidelines* of the 18th Edition published by the Work Loss Data Institute. (RX 2)

Petitioner's Petition for Immediate Hearing was filed with the Commission on January 9, 2015. (PX 9)

In a "Patient Information" sheet dated January 14, 2015 Dr. Kube limited Petitioner to sedentary activity (limited lifting up to ten lbs., no overhead work or floor to waist, rare bending and twisting, no prolonged sitting or standing position). (PX 2)

Petitioner was last seen by Dr. Kube on January 20, 2015. Petitioner reported being "off" for the past couple of weeks but now having increased pain, especially into the low back and central lumbar areas. She also noted radicular-type pain but felt the back pain was more severe. Petitioner had remained on light duty with Petitioner reporting that placing patients in rooms and giving them shots was almost too much for her. On exam Dr. Kube noted central lumbar tenderness on palpation. He modified her work status to sedentary work only.

At arbitration, Petitioner testified that the injections provided by Dr. Kube provided no permanent relief. She further confirmed that Dr. Kube performed a discogram after which he recommended surgery (a fusion) which Petitioner would like to proceed with. Petitioner testified that she remains symptomatic regarding her low back. She said the nature of her pain is stabbing and constant burning. She explained the location of pain as being primarily low back but intermittent down both legs, with left worse than right.

Petitioner testified she was in a generally good state of health prior to the accident at Marshall Browning Hospital on January 19, 2013; that she worked out in the gym 3 to 4 days a week and ran 2 to 3 miles on the average day. Petitioner testified that she is unable to stand or sit for long periods and she has difficulty lifting. Before the accident, she was gainfully employed as a full time emergency room trauma nurse, and was able to work on her feet all day. She never had any prior injuries to her back, never required any medical treatment, never took any medications for back pain, and has no prior history of any work injuries or car wrecks to explain

a pre-existing symptomatic degenerative condition. Petitioner testified that she was very active. Now she requires pain medication and takes Vicodin and Flexeril.

Petitioner further testified that she was examined by Dr. Petkovich on April 30, 2013 and that the doctor recommended additional physical therapy at that time. Petitioner explained that she then returned to see Dr. Khan on May 8, 2013 and he issued a slip for physical therapy. He issued a second slip on June 5, 2013. Petitioner testified that therapy was never approved. Petitioner further recalled returning to see Dr. Petkovich on October 22, 2013 and that he only spent about five minutes with her and was very argumentative regarding why she was even there. Petitioner testified that when she was seen by Dr. Petkovich in October of 2013 she did not deny any radicular pain complaints; rather, she testified that she told him of pain pattern. She said the pain is constant. She further testified that activities of daily living are a problem for her. She cannot perform her usual household chores, and must get help with dishes and laundry.

Petitioner testified that she was terminated from her employment with Respondent when her FMLA expired. Petitioner testified she has looked for work in nursing since her termination, including doctors' offices, Respondent, and Carbondale Memorial Hospital. She acknowledged that she filled out job applications, informed prospective employer she had been injuries, and advised them she had limitations.

Petitioner acknowledged receiving temporary total disability benefits from January 25, 2013 through August 4, 2013. Petitioner testified that her temporary total disability benefits were terminated on August 8, 2013.

Petitioner testified that on September 1, 2014, Petitioner began working light duty work as a nurse for Dr. Lee Peterbee. She explained that the work was within her restrictions. She was working from 4 to 10 hours per day for 1 to 2 days a week. She said although her light duty involved greeting patients and taking them to the examination room, sitting and limited lifting, she was unable to continue working due to her back pain. She was continuing to take pain medication Vicodin and Flexeril prescribed by Dr. Kube. She was unable to work light duty after December 11, 2014.

Petitioner's outstanding medical bills are found in PX 8.

The Arbitrator concludes:

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

   Petitioner's current condition of ill-being in her left ankle and low back is causally related to her January 19, 2013 accident. This conclusion is based upon a chain of events, Petitioner's credible testimony, the treating medical records, and the more persuasive opinion of Dr. Kube over that of Dr. Petkovich or Dr. Gould.

   Petitioner denied any prior low back problems, accidents, injuries, or treatment. While Petitioner's initial treating records with Marshall Browning Hospital do not discuss Petitioner's low back pain, her accident report clearly indicates she complained of twisting her low back at the time of the accident. Understandably, the focus of attention at the emergency room on January 20 and 23, 2013 was on the then-more significant left ankle injury. No physician, including Dr. Petkovich, has ever questioned Petitioner's motivation, sincerity, or credibility. Petitioner's testimony was unrebutted.

With regard to the opinions of Dr. Kube and Dr. Petkovich, the Arbitrator finds the opinions of Dr. Kube more persuasive. Dr. Petkovich was not correct in his understanding of all the facts. As Petitioner credibly testified to, she told him she was having radiating leg pain when examined the second time. Dr. Petkovich stated otherwise. Dr. Petkovich also incorrectly summarized what Dr. Khan had done in terms of Dr. Petkovich's earlier recommendation for physical therapy. He wrote that Petitioner told him Dr. Khan wouldn't authorize physical therapy because he didn't believe in it. However, if Dr. Petkovich was provided with all of Dr. Khan's records, he would have clearly seen that Dr. Khan had issued two scripts for physical therapy. Therapy was not initiated because Dr. Khan didn't believe in it. For whatever reason, it appears Respondent did not authorize the therapy[2]. There is also no evidence that Dr. Petkovich reviewed any additional records from Dr. Kube after his October of 2013 examination. His June of 2014 letter seems to be nothing more than a reiteration of his October 2013 letter/report. Dr. Petkovich also failed to mention (or possibly perform) tests that Dr. Kube had performed during his office visits (ex. a positive Faber and positive pelvic compression sign) so that a comparison could be made. Dr. Petkovich's explanation of the difference between an "exacerbation" and an "aggravation" was unpersuasive in this instance. He believed her condition was an exacerbation because it should have only been temporary. In citing to the Sixth Edition of the *Guides*, he failed to fully set forth the definition. It reads, "The terms 'exacerbation,' 'recurrence,' or 'flare-up' generally imply worsening of a condition temporarily, which subsequently returned to baseline." (*Guides to the Evaluation of Permanent Impairment*, Sixth Edition, p. 25) Petitioner has never returned to her baseline, asymptomatic condition. Hence, she did not sustain just an exacerbation. Had Dr. Petkovich reviewed all of Dr. Kube's records he would have seen that her complaints and symptoms have continued and worsened. It does not appear that he did. Additionally, much of Dr. Petkovich's conclusions were very speculative as he "believed" or "anticipated" Petitioner would be at maximum medical improvement after physical therapy. However, he did not re-examine Petitioner after October of 2013 nor was he provided with any more of her treatment records thereafter. Thus, his opinions as of the date of his June 2014 report and deposition in 2014 were not well informed.

2. 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 incurred treatment expenses in the sum of $21,363.89, as follows: (1) Prairie Spine and Pain Institute - Dr. Kube - $11,783.22; (2) Cape Radiology - $56.00; (3) Surgery Center of Southern Illinois - $1,609.00; (4) Surgery Center of Southern Illinois - $1,609.00; (5) Surgery Center of Southern Illinois - $3,218.00; and (6) Metro Cardiovascular - Dr. Khan $3,088.67. (PX 8)

   Consistent with her causation determination as set forth above, the Arbitrator concludes that the foregoing medical bills are reasonable and customary and medically necessary and orders Respondent to pay them directly to the medical providers and pursuant to the Fee Schedule.

3. Issue (K) - Is Petitioner entitled to any prospective medical care?

   Consistent with her causation determination as set forth above, Petitioner is awarded prospective medical care as recommended by Dr. Kube. Dr. Kube testified within a reasonable degree of medical

[2] Apparently Respondent knew of the request for physical therapy in August of 2013 as it was referenced in Ms. Manna's letter of August 8, 2013; however, the letter did not address it further.

certainty, that a fusion is medically necessary to cure or correct Petitioner's lumbar spinal condition or to relieve the symptoms of the discogenic low back pain and chemical irritation from the annular tear, as a result of Petitioner's work accident of January 19, 2013. Even Respondent's examining physician, Dr. Petkovich, agreed that Petitioner might be a surgical fusion candidate. The opinion of Dr. Gould is not persuasive considering the opinions of the two orthopedic surgeons.

4. Issue (L) - What temporary benefits are in dispute (TTD)?

Petitioner was employed by Respondent as an ER trauma nurse. After her injury, she was terminated. At the time of the termination, it is undisputed that Petitioner's primary care physician, Dr. Khan, had her off work as of the April 8, 2013 slip.

Respondent continued paying temporary total disability benefits until August 8, 2013, at which time Petitioner's TTD benefits were terminated. By letter that same date to Petitioner's counsel, Respondent stated that Petitioner's TTD benefits were being suspended based on the opinion of Dr. Petkovich. Interestingly, Dr. Petkovich's opinion was rendered back in April of 2013 and he stated at that time that Petitioner was not at maximum medical improvement and needed physical therapy for her work-related lumbar spine condition. He felt she could work light duty. Respondent did not offer Petitioner light duty at that time but continued paying TTD benefits until August 8, 2013 when it unilaterally cut them off relying upon Dr. Petkovich's earlier report. As of August 8, 2013 Petitioner remained under light duty restrictions. No doctor had fully released her.

On her own, Petitioner found employment on a light duty basis as a nurse beginning on September 1, 2014. She remained in that job through December 11, 2014 when she was unable to continue due to pain complaints. As of January 14, 2015, Dr. Kube imposed even greater restrictions -- ie., sedentary duty only.

Respondent has not offered Petitioner restricted work at any point in time. Respondent's own examining physician had also recommended treatment which was not provided by Respondent. Petitioner's testimony regarding her efforts to find work was credible and unrebutted. Petitioner has yet to be released to full duty by her treating physician. She is not at maximum medical improvement. She is in need of further treatment.

Consistent with her causation determination above and the Arbitrator's finding that Dr. Petkovich's opinion regarding Petitioner's current ability to resume full duty is not persuasive, Petitioner is awarded temporary total disability benefits for the following periods of time: (1) 1/23/13 to 1/29/13; (2) 1/31/13 to 8/31/14; and, (3) 12/12/14 to 2/4/15, a period of 91 weeks. Respondent is given credit for TTD benefits paid from 1/25/12 to 8/4/13, a period of 27-2/7ths weeks. Petitioner is not awarded temporary total disability benefits for the date of September 1, 2014 as she testified that was her first day of work for Dr. Peterbee. The Arbitrator also notes that Respondent stipulated to the TTD period of January 23, 2013 through August 4, 2013. (See AX 1)

****

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

RUSSELL BUFFA,

Petitioner,

vs. NO: 13 WC 27893

BLUELINE FOOD SERVICE DIST.,

16IWCC0138

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, notice, causation, and 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, except for the correction of the following clerical error and deletion of a portion of the decision as outlined below.

On page 1, the Arbitrator wrote, "...Petitioner reported the accident on March 9, 2013, and a Report of Injury was generated by Respondent's risk manager." However, the Commission notes that the Report of Injury was done on May 9, 2013 (not March). Also, Petitioner testified that he reported the injury on May 6th to Mark Thompson, the branch director. This is consistent with the "Authorization for Treatment" signed by Mr. Thompson on May 6, 2013, and Petitioner's initial visit to Concentra on May 7, 2013. The decision is hereby corrected to reflect these facts.

On page 3, we delete the sentence that states, "Dr. Mirkin acknowledged that in the past he has changed his favorable causation opinion to an unfavorable opinion upon request for respondents." (Citation omitted.) The Commission notes that Petitioner entered into evidence a workers' compensation decision from Missouri in an attempt to impugn Dr. Mirkin's credibility. In that case, Dr. Mirkin initially opined that the claimant's condition was causally related to his work injury on the basis that the claimant had not had any treatment for his condition in the few years prior. However, after Dr. Mirkin was provided with records showing that the claimant had, in fact, received ongoing treatment for his condition, he changed his opinion. This is hardly an

example of having "changed his favorable causation opinion to an unfavorable opinion upon request for respondents." Rather, Dr. Mirkin revised his opinion based on new evidence. Therefore, we hereby strike that sentence from the Arbitrator's decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 11, 2015, is hereby affirmed and adopted with the correction of a clerical error and deletion of a portion of the Decision as outlined above.

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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,500.00. 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: FEB 2 9 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 020916
49

الحمد لله الذي

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BUFFA, RUSSELL
Employee/Petitioner

Case# **13WC027893**

BLUELINE FOOD SERVICE DISTRIBUTION
Employer/Respondent

16IWCC0138

On 2/11/2015, 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

5365 BUSSE, BUSSE & GRASSE PC
KENNETH LUBINSKI
20 N WACKER DR SUITE 1363
CHICAGO, IL 60606

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

Russell Buffa
Employee/Petitioner

v.

Blueline Food Service Distribution
Employer/Respondent

Case # **13** WC **27893**

Consolidated cases: _____

16IWCC0138

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **December 18, 2014**. 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 **April 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 $**36,274.69**; the average weekly wage was $**697.59**.

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 $**all paid** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**all paid**.

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

ORDER

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

Respondent shall pay Petitioner permanent partial disability benefits of $418.55/week for 20 weeks, because the injuries sustained caused the 4% 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

2/9/15
Date

FEB 11 2015

FACTS

Petitioner filed a claim for injury to his low back sustained on April 24, 2013, while employed by Respondent as a warehouse worker in its freezer. (AX2). Petitioner testified that he was the only employee who worked in the freezer. (T.7). After accepting Petitioner's claim, paying all temporary total disability benefits, paying medical expenses, and having Petitioner examined by an orthopedic specialist who testified that Petitioner's lifting incident caused injury to Petitioner, at the hearing Respondent's counsel disputed accident, causal connection, notice, liability for medical expenses and the nature and extent of Petitioner's injury. (T.4).

Petitioner was the sole witness to testify. Petitioner testified that his employment required him to wear a special freezer suit. (T.8). Petitioner testified that on the above date, he was in the freezer stacking 25 to 35 pound boxes onto a pallet by hand when he felt pain in his back. (T.8). He described his onset of injury as follows:

> Q: On April 24, 2013, since it's disputed, can you describe for the Court what happened that day?
> A: Yes, sir. I was in the freezer in my freezer suit stacking 25-, 35-pound boxes onto a pallet by hand; and when I was stacking them on by hand, I felt back pain; and I stopped for a second. Then I kept working, thinking that it would go away or was nothing serious.
>
> Q: And ultimately, sir, did you continue performing the same job as a freezer man?
> A: Yes.
>
> Q: And what did you notice about your low back complaints over the next week, week and a half?
> A: Over the next six, seven days, as each day went, it got progressively worse to where I got shooting pains down my leg. When I even raised my head, it got so bad that I couldn't work anymore. (T.8).

When his symptoms got worse, Petitioner reported the accident on March 9, 2013, and a Report of Injury was generated by Respondent's risk manager. (RX9). While establishing notice, this report is computer generated and was clearly not prepared by Petitioner. *Id.* Petitioner reviewed the incident report and testified without rebuttal that he was not using a truck to move product onto the pallet, but rather was stacking the boxes by hand. (T.9, 10). He acknowledged that he told each of his medical providers, including Respondent's examiner, that he was moving product by hand. (T.10). Respondent produced no witnesses to rebut Petitioner's testimony.

When Petitioner reported the accident to his supervisor, he was ordered to treat with Respondent's physician at Concentra. (T.9). There, Petitioner was given x-rays and prescribed physical therapy which minimally improved his condition. (T.12; PX3). On June 11, 2013,

Petitioner was seen by Dr. David Raskas, a board certified orthopedic spine specialist who took the following history:

> The patient's onset of pain occurred on 4/24/13, where he was doing his normal routine of working in his freezer suit or boiler suit in a deep freeze cooler where he has a heavy labor job of stacking pallets with 25 to 50 pound boxes, each pallet having 35 to 40 boxes each. He has been doing the same routine for around 24 months. On Wednesdays it is a double load stated by patient where on Wednesdays there is a 41-pallet objective, which a typical objective is 21 [sic]. (PX4, 6/11/13).

Dr. Raskas also noted that Petitioner was required to wear a thermal suit and that his pain intensified upon arriving home that evening. (PX4, 6/11/13).

Dr. Raskas noted that Petitioner was a former drug user and smoker, but also noted that Petitioner rehabilitated himself to the point where he no longer uses those substances. *Id.* Dr. Raskas' examination showed moderately limited range of motion, tenderness and positive orthopedic signs. *Id.* He diagnosed a lumbar strain with a possible disc injury along with left SI joint dysfunction. *Id.* Dr. Raskas also recommended an MRI, which was performed on June 19, 2013. (PX4, 6/11/13; PX5).

Petitioner returned to Dr. Raskas on June 24, 2013, and Dr. Raskas agreed with the radiologist that annular tears were present at the L4-5 level. (PX4, 6/24/13). He recommended SI joint and epidural injections. *Id.* These improved Petitioner's condition significantly. (T.12; PX4). As of his last visit, Dr. Raskas noted Petitioner was having only minimal back pain with occasional stiffness and was tolerating work. (PX4, 8/13/13).

Respondent had Petitioner examined by Dr. Peter Mirkin, who testified, "I can find an annular tear in any 50 year old on an MRI." (RX13, p.33). In addition, when asked if Petitioner sustained an acute injury, Dr. Mirkin stated:

> Well, whether it's acute or not I think you have to depend on what the patient tells you. He says I was lifting at work and had back pain that particular day, unless he's blatantly lying to me I have no reason to not think he had a back strain that particular day. Now certainly I can't tell you why there was a delay of two weeks to go get treatment, I have seen people get hurt and not seek treatment for a long time in some cases. *Id.* at 32.

Respondent's counsel attempted to interject the issue of whether Petitioner's prior unfortunate drug use and hepatitis aggravated Petitioner's condition (*id.* at 39); however Dr. Mirkin gave the following testimony on cross-examination:

Q: Does Hepatitis C cause annular tears?

A: Not that I'm aware of.

Q: Does intravenous drug use cause annular tears?
A: Not that I'm aware of. *Id.* at 44.

Dr. Mirkin acknowledged that he was not aware of the level at which Dr. Raskas identified an annular tear, although he purportedly reviewed the radiology report and records which described same. *Id.* at 29, 45. In short, Dr. Mirkin's testimony supports the opinion that Petitioner's condition of ill-being is causally related to his lifting incident at work. Dr. Mirkin acknowledged that in the past he has changed his favorable causation opinion to an unfavorable opinion upon request for respondents. *Id.* at 45, 46; (RX13, Pet.Exh.B).

Dr. Raskas testified that Petitioner's MRI was of diagnostic quality and that he personally viewed an annular tear at L4-5 in addition to the typical age related changes one would expect in every 57-year-old patient. (PX8, p.6, 7, 9). His assessment of a lumbar strain was an initial working diagnosis. *Id.* at 21, 22. Dr. Raskas testified that is a tear in the outer wall of the disc that causes some of the disc material to protrude into that tear, and allows chemicals from within the disc to "communicate" with the tear and produce pain. *Id.* at 7. Since Petitioner failed to improve with physical therapy and non-steroidal anti-inflammatory medication, Dr. Raskas recommended injections to reduce inflammation. *Id.* at 8. Dr. Raskas testified that time away from heavy lifting and the cold environment in Respondent's freezer dramatically increased the odds of successful treatment. *Id.* at 8. Dr. Raskas testified that after Dr. Granberg performed the recommended epidural steroid injection and the sacroiliac joint injection, Petitioner experienced marked improvement. *Id.* at 9, 11.

Dr. Raskas linked Petitioner's annular tear to the repetitive heavy lifting done for Respondent on April 24, 2013. *Id.* at 18, 19. Dr. Raskas also testified that Petitioner's history of drug use and hepatitis C had absolutely no relation to Petitioner's injury or symptoms. *Id.* at 25, 26. He further testified that two weeks was not an unusual or unreasonable period of time between injury and treatment for a variety of reasons, including optimism toward improvement and physician appointment availability. *Id.* at 22, 23.

Although Petitioner reported minimal symptoms following his injections, Dr. Raskas testified that an increase in symptoms commensurate with the increased activity, especially laborious job duties like those performed by Petitioner, is expected. *Id.* at 11, 12. Dr. Raskas testified that both Petitioner's injury and his ongoing symptoms are causally related to his 24 April 2013 work injury. *Id.* at 12, 13.

At Arbitration, Petitioner testified that at times his pain is hardly noticeable. (T.14). However, there are times when it is intensely debilitating and affects his entire left side, which is consistent with his history and mechanism of injury. (T.14). He wakes up every 3 to 4 hours at

night with back pain. (T.16). He takes Aleve and Extra Strength Tylenol and utilizes disposable heating pads for his symptoms. (T.14, 15). His hobby of bike riding has been curtailed. (T.15, 16).

CONCLUSION

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

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n,* 797 N.E.2d 665, 671 (2003). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955).

"In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n,* 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro supra.* An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* Stated another way, "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 his 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 assigned duties. [Citations]. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar Tractor Co. v. Industrial Comm'n*, 541 N.E.2d 665 (Ill. 1989); *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003).

For the reasons set forth below, the Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent.

Petitioner testified without rebuttal that he sustained injury to his low back while lifting heavy boxes in a deep freezer while wearing a thermal suit. (T.7, 8). This occurred in the course and scope of his employment and was a risk peculiar to and distinctly related to his employment with Respondent. While Respondent offered a report which indicated that Petitioner was not lifting these boxes by hand, this was completed by one of Respondent's risk managers rather than Petitioner himself. (RX9). Petitioner credibly testified without rebuttal at Arbitration to his

mechanism of injury, and his testimony is consistently corroborated in each medical history in the record, including the Concentra clinic to which Petitioner was sent by Respondent. (PX3). Petitioner's initial therapy evaluation at Concentra detailed the following:

> THERAPY INITIAL EVALUATION
> Patient is referred for therapy with medical diagnosis of back pain
> Mechanism of Injury: Patient reports that he was lifting repetitively
> Chief Complaint: pain in left hip and down leg intermittently
> Exacerbating Factors: pain down the leg with step down, sitting to long
> Alleviating Factors: standing and walking makes leg pain leave

(PX3, 5/8/13).

Accordingly, the Arbitrator finds that Petitioner is a credible witness and that he successfully traced his injuries to a definite time, place, and cause. Therefore, his injury is accidental within the meaning of the Act. *Laclede Steel Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (Ill. 1955); *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003).

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

There is no legitimate dispute as to notice. Respondent's own report dated May 9, 2013, shows that it received notice of Petitioner's 24 April 2013 injury well within the statutory 45-day notice period. (RX9). Petitioner clearly provided timely notice under the Act.

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

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-73 (5th Dist. 2007).

Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65,

67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her 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. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). The Supreme Court noted that although another incident could have triggered the same result, where a work-related injury is shown to be an *actual* causal factor in bringing about an employee's disabling condition, recovery should *not* be denied simply because a normal daily activity *could have* brought on claimant's disabling condition. *Id.* at 674-77.

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n,* 631 N.E.2d 724, 728 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 442 N.E.2d 908 (Ill. 1982). A causal connection between work duties and a condition may also be established by a chain of events including petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Darling v. Indus. Comm'n of Illinois*, 530 N.E.2d 1135, 1140 (1st Dist. 1988).

Petitioner testified that following the unrebutted accident, his condition progressively worsened and "got so bad that he couldn't work anymore." (T.8). Dr. Raskas testified that the repetitive lifting done on 24 April 2013 caused an annular tear at L4-5. (PX8, p.18, 19). Dr. Raskas visualized this annular tear an MRI of diagnostic quality, which was also appreciated by the radiologist who conducted same. (PX5; PX8, p.6, 7). This tear was separate and distinct from typical age related changes typically seen in patients within Petitioner's age group. (PX8, p.6, 7, 9). Petitioner's condition showed a markedly favorable response to the treatment recommended by Dr. Raskas based on his diagnosis. (PX4; PX6). While Respondent's §12 physician, Dr. Mirkin, declined go as far as to say Petitioner's annular tear was acute and/or traumatic, he candidly acknowledged that Petitioner sustained an acute injury on April 24, 2013, which at least caused a strain or "transient" aggravation of the degeneration of his spine. (RX13, p.32, 33). He also agreed that Petitioner's past substance abuse had nothing to do with his work-related injury. *Id.* at 44.

The Arbitrator finds the causation opinion of Dr. Raskas to be more persuasive than that of Dr. Mirkin, who was not aware of the level at which Dr. Raskas identified an annular tear despite allegedly reviewing the objective radiology report and related records. *Id.* at 29-30, 45. Additionally, the evidence in the record raises serious concerns about Dr. Mirkin's credibility. (RX13, Pet.Exh.B). Dr. Mirkin believed that Petitioner's aggravation was temporary, but failed to give any logical explanation for the failure of conservative treatment short of injections, and for the latter Petitioner's positive response following same. (RX13).

The record evidences that Petitioner sustained at the least an aggravation of any pre-existing condition, and at the most, an annular tear. Respondent disputed causal connection at length on account of Petitioner's age and degeneration in his spine. However, the law is clear that where a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977). Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of April 24, 2013.

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?

Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 691 N.E.2d 13 (2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

The record shows that Petitioner exhausted all conservative measures short of the injections recommended by Dr. Raskas. (PX3; PX4). The injections, however, provided significant relief of Petitioner's increased symptoms which were the direct result of the 24 April 2013 injury. (PX4; PX6). Therefore, the Arbitrator finds that the treatment leading up to and including the injections administered by Dr. Granberg were reasonably necessary in the quest to relieve Petitioner of the effects of his work-related injury.

Respondent shall pay the medical expenses outlined in Petitioner's group exhibit and hall have credit for any amounts already paid, pursuant to §8(j) of the Act.

Issue (L): What is the nature and extent of the injury?

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011, are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. The Arbitrator therefore considers the remaining factors.

(ii) **Occupation**: Petitioner is currently unemployed. (T.7,49). Accordingly, the Arbitrator gives no weight to this factor.

(iii) **Age**: Petitioner was 56 years old at the time of his injury and had significant spinal degeneration as a result of his age. (AX1; PX5). He has diminished healing capacity as a result thereof. The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: There is no direct evidence of reduced earning capacity contained in the record.

(v) **Disability**: Petitioner credibly testified to continued symptoms commensurate with his level of activity. Petitioner testified that at times his pain is hardly noticeable. (T.14). However, there are times when it is intensely debilitating and affects his entire left side, which is consistent with his history and mechanism of injury. (T.14). Dr. Raskas testified that this was typical for Petitioner's type of injury. (PX8, p.11, 12). Petitioner testified that he wakes up every 3 to 4 hours at night with back pain. (T.16). He takes Aleve and Extra Strength Tylenol and utilizes disposable heating pads for his symptoms. (T.14, 15). His hobby of bike riding has been curtailed. (T.15, 16). The Arbitrator places some weight on this factor.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 4% loss of his body as a whole.

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

Jacqueline Toney,

Petitioner,

vs. NO: 13 WC 30507

Chicago Transit Authority,

Respondent.

ORDER

This matter comes before the Commission on the Commission's Motion to Dismiss 13 WC 30507 *Sua Sponte*. This claim was consolidated with 13 WC 28646 and arbitrated together. On April 1, 2015 both these claims were subject to a decision in 13 WC 28646, in which the Arbitrator denied compensation. Petitioner sought review, but only identified claim number 13 WC 28646. The Commission affirmed and adopted the Decision of the Arbitrator with clerical changes. While 13 WC 30507 was resolved, at least with regard to any action by the Commission, when it affirmed the Decision of the Arbitrator which disposed of both claims, the instant claim remains in the records of the Commission as pending decision, and that status would remain until the matter is disposed of. Therefore, the Commission dismisses 13 WC 30507 *sua sponte*.

IT IS THEREFORE ORDERED BY THE COMMISSION that 13 WC 30507 is hereby DISMISSED.

DATED: FEB 19 2016

Ruth W. White

RWW/dw
R-6/15/15
46

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

Joel Sanchez,
Petitioner,

vs. NO: 13WC 34650

Banner Home Construction,
Respondent,

16IWCC0134

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, 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 14, 2015 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 $40,678.80. 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: FEB 24 2016
MJB/bm
o-2/22/16
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

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

SANCHEZ, JOEL
Employee/Petitioner

Case# 13WC034650

16IWCC0134

BANNER HOME CONSTRUCTION
Employer/Respondent

On 4/14/2015, 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:

1072 EPSTEIN, JACK R LAW OFFICES
4346 W 26TH ST
SUITE 2000
CHICAGO, IL 60623

0507 RUSIN & MACIOROWSKI LTD
THEODORE J POWERS
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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B) ARBITRATION DECISION

Joel Sanchez
Employee/Petitioner

v.

Banner Home Construction
Employer/Respondent

Case # 13 WC 034650

Consolidated cases: D/N/A

16IWCC0134

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was originally heard in Elgin, Illinois, by then Arbitrator Luskin on January 8, 2015. After Arbitrator Luskin was appointed to the Commission, the matter was reassigned to Arbitrator Molly C. Mason and re-heard by said Arbitrator in the city of **Chicago**, on **March 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/12/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's multiple current conditions of ill-being *are* causally related to the accident.

Petitioner's average weekly wage was $**600**.

On the date of accident, Petitioner was **48** years of age, *married* with **2** dependent children.

The medical services Petitioner has received to date were reasonable, necessary and causally related to the accident.

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

Respondent shall be given a credit of $**20,330.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**20,330.00**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $114.00 to Illinois Medi-Car, $3,223.02 to Illinois Orthopedic Network, $185.00 to Archer Open MRI, and $2,332.78 to Metro Anesthesia Consultants as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $400/week for 79 5/7 weeks, commencing 9/13/13 through 3/24/15, as provided in Section 8(b) of the Act, with Respondent receiving credit for the temporary total disability benefits it has paid to date.

Prospective Medical Treatment

Respondent shall authorize and pay for prospective care, including but not limited to a left hip consultation with Dr. Domb, as previously recommended by Dr. Sompalli and the lumbar spine surgery recommended by Dr. Dixon.

Penalties and Fees

For the reasons set forth in the attached decision, the Arbitrator declines to award penalties or fees.

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

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

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

Molly C Mason
Signature of Arbitrator

4/14/15
Date

APR 14 2015

Petitioner testified he worked for Respondent for 3 to 4 months before his accident.

Petitioner testified that Francisco, Miguel and a young guy named Rosalio or Rosalino were present at the time of his accident. It is also possible that Adan was there.

Petitioner testified that, immediately before the accident, he was putting glue between sheets of wood in order to begin building walls. He was standing with his left foot on top of a piece of wood to secure it. He began leaning forward in order to begin applying glue when he slipped and fell through a hole that was intended to be a stairwell opening. The hole did not have any kind of safety cover over it. He realized he was falling head first and began turning in the air so as to avoid hitting his head. He fell a distance of about 12 to 14 feet, into the basement. He managed to land on his feet but with most of his weight on his left leg. At impact, his body "responded like a spring" and went to the right. In order to avoid hitting his head, he put his right hand out. He struck his hand against a concrete support structure that had a metal base. He ended up hitting his head but "only a little."

Petitioner testified he felt pain in his left knee, left "fibia," groin, back, right hand and head after the accident. Initially, however, he did not feel too bad. He called out to his co-workers and told them to wait for him because he believed he would be able to resume working after resting a while. By about 40 minutes after the accident, his pain was more intense and he asked Francisco to take him to a hospital. Another individual, the son of "Mr. Walter," ended up driving him to Elmhurst Memorial Hospital. "Mr. Walter" is an individual who assigned work to Respondent at the jobsite.

The Emergency Room records (PX 1) indicate that Petitioner's preferred language is Spanish.

Petitioner testified he gave a history of the accident to hospital personnel. The first test he underwent at the hospital was a blood test.

The "quick view" triage history reflects that Petitioner "fell from ladder approx. 10 ft," landing on gravel, and complained of a headache as well as left leg and right wrist pain.

Petitioner initially saw a physician's assistant, Christopher Ferron. Ferron described Petitioner as losing his balance at a construction site and falling from the first floor into the basement. Ferron indicated Petitioner fell feet first, landing initially on his left leg. After the left leg gave out, Petitioner "fell onto his right side on an outstretched right arm."

Ferron indicated that Petitioner rated his left leg pain at 9/10 and "worse with movement." He also noted that Petitioner complained of pain in his entire left leg but denied numbness or tingling. He further noted that Petitioner complained of "some mild lumbar pain and discomfort with movement."

Ferron noted that Petitioner denied any history of past medical problems.

Joel Sanchez v. Banner Home Construction
13 WC 34650

Procedural Background

A 19(b) hearing was previously held in this case on January 8, 2015 before then Arbitrator Luskin. After Arbitrator Luskin was appointed to the Commission, the case was reassigned to Arbitrator Mason, with the parties being given the option of the Arbitrator issuing a decision based on the January 8, 2015 transcript. After Respondent objected to proceeding in this manner, Arbitrator Mason conducted a new 19(b) hearing on March 24, 2015.

Arbitrator's Findings of Fact - Hearing of March 24, 2015

Petitioner testified through a Spanish-speaking interpreter.

The parties agree Petitioner sustained an accident while working for Respondent on September 12, 2013. Arb Exh 1. Petitioner testified that, two years before this accident, he held two jobs. During the day, from 8 AM to 5 PM, he worked at a window company where he cut, assembled and installed windows. He was required to lift up to 60 to 70 pounds. He performed this job for about 1 ½ years. During the same period, he worked at a restaurant from 7 PM to closing. The restaurant typically closed around midnight. He prepared food and washed dishes. He was required to lift up to 40 to 50 pounds.

Petitioner denied having any back injuries or experiencing any back or leg pain during the time he worked at the window company and restaurant. When these jobs came to an end, he worked at various offices through a temporary agency for about two months. He denied having any back injuries or experiencing any back or leg pain during this period. He then started working for Respondent.

Petitioner testified his job for Respondent consisted of cutting wood to various measurements and transporting the wood to carpenters. Essentially, he did what he was asked to do. The work was "pretty heavy." He regularly had to carry pieces of wood that were 20 feet long and 2 inches thick. He did not know how much the pieces weighed but they were heavy.

Petitioner testified his supervisor at Respondent was an individual named Francisco.

Petitioner testified that, during his tenure with Respondent, he worked 10 or 11 hours per day, Monday through Friday. He did not work on Saturdays. He regularly worked at least 50 hours per week and sometimes more. Regardless of how many hours he worked, Respondent paid him $1200 every two weeks. He was paid via check. Francisco drove the company truck to a location near his house and handed his check to him. He was always paid in this manner.

Ferron indicated that Petitioner was in a wheelchair. He deferred any gait analysis. He noted a small contusion to the left forehead, mild tenderness in the lower lumbar region, moderate edema and tenderness to the anterior aspect of the left knee, proximal tibia, moderate medial joint line tenderness in the left knee, no tenderness in the left hip and moderate edema noted to the right distal forearm over the distal radius.

Ferron ordered Norco for pain and X-rays of the following body parts: lower left leg, left hip, lumbar spine, right forearm, pelvis and thoracic spine. The lower left leg X-ray showed an oblique lateral tibial plateau fracture with 4 mm of depression at the articular margin, tibiotalar degeneration, mild patellofemoral degeneration and a moderate effusion. The left hip X-ray was negative. The lumbar spine X-rays showed levoscoliosis and multi-level spondylosis with mild chronic compression of L2 and L3. RX 6. The right forearm X-rays showed a non-displaced oblique fracture through the radial styloid and arthritic changes. The pelvis X-rays were negative, with the indication for the X-ray stating: "post fall, left hip pain today." The thoracic spine X-rays showed mild dextroscoliosis and no acute findings. PX 1.

The Emergency Room physician, Dr. Hall, indicated he went to Petitioner's room twice but never had the opportunity to examine Petitioner because, on both occasions, Petitioner "was in X-ray."

At discharge, Christopher Ferron, P.A. prescribed Motrin and instructed Petitioner to avoid bearing weight on his left leg and follow up with orthopedics the next day. PX 1.

Petitioner testified he went home after leaving the Emergency Room and later received a call from Dave Kirchmann of State Farm Insurance. Petitioner testified he asked Kirchmann whether he could undergo treatment closer to home because it would be complicated for him to travel to Elmhurst Memorial Hospital. Kirchman said "no problem." Petitioner testified he and Kirchmann then agreed on St. Anthony Hospital.

Respondent offered into evidence a Form 45 prepared by Pat Sheedy. The report is dated September 13, 2013, the day after the accident. The report reflects that Petitioner, a carpentry laborer, was injured at 1:45 PM on September 12, 2013 when he "fell from 1st floor to basement" while "laying plywood on joists" at a home that was under construction. The report also reflects injuries to the left foot and right hand. Petitioner's average weekly wage is described as "$12 x 40" and the duration of his employment is shown to be 3 to 4 weeks. RX 5.

On September 16, 2013, Petitioner saw Dr. Goldflies. The doctor noted he was seeing Petitioner for evaluation of a right wrist fracture and left tibial plateau fracture sustained on September 12th "secondary to falling off root-top [sic] at a construction worksite." He noted that Petitioner was "in severe pain" but denied paresthesia or numbness of the upper or lower extremities. He noted that Petitioner had undergone X-rays at Elmhurst Memorial and was currently taking Tylenol #3.

Dr. Goldflies indicated he examined Petitioner's right wrist and left knee. He described flexion and extension of both body parts as limited secondary to the fractures. He obtained X-rays and applied a short arm cast to Petitioner's right wrist and an immobilizer to Petitioner's left knee. He ordered CT scans of the left knee and right wrist/hand. PX 2.

On September 19, 2013, Petitioner underwent a left knee CT scan. The radiologist compared the results with the X-rays taken three days earlier. He noted that the scan "again demonstrated a comminuted fracture of the lateral tibial plateau." He indicated that the comminuted nature of the fracture made it "difficult to assess the degree of depression." He indicated the distal femur and fibula appeared to be intact. He noted a "large hemorrhagic effusion." His impression was: "severely comminuted lateral tibial plateau fracture." PX 2.

Petitioner also underwent a right wrist CT scan on September 19, 2013. The images were obtained through the cast. The radiologist noted non-displaced comminuted fractures involving the distal end of the radius and a chip fracture through the radial styloid. PX 2.

Petitioner saw Dr. Sompalli on September 20, 2013. The doctor noted a referral from Dr. Goldflies. He also noted the history of a construction site accident on September 12th. He indicated he examined Petitioner's left knee and right upper extremity. He reviewed the radiographic studies and scheduled ORIF left tibia and right radius surgery for September 24th. He also ordered a variety of pre-operative studies, including an EKG. Petitioner underwent the EKG on September 24, 2013. Because the study showed abnormalities, the surgery had to be rescheduled.

On the morning of September 24th, a nurse noted that Petitioner complained of 6/10 right wrist pain, 7/10 left tibial pain and an inability to put any pressure on his left leg. Petitioner was given Tylenol with codeine. A medical student examined Petitioner but indicated he deferred a back examination. Petitioner also saw Dr. Dahodwala for a cardiac consultation. The doctor admitted Petitioner to St. Anthony Hospital for a venous ultrasound of his lower extremity and overnight monitoring of his cardiac rhythm. A duplex sonography of both legs performed the next day did not show abnormalities. A chest CT scan showed no specific evidence of pulmonary embolism. Petitioner was discharged in the evening, with instructions to return the next morning for surgery.

On September 26, 2013, Dr. Sompalli performed the following surgical procedures: open reduction and internal fixation of the left lateral tibial plateau fractures, using plates, a right closed reduction and percutaneous screw fixation of the right distal radius fracture using screws and a repair of a left lateral meniscus tear.

On September 27, 2013, Lisa Schramm, R.N. noted that Petitioner reported "intermittent decreased sensation" of his left lower extremity. Schramm indicated she did not formally assess this complaint secondary to the bandaging.

On October 1, 2013, Petitioner was discharged from St. Anthony Hospital and transferred to the Rehabilitation Institute of Chicago [hereafter "RIC"]. At discharge, Dr. Sompalli instructed Petitioner to avoid bearing weight on his left leg for five weeks and to follow up with him on October 8, 2013.

A physician's assistant, Allison Elenbaas, PA, examined Petitioner at RIC on October 1, 2013, noting a history of the accident and subsequent treatment. Elenbaas noted that Petitioner complained of pain in his left knee, left hip and right wrist. On left hip examination, Elenbaas noted tenderness to palpation over the greater trochanter. She also noted that Petitioner's right wrist splint and left leg cast were in place. She ordered a left hip X-ray. PX 3, pp. 33-35 of 622. RX 10.

Dr. Huang evaluated Petitioner shortly after admission, noting the following: "reports he is obeying the weight bearing restrictions. Does report some left hip pain in addition to his knee and wrist pain. He reports he's had this since the accident." PX 3, p. 304 of 622.

On October 2, 2013, Lawrence Gross, P.T. noted a complaint of "global numbness distal to the [left] mid hip at night." PX 3, p. 18 of 622.

On October 2, 2013, Petitioner underwent left hip X-rays. The X-rays were negative.

On October 8, 2013, Christine Gin, R.N. noted a complaint of "L groin and upper LE into buttock rated 7/10 with exercises and during ambulation." PX 3, p. 531 of 622.

On October 9, 2013, Petitioner was fitted with a wrist brace and hinged knee immobilizer.

On October 16, 2013, Evelyn Newton, R.N. noted a complaint of 7/10 pain in the left medial hamstring insertion and minimal left groin/upper left leg pain. PX 3, p. 521 of 622. On October 17, 18 and 19, 2013, RIC nurses noted complaints of left foot and medial hamstring pain rated 8/10. PX 3, pp. 607-608 of 622.

Petitioner was transferred from RIC to Park House Nursing and Rehabilitation Center on October 21, 2013, with plans for readmission to RIC at such time that Petitioner's weight bearing restrictions were lifted. PX 3, pp. 444 and 570 of 622.

On October 22, 2013, Petitioner followed up with Dr. Sompalli. The doctor noted that Petitioner rated his pain at 5/10 and denied any paresthesia or numbness of his left leg or right upper extremity. The doctor sent Petitioner to the X-ray department for X-rays of his left tibia/fibula, pelvis and right wrist. He directed Petitioner to return in four weeks. PX 2.

Petitioner returned to Dr. Sompalli on November 19, 2013. The doctor noted that Petitioner "states that he has been having groin pain that is exacerbated when he is sitting." He

also noted that Petitioner denied any paresthesia or numbness of his lower extremities. He indicated that Petitioner presented with X-rays of the pelvis and left knee.

Dr. Sompalli described Petitioner's gait as within normal limits. He noted flexion of 0 to 100 of the left knee and flexion/extension of the right wrist from 0 to 50 degrees. With respect to the knee and wrist, he instructed Petitioner to return in four weeks. With respect to the left hip, he indicated there were "no abnormalities in imaging studies." He directed Petitioner to continue attending therapy. PX 2.

On November 23, 2013, Petitioner was readmitted to RIC for "acute inpatient rehabilitation." On that date, RIC providers listed the following as "problems" for Petitioner: arthralgia of the pelvic region and thigh, closed fracture of tibial plateau and closed fracture of radius. PX 2, PX 3, p. 613 of 622.

On November 27, 2013, Petitioner underwent a multi-planar MRI of the left hip at Northwestern Memorial Hospital. The interpreting radiologist noted: 1) no avascular necrosis, fracture or significant osteoarthritis; 2) an anterosuperior labral undersurface tear and a posterior labral detachment; 3) a Grade 1 vastus lateralis muscle origin strain; 4) moderate left and mild right facet arthropathy at L5-S1 with prominent subchondral marrow edema but no discrete fracture seen; 5) an "indeterminate 10 x 4 mm subcutaneous structure overlying the posterior lateral right femoral diaphysis posterior to the vastus lateralis muscle"; and 6) left quadrates femoris muscle edema "that can be seen in ischiofemoral impingement." The radiologist indicated that a targeted ultrasound could be performed for further evaluation of the "indeterminate" structure. PX 4, 5. There is no evidence indicating that Petitioner ever underwent this ultrasound.

Petitioner was discharged home from RIC on December 10, 2013. The following day, he began attending a "day rehab" program at RIC. On that date, Andrea Klusman, P.T. [hereafter "Klusman"], noted that Petitioner complained of left hip pain. She described the characteristics of this pain as follows: "described as pain from groin through upper hip into back bone, some tendinous pain." PX 3, p. 37 of 780. The same day, December 11, 2013, a different therapist, Sarah Snyder, P.T. [hereafter "Snyder"], noted that Petitioner "reported increased pain" in his left knee during ramp- and curb-related therapy, while attempting to increase left knee flexion. PX 3, pp. 428-429 of 780. On December 12, 2013, another therapist, Allison Wehunt, P.T., noted that Petitioner was unable to perform reciprocal stepping "due to discomfort at L posterior knee." PX 3, p. 416 of 780.

On December 13, 2013, Dr. Supanwanid of RIC conducted a "day rehab" evaluation. He noted that Petitioner complained of "pain in the back and occasionally to the L hip and knee." He also noted a complaint of foot numbness. PX 3, p. 48 of 780.

On December 17, 2013, Snyder noted that Petitioner "reported increase in L knee pain" and complained of tenderness in the posterior medial aspect of the knee. PX 3, p. 390 of 780.

On December 23, 2013, an occupational therapist noted that Petitioner complained of left hip and knee pain. PX 3, p. 665 of 780.

The following day, December 24, 2013, Petitioner underwent left knee and lumbar spine X-rays. The radiologist who interpreted the left knee films noted almost complete healing "with no change in alignment and position compared to study on 11/19/13." He indicated that only a tiny fracture line remained visible at the subarticular region of the lateral plateau. A different radiologist interpreted the lumbar spine X-rays as negative for fracture or dislocation and showing "degenerative osteoarthritis and possibly disc disease with bilateral facet arthopathy of L5-S1." PX 2.

Petitioner also saw Dr. Sompalli on December 24, 2013, with the doctor noting that Petitioner was "full weight bearing on the knee at home." The doctor recommended additional therapy. He directed Petitioner to return in five weeks with new X-rays. He noted that Petitioner had brought along an MRI disc but that the MRI was "inaccessible." PX 2.

On January 9, 2014, Petitioner saw Dr. Supanwanid of RIC for a "day therapy" evaluation. The doctor noted that Petitioner was still complaining of pain in his left hip/groin, back and left knee as well as numbness over the left lateral knee and distal leg. He also noted that Petitioner was relying on various pain medications, including Hydrocodone and Lidoderm. On lateral left leg examination, he noted patchy areas of altered sensation to light touch. After noting the previous left hip MRI results, he suggested EMG/NCV testing, indicating he would have to obtain authorization for same from Petitioner's case manager. PX 3, pp. 127-129 of 780.

Petitioner continued engaging in physical and occupational therapy thereafter. PX 4.

In a progress note dated January 23, 2014, Klusman noted that Petitioner was making progress, balance- and walking-wise, but was continuing to complain of left knee and left hip pain during exercise and functional activity. PX 3, p. 94 of 780.

On January 28, 2014, Petitioner underwent left knee and right wrist X-rays. The interpreting radiologist noted an internally fixed and healing fracture of the proximal left tibia and an internally fixed, healing fracture of the distal right radius. PX 2.

Petitioner also saw Dr. Sompalli on January 28, 2014. The doctor noted that Petitioner complained of 6/10 left knee pain but denied any paresthesia or numbness in his lower extremities. He indicated he planned to seek "work comp approval" for a left knee arthroscopy. He referred Petitioner to Dr. Chunduri for evaluation of his lower back pain and indicated that, if this pain persisted after the evaluation, Petitioner should see Dr. Domb "for evaluation of his left labral tear" [with reference to the left hip MRI]. PX 2.

Petitioner saw Dr. Chunduri on January 31, 2014. The doctor noted that Petitioner reported experiencing 8/10 knee, low back and left leg pain since falling at work on September

12, 2013. The doctor also noted that Petitioner's low back pain and left leg numbness, tingling and weakness had been "present since the injury."

On back examination, Dr. Chunduri noted paralumbar and buttocks tenderness, greater on the left, decreased extension, lateral bending and rotation, decreased ankle dorsiflexion strength, decreased medial malleolus sensation, decreased great toe dorsiflexion strength, decreased sensation in the mid dorsal foot and positive straight leg raising on the left. He diagnosed lumbago with left radiculitis. He indicated that Petitioner "was injured at work, resulting in his current symptoms." He recommended CT and MRI scans of the lumbar spine and directed Petitioner to return to him in one week. PX 2, 7.

On February 10, 2014, Petitioner underwent a lumbar spine CT scan. The interpreting radiologist noted degenerative facet disease at L4-L5 and L5-S1 with ligamentum flavum and facet joint hypertrophy along with "mild diffuse disc bulges that contribute to central canal narrowing." PX 2, 7. RX 7.

Petitioner returned to Dr. Chunduri on February 13, 2014, with the doctor noting the recent CT scan results. The doctor indicated that the CT did not show any significant nerve compression. Based on Petitioner's ongoing radicular complaints, he recommended a lumbar spine MRI and EMG of the left lower extremity. He noted that Petitioner had previously undergone a left hip MRI but that this MRI was not available. He instructed Petitioner to stay off work and to bring this MRI with him to the next visit. PX 7.

Petitioner underwent the recommended lumbar spine MRI on February 17, 2014. The radiologist described the study as "limited by motion." He noted a congenitally small spinal canal, Grade 1 spondylolisthesis of L5 on S1 with questionable bilateral L5 spondylolysis, mild to moderate diffuse disc bulging at L5-S1 "which contributes to mild bilateral foraminal stenosis and mild central canal stenosis," hypertrophic degenerative change of the facet joints, most significant at L4-L5 and L5-S1 and a small posterior disc bulge at L4-L5 "which contributes to mild central canal and bilateral foraminal stenosis." PX 7. RX 8.

On February 27, 2014, Dr. Sompalli performed a left knee arthroscopy. In his operative report, he noted an anterior cruciate ligament tear. He opined that this tear was "most likely" due to Petitioner's accident.

On March 4, 2014, Dr. Sompalli examined Petitioner's left knee and recommended physical therapy. He anticipated the need for Synvisc injections and possibly additional surgery in the future "because of [the] articular surface damage in [the] plateau secondary to the plateau fracture." He directed Petitioner to remain off work. PX 7.

On March 7, 2014, Dr. Arayan evaluated Petitioner and performed a left lower extremity EMG. He recorded a history of the work accident and subsequent care. He indicated that Petitioner was currently complaining of 9/10 pain in his left leg along with numbness and tingling in the same extremity. On examination, he noted decreased sensation to light touch in

the left lower leg compared with the right. He also noted 3-/5 left hip flexion, compared with 5/5 on the right, and an antalgic gait.

Dr. Arayan described the EMG results as abnormal, albeit "limited by patient pain." He found electrodiagnostic evidence of a left L5 and S1 lumbar spine radiculopathy. He found no electrodiagnostic evidence of a distal left lower extremity peripheral neuropathy. PX 7.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Boone Brackett of Westgate Orthopaedics on March 10, 2014. See below for a summary of Dr. Brackett's deposition testimony.

On March 11, 2014, Dr. Supanwanid of RIC evaluated Petitioner and noted that "day therapy" had been on hold since late January due to Petitioner's left knee pain and surgery. He also noted that "day therapy" was being reinstituted. He indicated that Petitioner complained of a little pain in his left knee, pain in his hip, back and left leg and "constant numbness from the left hip down to the toes." He described Petitioner's gait as antalgic. He indicated Petitioner used in a cane in his right hand while walking. He noted that Petitioner had recently undergone an EMG and was seeing Dr. Chunduri for his back and hip issues. He referred Petitioner to Dr. Stanos at a chronic pain center for medication management of multiple pain complaints. PX 3, pp. 123-125 of 780.

Petitioner returned to Dr. Chunduri on March 17, 2014. The doctor noted that Petitioner complained of 8/10 pain in his low back, radiating down his left leg, and in his left hip, radiating to his groin. He also noted that Petitioner described his left leg as "essentially constantly numb." He described Petitioner's gait as antalgic. His lumbar spine examination findings were unchanged. He noted positive left hip tenderness to palpation and with extension, flexion and rotation of the left hip. He recommended an epidural injection and indicated he needed to gain access to the left hip MRI. He directed Petitioner to remain off work. PX 7.

In a progress note dated March 20, 2014, Klusman noted that Petitioner was making "slow and steady progress" but had been "limited this interim due to L knee, L hip and low back pain." PX 3, p. 58 of 780.

Petitioner returned to Dr. Sompalli on March 24, 2014. On that date, the doctor noted that Petitioner was attending therapy only twice a week when he had recommended three sessions per week. He also noted that some of the therapy was directed to the wrist even though Petitioner had already reached maximum medical improvement with respect to the wrist. He recommended that Petitioner participate in knee therapy three times per week and remain off work. He also recommended a patellar tendon strap. PX 7.

On April 17, 2014, Dr. Chunduri administered a left L5-S1 epidural steroid injection. PX 7.

On April 21, 2014, Dr. Sompalli noted that Petitioner reported some left knee improvement and was seeing Dr. Chunduri for his back. He recommended a home exercise program and released Petitioner to seated work with respect to his knee. He directed Petitioner to return in six weeks. PX 7.

On April 24, 2014, Dr. Chunduri noted that Petitioner reported no improvement following the injection. He referred Petitioner to a spine surgeon and directed him to stay off work. PX 7.

On May 2, 2014, Petitioner saw Dr. Dixon, a neurosurgeon affiliated with Illinois Orthopedic Network. Dr. Dixon obtained a history of the work accident and subsequent treatment. He noted he had been provided with the lumbar spine MRI report but not the scan itself. He also noted Petitioner was still undergoing knee-related care. On examination, he noted normal strength in both legs except for 3/5 weakness of the quadriceps and hamstring on the left "due to knee instability" and 4/5 strength in the left tibialis anterior and EHL. After discussing various spine-related treatment options, he directed Petitioner to return in one month and to stay off work in the interim. At a subsequent visit, on May 30, 2014, Dr. Dixon reviewed the lumbar spine MRI scan and EMG. He directed Petitioner to return in one month, pending intervening left knee care. He instructed Petitioner to remain off work in the interim. PX 7.

On June 2, 2014, Dr. Sompalli recommended a series of Supartz injections for Petitioner's left knee. He administered several of these injections thereafter, with the last injection taking place on July 21, 2014. He kept Petitioner off work during this period. PX 7.

Petitioner returned to Dr. Dixon on August 29, 2014. On re-examination, the doctor noted normal strength in both legs except for 3/5 weakness of the quadriceps and hamstring on the left "due to knee instability" and 4/5 strength in the left tibialis anterior and EHL. Dr. Dixon discussed various treatment options with Petitioner and indicated Petitioner planned to consult with Dr. Chunduri again concerning another injection. He directed Petitioner to return to him in one month and to stay off work in the interim.

Dr. Dixon indicated he disagreed with Dr. Brackett's assertion that Petitioner was magnifying his symptoms. He indicated that Dr. Brackett made this assertion "without review of the MRI films of the lumbar spine or any mention of the EMG findings."

Dr. Dixon opined that Petitioner "is suffering from radiculopathy due to spondylolisthesis and stenosis at L5-S1 and L4-L5, respectively." He further opined that these conditions were "almost certainly exacerbated to the point of becoming symptomatic by his work-related fall." He indicated Petitioner required additional spine-related care in order to be able to return to work. PX 7.

On September 18, 2014, Dr. Chunduri administered another left L5-S1 epidural steroid injection. He directed Petitioner to remain off work. PX 7. A week later, Dr. Chunduri noted

that Petitioner reported some improvement but was still complaining of numbness and tingling in his left leg. He recommended that Petitioner follow up with Dr. Dixon and remain off work. PX 7.

Dr. Sompalli testified by way of evidence deposition on September 18, 2014. PX 12. He testified he specializes in orthopedic trauma. He does not treat spinal conditions. PX 12 at 5.

Dr. Sompalli testified he first treated Petitioner in September or October 2013, at the referral of Dr. Goldflies. Petitioner provided a history of slipping and falling at a wet construction site. After examining Petitioner and reviewing the radiographic studies, he diagnosed a Schatzker Type 2 tibial plateau fracture and a distal radius fracture. PX 12 at 6. While he would typically not address a distal radius fracture via surgery, he did so in Petitioner's case in order to allow early right wrist motion, given that Petitioner experienced fractures in opposite extremities, i.e., the right upper extremity and left lower extremity. PX 12 at 7, 15. If he had merely casted Petitioner's right wrist, Petitioner's mobility would have been delayed. PX 12 at 15. Petitioner had depression and gapping in his tibial plateau fracture, which required insertion of a plate and screws. Such a fracture causes pain, sometimes down the leg, along with swelling and burning. The burning sensation could result from peroneal nerve involvement. PX 12 at 10.

Dr. Sompalli testified he last saw Petitioner in August 2014, at which point Petitioner still had left knee pain. It was his impression Petitioner was developing traumatic arthritis, "which is what happens" as a consequence of a tibial plateau fracture. He decided to administer a series of Supartz injections to address the arthritis. PX 12 at 10. Petitioner also exhibited some valgus instability of the left knee. PX 12 at 14. During the left knee arthroscopy, he noted articular damage, i.e., "multiple cracks" in the tibial cartilage secondary to the fracture. PX 12 at 14, 40. In the future, Petitioner might need to have the plate and other surgical hardware removed. PX 12 at 16-17, 30. In contrast, Petitioner's right wrist is doing very well. PX 12 at 16. Petitioner also has a complaint of low back pain radiating down his leg but he does not treat back conditions. PX 12 at 16.

Dr. Sompalli opined that the costs associated with the knee and wrist care and surgery were reasonable, necessary and related to the work accident. PX 12 at 17.

Under cross-examination, Dr. Sompalli testified that, as of August 2014, Petitioner was at the end of the road, treatment-wise, with respect to his left knee and right wrist. Petitioner has damaged cartilage in his knee. The type of fracture Petitioner sustained tends to result in chronic pain. PX 12 at 22. A very low percentage of patients with damaged cartilage go on to require knee replacement surgery. PX 12 at 20. In Petitioner's case, serial knee X-rays have shown the alignment to be good. PX 12 at 22. When he last examined Petitioner, Petitioner still had tenderness around the joint line but no swelling or atrophy. PX 12 at 23-25. When you administer Supartz injections, you administer a series of five and then wait six to eight weeks to determine whether there is improvement. PX 12 at 24. With respect to the knee, Petitioner does not require a brace or gait assist. PX 12 at 26. Petitioner does not require restrictions

with respect to his wrist but, with respect to his left knee, is restricted from lifting over 10 pounds, due to his pain. PX 12 at 29. He can only address restrictions insofar as the wrist and knee are concerned. PX 12 at 30. He is not able to state whether Petitioner will require more surgery for his traumatic arthritis. PX 12 at 31. The initial left leg surgery was open, not arthroscopic. PX 12 at 31. When you operate on the type of leg fracture Petitioner had, the one knee structure you can easily visualize is the lateral meniscus. He does not recall whether he was able to visualize the anterior cruciate ligament. PX 12 at 31. From a clinical perspective, he did not have a reason to look for an anterior cruciate ligament tear, since Petitioner did not have a positive Lachman's pre-operatively. PX 12 at 32. After the first surgery, Petitioner could not undergo a left knee MRI, due to the plate, so he had to perform a second, diagnostic surgery. He provisionally diagnosed a medial meniscal tear but it turned out that it was the anterior cruciate ligament that was torn. PX 12 at 33. He cannot say whether that tear stemmed from the accident because he cannot recall looking at the anterior cruciate ligament during the first surgery. PX 12 at 33. He prescribed therapy three times weekly for a period of weeks. He cannot recall prescribing "day therapy" for Petitioner. Whether such a regimen was appropriate may depend on whether the therapy also involved the back. PX 12 at 35. With respect to the left knee and wrist, Petitioner did not need eight hours of therapy per day. PX 12 at 35. As of March 24, 2014, he found the wrist to be at maximum medical improvement. PX 12 at 36. There are two schools of thought, operative and non-operative, when it comes to treating tibial plateau fractures. He is in the operative "camp" based on his training. PX 12 at 39. In his opinion, surgical fixation results in a better outcome with respect to the type of split, depressed fracture Petitioner had. PX 12 at 39. Petitioner speaks "very broken, very little" English, so he always had an interpreter available when he saw Petitioner. PX 12 at 39.

On September 25, 2014, Petitioner returned to Dr. Chunduri, with the doctor noting ongoing complaints of 6/10 lower back pain and numbness/tingling down the left leg to the big toe. On examination, Dr. Chunduri noted positive straight leg raising on the left at 45 degrees and decreased sensation in the left leg compared with the right. He recommended that Petitioner follow up with Dr. Dixon due to his failure to respond favorably to the recent injection. He directed Petitioner to remain off work. PX 7.

On September 27, 2014, Petitioner returned to Dr. Sompalli, with the doctor noting a complaint of 5/10 left knee pain, associated with flexion/extension and walking. On left knee examination, the doctor noted full extension, flexion to 100, no effusion, mild joint line tenderness, negative valgus and varus stress testing and intact sensation in the left lower extremity. Dr. Sompalli indicated that he told Petitioner "there is not much else to be done for his knee." He found Petitioner to be at maximum medical improvement with respect to the knee, noting that the knee might remain painful, "as is what happens with tibial plateau fractures." He did not believe that further therapy would be helpful. PX 7. RX 9.

Dr. Dixon testified by way of evidence deposition on October 21, 2014. PX 11. Dr. Dixon testified he obtained Illinois licensure in 2003. PX 11 at 3. He is a neurosurgeon. PX 11 at 5.

Dr. Dixon did not independently recall Petitioner and thus relied on his notes. PX 11 at 5-6. Dr. Chunduri, a pain physician, referred Petitioner to him for consideration of the appropriateness of back surgery. PX 11 at 6-7. He initially examined Petitioner on May 2, 2014, at which time Petitioner gave a history of the accident and primarily complained of back and left leg pain. PX 11 at 7-8. Based on his examination, he concluded that Petitioner was suffering from a radiculopathy on the left side "which included pain derangements of sensation as well as weakness." PX 11 at 9. At a subsequent visit, on May 30, 2014, he reviewed Petitioner's lumbar spine MRI scan. PX 11 at 9. He interpreted the MRI as showing a broad-based disc protrusion with central canal and lateral recess stenosis with some nerve root compression at L4-L5 and Grade 1 spondylolisthesis at L5-S1. PX 11 at 10. Both the L4-L5 disc and the L5-S1 disc would have been contributing to Petitioner's symptoms. PX 11 at 10.

Dr. Dixon testified his notes show Petitioner fell on September 12, 2013, while laying tile. PX 11 at 11. Petitioner's spondylolisthesis and stenosis pre-existed this accident. In his opinion, Petitioner's spondylolisthesis was congenital. More likely than not, the spondylolisthesis became symptomatic when Petitioner fell. PX 11 at 12. Petitioner's pre-existing conditions made him more vulnerable to having significant and refractory pain due to the fall. PX 11 at 12. The lower extremity weakness he detected on examination was consistent with the EMG and MRI. PX 11 at 13. He discussed various treatment options with Petitioner but "tabled" the idea of back surgery because of the left knee surgery. PX 11 at 14. He last saw Petitioner in August 2014. At that time, he read Dr. Brackett's report. He disagrees with Dr. Brackett's opinion that Petitioner is magnifying his symptoms, since Dr. Brackett voiced this opinion without reviewing the EMG or lumbar spine MRI. PX 11 at 16. He also disagrees with Dr. Brackett's opinion that Petitioner does not need additional back care in order to be able to return to work. PX 11 at 16. In his view, there is a significant possibility that Petitioner will need a decompressive laminectomy with interbody instrumented fusion. PX 11 at 17. He regularly performs this surgery. He performs between three and five surgeries per week. PX 11 at 18. He believes Petitioner was unable to return to work as of his last visit in August 2014, due to his demonstrable neurologic weakness and severe pain. PX 11 at 19.

Under cross-examination, Dr. Dixon could not recall whether Petitioner had difficulty communicating in English. He relies on interpreters in such cases. PX 11 at 19-20. He has not seen Petitioner for two months and does not know his current condition. He cannot speak to whether Petitioner is currently able to work. PX 11 at 20. Spondylolisthesis is progressive but can improve with conservative care. PX 11 at 21. When he examined Petitioner, he consistently noted 3/5 quadriceps and hamstring weakness on the left and 4/5 strength in the left tibialis anterior and EHL. PX 11 at 22. He attributes these findings to Petitioner's left knee condition, based on the EMG results, because the weakness Petitioner exhibited is not referable to either the L5 or S1 nerve root. PX 11 at 22. He did not perform an orthopedic knee examination. PX 11 at 23. The weakness does not necessarily have to stem from instability. It can be pain-related. PX 11 at 24. He does not know specifically how Petitioner fell but Petitioner told him he did not have pain before he fell. He does not know when Petitioner first reported back pain after the fall. PX 11 at 25. He takes Petitioner at his word in terms of his lack of symptoms before the accident. PX 11 at 26. Petitioner may have been experiencing left

leg numbness but he did not note this. PX 11 at 27. When he examined Petitioner, he did not note sensory deficits. PX 11 at 27. If Petitioner is experiencing stocking-glove numbness of his entire leg, that would typically be associated with a neuropathy but the EMG excluded this. PX 11 at 28. The EMG does not provide a physiological basis for a complaint of numbness in the entire left leg. PX 11 at 29. He does not agree with Dr. Brackett's conclusion that Petitioner was magnifying his symptoms. PX 11 at 30. A patient who has spondylolisthesis would typically experience pain when standing or walking but he could also experience severe pain while sitting or lying flat. PX 11 at 32. Over time, Petitioner could have become symptomatic absent trauma. PX 11 at 36.

On December 5, 2014, Petitioner filed a 19(b) petition and a petition for penalties and fees. Arb Exh 2.

Respondent's Section 12 examiner, Dr. Brackett, testified by way of evidence deposition on December 8, 2014. RX 4. Dr. Brackett testified he has been a medical doctor since 1961. He obtained board certification in orthopedic surgery in 1969 and board certification in neurological orthopedic surgery in 1982. RX 4 at 4-5.

Dr. Brackett testified he regularly treats individuals with orthopedic injuries involving the hands, arms, knees and spine. He was on his own until 2013, when he sold his practice. He stopped performing spine surgery at that point, due to the cost of liability insurance. After he sold his practice, he began working for Perry Memorial Hospital and "Locum Tenens," a company that provides substitutes for physicians who are ill or on vacation. In these capacities, he continues to perform non-spine surgery. RX 4 at 5-7.

Dr. Brackett testified he examined Petitioner once, on March 10, 2014. RX 4 at 7. He prepared a report in connection with his examination. After receiving additional information, he later prepared two supplemental reports. RX 4 at 8.

Dr. Brackett testified he has an independent recollection of examining Petitioner but needed to refer to his reports for specific details. RX 4 at 8.

Dr. Brackett testified that, on March 10, 2014, Petitioner presented with an interpreter who "did a very good job." RX 4 at 9-10. Via the interpreter, Petitioner indicated he was working on the first floor of a house immediately before his accident. It had rained. The floor was wet and he had mud on his shoes. He slipped and fell through a hole in a stairwell, initially landing with all of his weight on his left leg and then breaking his fall with his right hand. RX 4 at 10.

Dr. Brackett testified that Petitioner denied having any problems with his right hand or left leg before the accident. Petitioner complained of pain in his front left pelvic area, his back, his right wrist and down his left leg. RX 4 at 11. He also complained of numbness in his entire left leg, from the iliac crest to the sole of his left foot. RX 4 at 11. When Petitioner walked, he leaned quite heavily on a cane, which he held in his right hand. Petitioner used his left hand to

support his left knee. Petitioner indicated he used his left hand to do this because of right wrist pain. RX 4 at 11.

Dr. Brackett opined that Petitioner's complaint of left leg numbness was either factitious or indicative of either "some bizarre neurological disease." Each area of a leg is enervated by a particular nerve root. In order for an individual's entire leg to be numb he would have to have global involvement of the nerve roots, "which is just plainly impossible to have without concomitant wasting of muscle." RX 4 at 12.

Dr. Brackett testified that, during his examination, Petitioner was alert and cooperative. Petitioner did not appear to be in any acute distress. RX 4 at 13. On left knee examination, the doctor noted three healed arthroscopic portals and a healed lateral scar. Petitioner had equal and normal measurements in both calves, knees and thighs. RX 4 at 13. Petitioner's right knee range of motion was normal. His left knee range of motion was "not as complete" but he could flex to about 105 degrees. The left knee was stable to stress testing. RX 4 at 14. On straight leg raising to 90 to 100 degrees, Petitioner did not complain of radiating pain but did complain of back pain. This was "not normal." Straight leg raising should duplicate sciatic radiation, if present, but Petitioner did not voice radicular complaints. RX 4 at 15. Petitioner voiced no back complaints during "Tisch" testing. This was an inconsistent finding. RX 4 at 16. FABRE testing of the hip joint was negative, although Petitioner complained of slight pain in both hips during this testing. RX 4 at 17. Petitioner's ankle and knee reflexes were symmetrical. RX 4 at 17.

Dr. Brackett acknowledged he did not have access to any previous radiographic studies when he examined Petitioner. RX 4 at 19-20. As part of his examination, he obtained X-rays of Petitioner's pelvis, right wrist, lumbar spine and left knee. The pelvis X-rays were not remarkable. The right wrist X-rays showed a healed styloid fracture with two parallel screws. RX 4 at 19. The lumbar spine X-rays showed some arthritic change in the lower two lumbar areas, with a very slight loss of lumbar curve, and Grade 1 to Grade 2 spondylolisthesis, or vertebrae slippage, at the L5-S1 interspace. RX 4 at 19. The left knee X-rays showed the presence of a reverse tibial plate and five screws, a "distal healed lateral plateau fracture" and adequate joint space. RX 4 at 18.

Dr. Brackett described Petitioner as exhibiting a "very exaggerated type of limp." Petitioner's gait was "factitial, meaning fraudulent to some degree." RX 4 at 20.

Dr. Brackett testified that at a later time, prior to his supplemental report of June 2, 2014, he received the initial X-ray films from Elmhurst Memorial Hospital. The left leg X-rays showed "very slight skiving," or shaving off, of the subchondral portion of the lateral portion of the lateral tibial plateau. They also showed a "slight depression" of the lateral tibial plateau. This depression was not so large as to "demand" open reduction/internal fixation. Rather, you "could argue about whether" fixation should be performed. This "could go either way." Surgical fixation was not the wrong thing to do. RX 4 at 21. The right wrist X-rays showed a radial styloid fracture which was very minimally displaced. Dr. Brackett testified that, during his

47 years in practice, he always casted and never pinned such fractures. While he would not have operated on Petitioner's right wrist, he did not fault Petitioner's surgeon for doing so. "That's certainly something that two people could disagree on." RX 4 at 22. The hip X-rays looked good. There was no obvious loss of joint cartilage. RX 4 at 22. The lumbar spine X-rays showed Grade 1 spondylolisthesis and some degenerative changes. RX 4 at 22-23.

Dr. Brackett testified he reviewed Dr. Sompalli's operative reports but did not review any of Petitioner's rehabilitation records. RX 4 at 23.

Based on his examination, X-ray review and experience, Dr. Brackett opined that, as of June 2, 2014, Petitioner did not require any additional right wrist care. RX 4 at 24.

Dr. Brackett acknowledged he examined Petitioner only a couple of weeks after Dr. Sompalli operated on Petitioner's left knee. During that operation, Dr. Sompalli found a "ball valve type of finding on an anterior cruciate ligament," meaning that, when the ligament avulsed from the femur, it rolled up into a ball and could have led Dr. Sompalli to believe he was dealing with a medial semilunar cartilage tear or a meniscal tear. RX 4 at 25. Dr. Brackett opined that, during the first left leg surgery, it would have been difficult for Dr. Sompalli to evaluate the medial semilunar cartilage through the lateral joint. On the other hand, if Petitioner indeed had a torn anterior cruciate ligament at the time of that surgery, that tear would have been "not so difficult to evaluate." RX 4 at 25-26.

Dr. Brackett opined that he found no indication, either via symptoms or his examination, of any condition of ill-being in Petitioner's left hip. RX 4 at 27.

Under cross-examination, Dr. Brackett testified he no longer practices out of the Westgate Orthopedics office. He typically uses that office only for examinations and depositions. RX 4 at 32-33. He no longer has any ownership interest in Westgate Orthopedics. RX 4 at 33. At the present time, he writes about 15 to 20 IME reports each year and gives about 15 depositions each year. RX 4 at 33. Not all of those IMEs and depositions are for defendants but most of them are. RX 4 at 34. He has performed the surgeries Dr. Sompalli performed "countless times," with the exception that he might have operated on only one radial styloid fracture. He typically casted such fractures. RX 4 at 34. He agrees that the conditions Dr. Sompalli treated via surgery were caused by the work accident of September 12, 2013. RX 4 at 34. He agrees that these conditions would have residual effects for some time. RX 4 at 34-35. The wrist fracture would have residual effects for a maximum of six weeks and the knee condition would have effects for "maybe three months." RX 4 at 35. Dr. Brackett acknowledged he did not read Dr. Sompalli's or Dr. Dixon's depositions. What he knows of these doctors' opinions is based on his review of their reports and his review of the initial Emergency Room X-rays and the X-rays he took on his own. RX 4 at 35-36.

Petitioner testified he returned to Dr. Dixon on March 23, 2015, the day before the rehearing. Dr. Dixon discussed lumbar spine surgery with him. [In his note of March 23, 2015, Dr. Dixon indicated that Petitioner's low back and left leg remained symptomatic despite the

intervening injections. He went on to state that Petitioner "continues to have numbness and pain in the right leg including the toes." His examination findings were unchanged. He recommended a L4-L5/L5-S1 decompression and interbody fusion with instrumentation. He instructed Petitioner to remain off work. PX 7.] Petitioner testified he is scheduled to return to Dr. Dixon on April 20, 2015. He wants to undergo the recommended lumbar spine surgery because of his pain and numbness. Dr. Dixon is keeping him off work pending surgery.

Petitioner clarified he currently has two dependent children, both daughters. One of those daughters is 21 years old but she is disabled due to a head injury. The other is 17 years old.

Under cross-examination, Petitioner testified he has experienced numbness in his entire left leg since the accident. The numbness extends from his back down to his toes. He experiences this numbness about 90 to 95% of the time. When he returned to Dr. Dixon the day before the rehearing, he complained to the doctor of left leg numbness. Dr. Dixon touched his leg. In his opinion, Dr. Dixon's examination was more thorough than Dr. Brackett's. He has always felt that Dr. Brackett's examination was "very superficial." Dr. Brackett stuck needles in both of his legs. Dr. Dixon also stuck needles in his legs but was more focused on his back. Dr. Brackett's physical examination lasted 40 minutes but he was in the doctor's office for an hour.

Over objection, Petitioner testified he came to the United States in August 2004. His wife and children continue to live in Mexico. They have always lived there. Before he worked at the restaurant, he worked through temporary agencies for three years and also worked as a taco maker. Before that, he worked at the airport in Mexico City. When he lived in Mexico, he also worked as a taco maker for six years. He is now 48 years old.

Petitioner testified he does not recall exactly when he began working for Respondent but he is sure he worked there for three or four months, and not just a few weeks, before the accident. He remembers getting a call from David Kirchmann of State Farm after the accident but he does not recall being asked about the duration of his employment. He is unable to recall much of his conversation with Mr. Kirchmann because he was in a lot of pain when they spoke. He was also very concerned about whether/when he would be able to return to work because he needed to be able to pay for his disabled daughter's medication. He told Mr. Kirchmann he was worried about this.

Petitioner acknowledged receiving checks from State Farm until State Farm suspended payment. [A letter in PX 7 reflects that Respondent discontinued the payment of temporary total disability benefits on June 20, 2014, based on Dr. Brackett's examination.]

Petitioner testified that Pat Sheedy did not hire him to work for Respondent. It was Francisco who took him to Respondent. He always earned $1200 every two weeks, regardless of how many hours he worked. Respondent did not ask him to complete any tax forms. It was Francisco who gave him his checks. The checks did not have stubs attached to them. During

the time he worked for Respondent, he did not add up his earnings. Respondent never told him he would be earning $12 per hour.

Petitioner acknowledged he did not file income tax returns. Over objection, he acknowledged he did not have a legal Social Security number at the time of the accident. He was born on August 31, 1965.

Petitioner testified the accident occurred when he slipped and fell through an opening over an area where stairs were going to be built. He fell approximately 12 to 14 feet. He recalled testifying at a previous hearing, in January, but he did not recall testifying he fell 9 to 10 feet. He recalls telling the arbitrator at that hearing that he fell from a height that was a little higher than the ceiling of the hearing room. He does not recall telling anyone he fell 9 feet. He does not recall telling Emergency Room personnel how far he fell. Right now he would estimate he fell 12 to 14 feet. He is sure he fell from a height a little higher than the ceiling of the hearing room. He never measured the distance because his job did not require him to take such measurements. He never said he fell head first. He said he turned in the air, while falling, in order to land in a standing position. He felt he was going to land on his head but he was able to turn and thus land in a standing position. He did not land correctly, however. He landed on gravel, with most of his weight on his left leg, and then "sprang" to the right. He experienced an immediate onset of pain in his lower back and pain and numbness in his left leg. At the Emergency Room, he was experiencing severe lower back pain and numbness in his entire left leg. Before the accident, he never experienced any lower back pain or even achiness. Two years before the accident, he regularly worked at least twelve hours per day and his back never bothered him. He always complained of left leg numbness to Dr. Dixon. He also complained of this to the therapists at RIC. He further complained of groin pain. He still has this pain. He uses a cane. Dr. Sompalli prescribed this. Apart from Dr. Sompalli's recommendation, he uses the cane because he experiences left knee and groin pain when he walks a lot. He would like not to have to rely on the cane. He was in a wheelchair before he graduated to a cane. Dr. Sompalli never told him to stop using a cane. He received the cane the last day he was at RIC. Dr. Sompalli released him to work but Drs. Chunduri and Dixon have told him to stay off work. Because of his knee complaints, he avoids stairs and tries not to walk much.

On redirect, Petitioner testified he complained to Dr. Dixon of left leg numbness on March 23, 2015. If Dr. Dixon wrote down that he complained of his right leg, that is a mistake. It is his left leg that is the problem. When he underwent therapy, he would complain about certain exercises. He asked to undergo testing. He has not undergone any treatment or surgery for his groin complaints. He does not speak English. If an interpreter was available, he communicated through that individual. No interpreter was available at the Emergency Room but a nurse who knew a little Spanish did try to talk with him. At RIC, there were two occasions on which an interpreter was not available. He wants to undergo the recommended back surgery because he is in pain.

Respondent did not call any witnesses.

Arbitrator's Credibility Assessment

Petitioner's testimony concerning his pre-accident activity level and the mechanics of the accident was detailed and highly credible. The voluminous RIC records support Petitioner's testimony that he complained of left leg, hip and groin numbness and that he had difficulty performing various exercises during therapy.

Respondent's examiner, Dr. Brackett, described Petitioner's gait and complaints as exaggerated, while readily acknowledging he saw Petitioner in the early post-operative phase, only two weeks after the left knee arthroscopy. Drs. Sompalli, Chunduri and Dixon did not note any symptom magnification. The numerous therapists who saw Petitioner at RIC did not note malingering or lack of effort. Petitioner did not come across as a fabricator at the hearing. Rather, he presented as an individual who is understandably concerned about his injuries and who is willing to undergo back surgery in an effort to get better.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed work accident and his multiple claimed current conditions of ill-being?

The Arbitrator finds that Petitioner established a causal connection between his undisputed work fall and his various claimed current conditions of ill-being, namely his left leg/knee, right wrist, hip/groin and lower back conditions. The Arbitrator further finds that Petitioner established causation with respect to the treatment rendered to date, including but not limited to the left knee arthroscopy of February 27, 2014, and the need for future care (see below).

In making the foregoing findings, the Arbitrator relies in part on Petitioner's testimony as to his ability to perform physically strenuous duties prior to the accident, his denial of any pre-accident left leg, back or right wrist complaints and the lack of evidence of any new, post-accident trauma. The Arbitrator also relies in part on Petitioner's detailed account of his fall and landing. In the Arbitrator's view, it matters not that Petitioner might have fallen a distance of 9 or 10 feet versus 12 feet. What is significant is that Petitioner fell from a height, contorting himself so as to land on his feet, landed with most of his weight on his left foot and leg and then rebounded to the right. The force of the fall was sufficient to cause a significant, splintered fracture of the tibial plateau along with a lateral meniscal tear and a distal radius fracture of the right wrist. From the outset, Petitioner voiced other complaints, relative to his left hip and lower back, but these complaints were overshadowed by the other, immediately noticeable fractures, which required emergent care. It makes sense to the Arbitrator that the left hip and lower back complaints resurfaced at such time that Petitioner began bearing weight, increasing his activity level and performing therapeutic exercises. While left hip X-rays did not show any fracture, the left hip MRI, ultimately performed on November 27, 2013, showed significant pathology, including a labral tear, with the radiologist recommending an ultrasound that was apparently never performed. Dr. Chunduri twice expressed a desire to

review the left hip MRI but it appears he never did so. The left hip cannot logically be excluded as a cause of Petitioner's ongoing complaints.

In finding causation as to the lower back, the Arbitrator also relies on Dr. Dixon's testimony that the fall caused Petitioner's congenital pars defect/spondylolisthesis to become symptomatic. Overall, the Arbitrator found Dr. Dixon more persuasive than Respondent's examiner, Dr. Brackett. Dr. Brackett saw Petitioner on one occasion, did not review the EMG or MRI scans and admitted that the vast majority of the medical-legal consulting he performs is for defendants.

In finding causation as to the need for the left knee arthroscopy of February 27, 2014, the Arbitrator relies in part on Petitioner's credible testimony concerning his pre-accident activity level and the manner in which he landed on his left leg. The Arbitrator also relies on the RIC therapy notes, which document ongoing left knee complaints, and Dr. Sompalli's testimony. At his deposition, Dr. Sompalli explained that, following the initial left leg surgery, he could not explore the etiology of Petitioner's persistent left knee complaints via MRI, due to the plate, and thus was compelled to perform a diagnostic procedure, i.e., an arthroscopy. He expected to find a medial meniscus tear during that procedure but instead found an anterior cruciate ligament tear. He could not directly attribute this tear to the work accident, since he could not recall looking for such a tear during the first surgery, but there is no evidence suggesting Petitioner was having problems with his left knee before the accident. The Arbitrator also notes that, under cross-examination, Dr. Brackett conceded that the conditions Dr. Sompalli addressed via surgery were caused by the work accident. RX 4 at 34.

Much has been made of Petitioner's complaint of numbness in his left leg, hip and groin. While the physician's assistant who evaluated Petitioner at the Emergency Room indicated Petitioner denied numbness in his extremities, a therapist recorded a complaint of intermittent left leg numbness only two weeks after the accident. She indicated this complaint could not be fully addressed due to Petitioner's post-operative bandaging. On October 2, 2013, a different therapist noted a complaint of distal left hip numbness, especially at night. These entries support Petitioner's testimony that he tried to alert his providers to the numbness, despite some communication difficulties. Dr. Brackett described Petitioner's complaint of numbness as "factitious" but there is no evidence indicating the doctor ever reviewed the RIC records, the EMG results or the lumbar spine MRI. Dr. Brackett testified he found "no indication" of a left hip condition on examination (RX 4 at 27) but the Arbitrator finds this testimony unpersuasive since there is no evidence Dr. Brackett's examination was informed by the left hip MRI. Dr. Brackett readily admitted he reviewed only X-rays. As stated above, it appears to the Arbitrator that no hip specialist has attempted to correlate Petitioner's complaints with the positive left hip MRI. More than a year ago, Dr. Sompalli noted that this MRI showed a labral tear and recommended Petitioner see Dr. Domb if he remained symptomatic after seeing Dr. Chunduri. Petitioner clearly remains symptomatic and apparently has never seen Dr. Domb.

What is Petitioner's average weekly wage?

At the hearing, Petitioner claimed an average weekly wage of $600 while Respondent claimed $480. Arb Exh 1. Neither party offered any time cards, paychecks or payroll records into evidence.

Petitioner testified he always received his checks from his supervisor, Francisco. Francisco would drive a company vehicle to a location near his home and personally deliver his check to him. Petitioner testified he received a check every two weeks. He also testified that, throughout his three- or four-month tenure with Respondent, he received $1200 every two weeks, regardless of how many hours he worked. He indicated the checks lacked any accompanying stubs or explanatory information.

Respondent did not call any witness to rebut Petitioner's testimony concerning his earnings. The only wage-related evidence Respondent offered was a Form 45 (authored by Patrick Sheedy) dated September 13, 2013 reflecting that Petitioner was hired "3-4 wks" earlier and earned "$12 x 40." RX 5. Under cross-examination, Petitioner denied being hired by Sheedy and indicated it was Francisco who put him in touch with Respondent and interacted with him post-hiring. Petitioner also denied being told he would be paid $12 per hour.

Petitioner's testimony concerning the duration of his employment, the method by which he was paid and the fixed amount he received every two weeks was detailed and credible. Petitioner provided a rational explanation for his failure to produce any checks – namely, that the checks he received lacked stubs or any other tear-off information he could have retained. Petitioner's testimony that he typically worked about 50 hours per week is echoed in the records from RIC. PX 3, p. 38 of 780. The Arbitrator relies on Petitioner's credible testimony in finding his average weekly wage to be $600.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed he was temporarily totally disabled from September 13, 2013 through March 24, 2015 (the date of rehearing) while Respondent claimed he was temporarily totally disabled from September 13, 2013 through March 10, 2014 (the date of Dr. Brackett's Section 12 examination). Arb Exh 1.

The Arbitrator has previously found in Petitioner's favor on the issue of causation. The Arbitrator concludes that Petitioner's causally related lower back and hip/groin conditions remain unstable and that he has not reached maximum medical improvement. The Arbitrator also notes that Dr. Dixon did not release Petitioner to any form of employment on August 29, 2014 or March 23, 2015 and that Dr. Chunduri instructed Petitioner to remain off work on September 25, 2014. PX 7. In reliance on Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132 (2010), the Arbitrator finds that Petitioner was temporarily totally disabled from September 13, 2013 (the day after the accident) through March 24, 2015 (the date of the 19(b) rehearing), a period of 79 5/7 weeks, with Respondent receiving credit for the temporary total disability benefits it paid prior to March 25, 2015. Arb Exh 1. Having previously found Petitioner's

average weekly wage to be $600, the Arbitrator awards temporary total disability benefits at the rate of $400 per week.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the following outstanding medical bills:

Illinois Medi-Car (PX 6)		
11/23/13	$	63.00
12/10/13	$	51.00
Illinois Orthopedic Network (PX 7)	$	3,223.02
Archer Open MRI (PX 9)		
7/30/14, left knee X-ray	$	185.00
Metro Anesthesia Consultant (PX 10)		
9/18/14 (epidural steroid injection)	$	2,332.00
TOTAL:	$	5,854.02

The Arbitrator awards the two Medi-Car bills, subject to the fee schedule, noting these bills relate to transportation provided to Petitioner prior to Dr. Brackett's Section 12 examination, during the time Petitioner was non weight bearing and undergoing long-term therapy at RIC.

The remaining bills relate to post-IME treatment of the disputed lower back and left knee conditions. The Arbitrator awards these bills, subject to the fee schedule, having already found that Petitioner established causation as to those conditions and as to the need for treatment of those conditions.

Is Petitioner entitled to prospective care?

Based on the foregoing findings as to causation and instability of Petitioner's lower back and hip/groin conditions, the Arbitrator finds that Petitioner is entitled to prospective care as deemed necessary for those conditions, including but not limited to the left hip consultation with Dr. Domb recommended by Dr. Sompalli on January 28, 2014 and the lumbar spine surgery recommended by Dr. Dixon on March 23, 2015.

Is Respondent liable for penalties and fees?

Respondent paid temporary total disability benefits for a significant period (Arb Exh 1), apparently suspending same in June 2014, based on Dr. Brackett's opinions. Respondent also paid for much of Petitioner's medical care. Petitioner filed a petition for penalties and fees on

December 5, 2014, about one month before the original 19(b) hearing. Arb Exh 2. The petition is generic in nature and does not include any demand for payment of specific medical bills. There is no evidence indicating that Respondent learned of the claimed bills prior to the original January 8, 2015 hearing. The post-hearing reassignment of this case arose from unusual circumstances. Although the Arbitrator finds Dr. Brackett unpersuasive, the Arbitrator declines to award penalties and fees in this case, noting the foregoing and the wage dispute.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Jacob Bradford,
Petitioner,
vs.

16IWCC0131

NO: 14 WC2351

City of Peoria,
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 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 May 27, 2015, 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: FEB 24 2016
KWL/vf
O-2/22/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0131

BRADFORD, JACOB
Employee/Petitioner

Case# 14WC002351

CITY OF PEORIA
Employer/Respondent

On 5/27/2015, 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:

5354 STEPHEN P KELLY LLC
2710 N KNOXVILLE AVE
PEORIA, IL 61604

0980 HASSELBERG GREBE SNODGRASS
JOHN DUNDAS
124 S W ADAMS ST SUITE 360
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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 16IWCC0131

Jacob Bradford
Employee/Petitioner

v.

City of Peoria
Employer/Respondent

Case # **14** WC **2351**

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 **Peoria**, on **April 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **01/19/2014**, Petitioner ***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 accident.

In the year preceding the injury, Petitioner earned $**98,800.00**; the average weekly wage was $**1,900.00**.

On the date of accident, Petitioner was 32 years of age, ***single*** with **0** dependent children.

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

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

ORDER

- **The Arbitrator finds that the Petitioner's condition of ill-being was causally related to the work accident of January 19, 2014.**

- **The Petitioner sustained injuries sustained injuries to the extent of 2% loss of use of the man as a whole, in addition to the statutory loss of 12 weeks for the fracture of two vertebra set forth in Section 8 (d) (2) of the Act. The Respondent is entitled to credit for payment of said statutory benefits.**

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. R. McCarthy
Signature of Arbitrator

May 19, 2015
Date

MAY 27 2015

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

1. The Petitioner was employed as a police officer for the City of Peoria for the past ten (10) years. Petitioner testified his job included doing police work out on the streets in the City of Peoria. This job required him to apprehend suspects, protect the public, and perform general police activities.

2. On January 19, 2014, Petitioner was engaged in work activities and trying to apprehend a suspect. There was snow on the ground when the Petitioner left his vehicle. The Petitioner was traversing a snowy driveway when he fell.

3. Petitioner testified he fell onto his back. Petitioner noted the wind got knocked out of him. Petitioner testified he had pain everywhere.

4. The Petitioner was transported to OSF St. Francis Medical Center immediately. Petitioner was transported on a board with a cervical collar.

5. Petitioner provided a history to OSF St. Francis Medical Center of having the wind knocked out of him when he landed on his back while working. The records reveal the Petitioner was transported by a backboard. (Petitioner's Exhibit #3)

6. Petitioner's complaints were that of a back pain and an x-ray and CT scan were performed. Petitioner was provided Norco by the medical facility on this date. (Petitioner's Exhibit #3)

7. The CT scan from the Petitioner's back revealed the Petitioner sustained a T3 anterior compression wedge fracture, in addition to, a T4 anterior compression wedge fracture, with a suspected compression fracture at T5. (Petitioner's Exhibit #3)

8. Petitioner testified he was released from the hospital on that date and went home. Petitioner testified he was bedridden for approximately a week with the exception of a few visits to the company doctor for the City of Peoria.

9. On January 20, 2014, the Petitioner was seen at the request of the Respondent by the company doctor. Petitioner was seen at OSF Occupational Health. These records reveal Petitioner had continued neck pain and continued back pain. The Petitioner was noted to have over a 15% compression fracture at the T3-T4 level. Petitioner was noted to be moving stiffly and was sent to Dr. O'Leary for an orthopedic consultation. (Petitioner's Exhibit #2)

10. On January 24, 2014, the Petitioner was seen by Dr. O'Leary. Dr. O'Leary is a board certified orthopedic surgeon in the Peoria area. Dr. O'Leary took a history from the Petitioner on January 24, 2014 of having neck and mid-back pain. The Petitioner also informed him that he could not sit very long without tremendous pain.

11. Dr. O'Leary noted that Petitioner sustained a painful injury and that this is a type of injury that you cannot brace. Petitioner was provided with restrictions by Dr. O'Leary and was provided instructions for care. (Petitioner's Exhibit #4)

12. Petitioner testified he was seen on two (2) occasions after Dr' O'Leary's visit at OSF Occupational Health (City doctor). Petitioner was seen on January 29, 2015 and February 25, 2014. The Petitioner is still having pain in the back and neck area that wrapped around his ribs. (Petitioner's Exhibit #2)

13. On March 4, 2014, Petitioner was seen by Dr. O'Leary. At that time, Petitioner was still having pain. Dr. O'Leary returned the Petitioner to work but no wearing the vest. Petitioner testified that his vest would have aggravated his condition of ill-being. (Petitioner's Exhibit #4)

14. The Petitioner returned to work, full-duty, for the City of Peoria sometime in April of 2014. Petitioner has been able to do his work for the City of Peoria since that time.

15. In November of 2014, Petitioner returned to Dr. O'Leary for continued complaints. Petitioner provided complaints of back pain and neck pain to Dr. O'Leary. Dr. O'Leary ordered an MRI. Dr. O'Leary noted that the areas of pain were in the upper back where they had been previously. His examination showed tenderness of the thoracic spine. (Petitioner's Exhibit #4)

16. Petitioner testified at the time of trial that he did not sustain any prior injuries or receive any treatment to his back predating January 19, 2014. Petitioner also did not miss any time from work prior to the work injury.

17. At the time of trial, the Petitioner testified he still continues to have stiffness and pain in his thoracic and cervical area. Petitioner has difficulty performing daily activities due to the pain. Petitioner is very cautious while performing any lifting activity, the pain as never gone away.

18. Wherefore, the Arbitrator finds that the Petitioner's condition of ill-being at the time of trial was causally related to the work accident occurring on January 19, 2014.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

1. Pursuant to Section 8(1b) of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

    a. A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall 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.

b. Also, the Commission shall base its determination on the following factors:
   i. the reported level of impairment;
   ii. the occupation of the injured employee;
   iii. the age of the employee at the time of injury;
   iv. the employee's future earning capacity; and,
   v. evidence of disability corroborated by medical records.

2. With regards to (i) of Section 8(1b) of the Act, the Respondent chose not to have an AMA disability rating in this case. Therefore, this factor will not be discussed.

3. With regards to (ii) of Section 8(1b) of the Act, the Petitioner is employed as a police officer. The Arbitrator notes that this work, as a police officer, does include heavy labor. Petitioner will be put in circumstances that would expose him to dangerous situations such as altercations and protecting citizens.

4. With regards to (iii) of Section 8(1b) of the Act, the Petitioner at the time of injury was 31 years old. The Arbitrator considers the Petitioner to be a younger individual and concludes that the Petitioner's permanent partial disability would be more extensive than that of an older individual because he will have to live with the permanent partial disability longer.

5. With regards to (iv) of Section 8(1b) of the Act, the Petitioner's future earning capacity, at the present time, appears to be undiminished as a result of his injuries, because he has medically been returned to work to his full-time duties.

6. With regards to (v) of Section 8 (1b) of the Act, the Petitioner has demonstrated evidence of disability corroborated by his treating medical records. Records from both Dr. Moody and O'Leary show the petitioner had significant symptoms related to his injury. When released to full duty on March 25, Dr. O'Leary still noted a little pain with palpation at the T4-T5 region. When he returned to Dr. O'Leary on November 11, the doctor noted pain in the same areas as when he was previously seen. His exam showed generalized tenderness in the upper thoracic area. The Petitioner has credibly testified that he currently experiences pain in his low back. This also affects his cervical area. Petitioner also testified that he has problems rotating his neck. The Petitioner testified his complaints are present on a daily basis.

7. Therefore, applying Section 8(1b) of the Act, 820 ILCS 305/8(1b), the Petitioner has sustained accidental injuries that caused 2% loss of use of the man as a whole, in addition to payment of his two statutory fractures, for which he has previously been 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

Carolyn Wallace,

Petitioner,

vs.

NO: 14WC 02509

16IWCC0139

FedEx Ground,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical, causal connection, 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 28, 2015, 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.

16IWCC0139

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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,500.00. 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: FEB 2 9 2016
o012116
DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

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

WALLACE, CAROLYN
Employee/Petitioner

Case# **14WC002509**

16IWCC0139

FEDEX GROUND
Employer/Respondent

On 5/28/2015, 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:

5019 SEIDMAN MARGULIS & FAIRMAN LLC
RYAN A MARGULIS
500 LAKE COOK RD SUITE 350
DEERFIELD, IL 60015

1401 SCOPELITIS GARVIN LIGHT
GERALD F COOPER JR
30 W MONROE ST SUITE 600
CHICAGO, IL 60603

FINDINGS

On the date of accident, **12/23/2013**, 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 $**2,314.37 (12 weeks)**; the average weekly wage was $**192.86**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

Issue of medical bills reserved by the parties by agreement for the purposes of this 19(b) hearing.

Respondent shall be given a credit of $**10,993.02** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**10,993.02**.

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 $**192.83**/week for **69** weeks, commencing **12/24/2013** through **4/20/2015**, as provided in Section 8(b) of the Act. Respondent to be given credit for an amounts previously paid.

Respondent shall authorize and pay for the prescribed right knee total knee replacement and its *sequelae* as prescribed by Dr. Collins as such treatment is 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.

Signature of Arbitrator

May 10, 2015
Date

ICArbDec19(b)

MAY 28 2015

The records reflect that the Petitioner came under the care of Dr. Roger Collins of Greenleaf Orthopedics on January 9, 2014 (P x 2). Dr. Collins noted a history of an initial accident in October 2013, subsequent to which the Petitioner wore a patellar brace. Dr. Collins then noted the history of the December 23, 2013 accident involving the pivot motion and the Petitioner feeling a "pop" in her right knee. Dr. Collins released the Petitioner from all work activity and referred her for physical therapy (P x 2).

During the initial physical therapy evaluation on January 21, 2014, the history of both the October 2013 incident and the December 23, 2013 accident were noted (P x 2). Ultimately the Petitioner underwent an MRI of the right knee which revealed a tear of the posterior horn of the medial meniscus, an MCL sprain and small to moderate joint effusion (P x 2).

On April 4, 2014, the Petitioner underwent surgical intervention at Advocate Condell Medical Center performed by Dr. Collins. The surgery revealed a medial mensicus tear as well as advanced chondromolacia of the patella, throughout the trochlea and the patellofemoral articulation. Large chondral fragments were also floating in the joint (P x 2). Post-operatively the Petitioner underwent a series of three Supartz injections.

As of July 23, 2014, Dr. Collins noted that the Petitioner had failed the post-operative treatment and the knee was giving way, causing the Petitioner to fall occasionally. Dr. Collins referred the Petitioner to his partner, Dr. Thomas Baier, who noted that the Petitioner was "bone on bone". Dr. Baier prescribed a total knee replacement and continued the off-work status pending the surgery.

Conclusions of Law

IN SUPPORT OF THE ARBITRATOR'S DECISION PERTAINING TO ISSUE (F), WHETHER PETITIONER'S CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

On the issue of causation, the Arbitrator is faced with the divergent opinions of the treating physician, Dr. Collins, and the examining physician, Dr. Wolin. In assessing the opinions of these two physicians, the Arbitrator the opinions of Dr. Collins more credible than those of Dr. wolin. In reviewing Dr. Wolin's report, it is clear that he did not review the entirety of the Plaintiff's medical records, but rather only a few office visit notes. There is no evidence that Dr. Wolin reviewed the MRI films or the intraoperative films.

Further, Dr. Wolin claims that the Petitioner lacks credibility by not telling her treating physician about the October incident at work that predated the subject accident. This claim is directly contradicted by the medical records. Not only did the Petitioner tell Dr. Collins about the October accident, but she also relayed this information to the Emergency Department and the physical therapist at the initial evaluation. Therefore, not only did the Petitioner not hide this fact from her treater, but she told every treating facility/provider about the October incident.

Dr. Wolin also claims that the Petitioner has "symptom magnificent" without explaining his basis for such an allegation. Given the description from Dr. Baier that the Petitioner's knee was essentially "bone on bone", Dr. Wolin's assessment is not supported by the records.

The Arbitrator finds the opinions of Dr. Collins credible. In his testimony, Dr. Collins methodically described the extent of the damage found in the Petitioner's knee,

As previously discussed, the Arbitrator finds the opinions of Dr. Collins more credible than those offered by Dr. Wolin. Dr. Wolin's recommendation to release the Petitioner to full duty work is contrary to the diagnosed injury and "bone on bone" situation in the Petitioner's right knee. The treating medical records and the credible testimony of Dr. Collins establish that the Petitioner was temporarily and totally disabled from December 24, 2013 through December 26, 2013, and again from January 9, 2014 through the date of hearing, September 20, 2015.

In reviewing the records, the Petitioner was authorized off of work from the Emergency Department through December 26, 2013 with a presumed follow-up visit scheduled to re-assess restrictions. The Petitioner credibly testified that, due to the Christmas holiday and New Year's holiday, she was unable to present to an orthopedist until January 9, 2014. Such a gap spanning 17 days from the accident date does not refute the Petitioner's claim for temporary total disability. Petitioner's testimony on this point was undisputed.

A reasonable inference can be made that, since the Emergency Department restricted the Petitioner from work on December 23, 2013 and Dr. Collins restricted the Petitioner from work on Janauary 9, 2014, the Petitioner remained disabled from work in the interim. This is further supported by the need for surgery and the continued "off work" status post-operatively pending the prescribed right total knee surgery.

Based on the foregoing, the Arbitrator finds the Petitioner temporarily and totally disabled from December 24, 2013 through the date of hearing, April 20, 2015, a period spanning 69 weeks. Respondent is ordered to pay the accrued disability benefits for this time period.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BRIAN JONES,

Petitioner,

vs.

NO: 14 WC 3039
14 WC 3338
14 WC 8433

SOUTHWEST AIRLINES,

Respondent,

16IWCC0137

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of 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.

Pursuant to Will County Forest Preserve Dist. v. IWCC, 2012 Ill. App. LEXIS 109, 361 Ill. Dec. 16 (2012), permanent partial disability for shoulder injuries resulting in internal structural changes should be compensated under §8(d)2 of the Act instead of §8(e). Regarding the left shoulder, we find that Petitioner has sustained a greater loss of use of the left shoulder than the Arbitrator found and increase the award to 2% loss of use of the person as a whole under §8(d)2.

Regarding the right shoulder, the disability of which was analyzed under the five factors listed in §8.1(b), we find that more weight should have been given to Petitioner's age. He is only 46 years old and will have to work with his disability for an extended period of time. We also find that the treating medical records do corroborate some of Petitioner's testimony regarding his current disability. Although there is no recent medical record to indicate that Petitioner's right shoulder is "only 70%" or that he ices his shoulder, the last physical therapy records do indicate that Petitioner was still complaining of 2-3/10 pain at the time he was released to full duty. Therefore, we increase the award for the right shoulder to 8% loss of use of the person as a whole under §8(d)2.

16IWCC0137

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $474.38 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained to the left shoulder caused the 2% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $511.18 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained to the right shoulder caused the 8% loss of use of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all 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 $25,200. 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: FEB 2 9 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 1/20/16
49

السعد بدا للاطمئنان

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, BRIAN
Employee/Petitioner

Case# **14WC003039**

14WC003338
14WC008433

SOUTHWEST AIRLINES
Employer/Respondent

16IWCC0137

On 7/30/2015, 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:

0154 KROL BONGIORNO & GIVEN LTD
CHARLIE GIVEN
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
QUINN BRENNAN
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)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

BRIAN JONES
Employee/Petitioner

Case #14 WC 3039
#14 WC 3338
#14 WC 8433

v.

SOUTHWEST AIRLINES
Employer/Respondent

16IWCC0137

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 July 10, 2015. 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. ☒ What is the nature and extent of injury?

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 3, 2011, August 16, 2012, and October 13, 2013, the respondent was operating under and subject to the provisions of the Act.

- An employee-employer relationship existed between the petitioner and respondent on the above dates.

- On the above dates, the petitioner sustained injuries that arose out of and in the course of employment.

- Timely notice of the accidents was given to the respondent.

- In the year preceding the injuries on August 3, 2011, and August 16, 2012, the petitioner earned $41,113.08; the average weekly wage was $790.64. In the year preceding the injury on October 30, 2013, the petitioner earned $45,566.97; the average weekly wage was $851.96.

- At the time of injuries, the petitioner was 42 through 45 years of age, married with two children under 18.

- The parties agreed that the respondent is not liable for any unpaid medical services provided to the petitioner for each injury.

- The parties agreed that the respondent paid all the temporary total disability benefits due the petitioner for each injury.

ORDER:

- The respondent shall pay the petitioner the sum of $474.38/week for a further period of 5.06 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 2% loss of use of his left arm.

- The respondent shall pay the petitioner the sum of $511.18/week for a further period of 20.24 weeks, as provided in Section 8(d)2/8(e) of the Act, because the injuries to his

right arm on August 16, 2012, and October 30, 2013, caused the permanent partial disability to petitioner to the extent of 4.048% loss of use of the person as a whole (8% loss of use of his right arm).

- The respondent shall pay the petitioner compensation that has accrued from August 3, 2011, through July 10, 2015, 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.

Robert E. Williams

Signature of Arbitrator

July 30, 2015

Date

JUL 30 2015

FINDINGS OF FACTS:

On August 3, 2011, the petitioner, a provisioning agent, injured his left shoulder while pulling a liquor kit. The incident is the subject matter of claim #14 WC 8433. He received immediate medical care at Occupational Health Centers of Illinois (OHC) for his left shoulder, where he was prescribed therapy and medication for a left shoulder strain. Improved symptoms were noted by Dr. Amir and Dr. Ross at OHC through September 8th. He reported no improvement on September 15th and was evaluated by Dr. Kevin Tu on September 28th. Dr. Tu opined on January 18, 2012, that an MR arthrogram revealed a partial thickness left rotator cuff tear and no labral tear. Dr. Tu noted that the petitioner's symptoms had improved and that he had minimal difficulty with overhead activity and mild pain localized to the biceps tendon. The petitioner was released to full-duty activities. At a follow-up on February 15, 2012, the petitioner reported no difficulty with daily work activities.

On August 16, 2012, the petitioner injured his right shoulder while pulling a guard rail. The incident is the subject matter of claim #14 WC 3039. The petitioner received immediate medical care at OHC. On October 10, 2012, Dr. Tu evaluated the petitioner and released him to unrestricted work beginning October 15, 2012. The petitioner received physical therapy through October 12, 2012.

On October 30, 2013, the petitioner re-injured his right shoulder while pulling a garbage can. The incident is the subject matter of claim #14 WC 3338. He received medical care at OHC and started physical therapy. On March 21, 2014, Dr. Tu performed a right shoulder arthroscopic subacromial decompression and distal clavicle excision. His post-operative diagnosis was right shoulder impingement and right shoulder AC joint

arthropathy. The petitioner received physical therapy and on July 16, 2014, Dr. Tu released him to unrestricted work. At the petitioner's last follow-up on August 6, 2014, he reported occasional shoulder pain and manageable symptoms. The doctor noted 5/5 supraspinatus and infraspinatus strength and no AC joint tenderness.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of stiffness in his left shoulder with low temperatures. He is hesitant to pick up his child and, due to vibration, mowing his lawn. He needs to ice his left shoulder after a lot of activities. The respondent shall pay the petitioner the sum of $474.38/week for a further period of 5.06 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 2% loss of use of his left arm.

An impairment rating by Dr. Bryan Neal on December 29, 2014, based on a right shoulder impingement syndrome diagnosis by Dr. Tu and the MRI was a 3% default with an adjusted impairment of 4% right upper limb impairment or 2% whole person impairment. There is no evidence concerning the impact of the petitioner's right shoulder injuries in regard to his occupation, age or future earning capacity, as delineated in Section 8.1(b)(ii) through (iv) of the Act. The petitioner currently works in a full-duty capacity as a provisioning agent for the respondent. He is able to perform his job duties without assistance. No reasonable inference can be made regarding the impact of the petitioner's right shoulder injuries on his occupation, age or future earning capacity. Regarding Section 8.1(b)(v), the petitioner complains of only a 70% improvement with his right shoulder, stiffness and cautiousness with activities, lifting and moving. He ices

and favors his right shoulder. He is cautious with his workload. The treating medical records do not corroborate the petitioner's testimony.

The respondent shall pay the petitioner the sum of $511.18/week for a further period of 20.24 weeks, as provided in Section 8(d)2/8(e) of the Act, because the injuries to his right arm on August 16, 2012, and October 30, 2013, caused the permanent partial disability to petitioner to the extent of 4.048% loss of use of the person as a whole (8% loss of use of his right arm).

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

Robert Strong,
Petitioner,

vs. No: 01 WC 61996

Spherion,
Respondent.

16IWCC0119

DECISION AND OPINION ON REVIEW

Petitioner, *pro se*, seeks review of Arbitrator Huebsch's December 12, 2014 order denying his motion for reinstatement. The Commission, after considering the record, hereby affirms the Arbitrator's order. In support, the Commission makes findings of facts and conclusions of law as follows:

1. On November 8, 2001, Petitioner, *pro se*, filed his Application for Adjustment of Claim.

2. On October 3, 2012, Arbitrator Kane, the then-presiding hearing officer, dismissed the case for want of prosecution. The case was reinstated on January 20, 2013.

3. On March 14, 2014, the parties appeared before Arbitrator Heubsch for pretrial and discussion. The Arbitrator recommended that Petitioner settle the case or retain counsel, and advised Petitioner that the case was subject to dismissal in the event that no progress was made.

4. On June 4, 2014, the parties appeared before Arbitrator Heubsch for trial set on this date, but Petitioner advised that he was not prepared to proceed. The Arbitrator granted a continuance and returned the case to his August 18, 2014 call. Petitioner was again advised that he must be prepared to proceed with the case.

5. On August 18, 2014, the parties appeared before the Arbitrator at status call. Petitioner requested a trial date, and same was set for September 12, 2014.

6. On September 12, 2014, the parties appeared before the Arbitrator for trial. Petitioner requested another continuance in order to take the evidence deposition of a Dr. Fink. Respondent requested dismissal. The Arbitrator issued an order of dismissal for want of prosecution.

7. On November 10, 2014, Petitioner timely filed a motion for reinstatement and indicated that, at the September 12, 2014 hearing, he had been "ready to proceed with his own testimony, but did not know if there was an option where he could present his testimony and then submit records and the doctor's deposition at a later time."

8. On December 12, 2014, the parties appeared before the Arbitrator at hearing of the motion for reinstatement. Petitioner submitted his un-notarized "affidavit" suggesting that Respondent's counsel agreed during a phone conversation that the trial that had been scheduled for September 12, 2014 could be continued so that Petitioner could take the deposition of Dr. Fink. The Respondent disagreed with these representations of Petitioner. The Arbitrator, having considered the arguments of the parties, denied reinstatement.

9. On January 12, 2015, Petitioner timely filed a Petition For Review of the Arbitrator's denial of reinstatement.

10. On March 30, 2015, Respondent filed a motion to dismiss the petition for review, citing Petitioner's failure to pay for and furnish the required transcripts of the September 12, 2014 and December 12, 2014 hearings.

11. On April 1, 2015, Petitioner filed a *in forma pauperis* petition under Section 20, requesting permission to proceed without the payment of costs for the required transcripts.

12. On May 20, 2015, the parties appeared before before Commissioner Luskin for hearing of Petitioner's Section 20 petition and Respondent's motion to dismiss.

13. On June 22, 2015, Commissioner Luskin granted Petitioner's Section 20 petition.

14. On July 16, 2015, a notice of briefing schedule (Notice of Return Date) was sent to both parties, indicating that Petitioner's Statement of Exceptions and Supporting Brief under Rule 7040.70 was September 11, 2015.

15. On September 10, 2015, Petitioner filed a motion for extension of time, requesting that the date for submission of his Rule 7040.70 brief be extended 30 days.

16. On September 22, 2015, Commissioner Luskin granted Petitioner an extension of 45 days for the filing of Petitioner's brief.

16IWCC0119

17. On September 24, 2015, a notice regarding the new briefing schedule was sent to both parties, indicating that Petitioner now had until November 9, 2015 to file his brief.

18. On November 25, 2015, Respondent filed a motion to dismiss review and oral arguments, citing Petitioner's failure to file his Rule 7040.70 brief. The motion was noticed for hearing on December 17, 2015.

19. On December 17, 2015, a hearing of Respondent's motion to dismiss review and oral arguments was held before Commissioner Luskin. Petitioner did not appear. As to Respondent's motion, Commissioner Luskin denied oral arguments, but did not dismiss the review.

The granting or denying of a petition for reinstatement rests in the sound discretion of the Commission; the standard is the same whether the dismissal takes place at arbitration or on review. Bromberg v. Industrial Commission, 97 Ill.2d 395 (1983). With respect to whether the Petitioner has shown justification for reinstatement, the Commission finds that he has not.

Arbitrator Heubsch's September 12, 2014 dismissal of the case for want of prosecution was appropriate. Despite at least one previous dismissal and being advised multiple times of the importance of making progress on this nearly 13-year-old case, Petitioner on that day sought another continuance. As well, Arbitrator Huebsch's denial of Petitioner's motion for reinstatement on December 12, 2014 was appropriate, the Arbitrator having noted that due process required finality in the disposition of cases.

Petitioner now claims that he had been ready to proceed with his own testimony at the trial that was scheduled for September 12, 2014. However, his conduct over the course of the past years suggests that he was not ready then and will never be ready. The Commission notes that his Petition For Review was filed a year ago. Since then, he has postponed the resolution of this petition by first claiming inability to pay for transcripts. After he was ultimately granted relief in this regard and a new briefing schedule set, at the last minute he requested a 30-day extension to file his Rule 7040.70 brief. Commissioner Luskin granted him more than what was requested, giving him until November 9, 2015 to file his brief (the original due date was September 11, 2015).

Since then, there has been no brief filed by Petitioner. In fact, there has been no communication at all by Petitioner to the Commission. Significantly, while Petitioner had appeared for previously scheduled status calls and trial dates, he failed to appear at the December 17, 2015 hearing on Respondent's motion to dismiss the review.

Ultimately, a party must exercise due diligence in pursuing his or her claim before the Commission. Contreras v. Industrial Commission, 240 Ill. Dec. 14 (1999). Given Petitioner's excessive delaying tactics and demonstrated unwillingness or inability in prosecuting this case, the Arbitrator's denial of reinstatement was appropriate.

16IWCC0119

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's order of December 12, 2014 is hereby affirmed.

No bond is required for removal of this cause to Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

FEB 11 2016

Joshua D. Luskin

Charles J. DeVriendt

o-01/20/16
jdl/ac
68

Ruth W. White

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

Audrey Roberts,

Petitioner,

vs. NO: 08 WC 42751

Rich Lee Vans,

16IWCC0116

Respondent,

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 causal connection, medical, permanent disability, penalties pursuant to §19(l), §19(k) and §16 attorney's fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that there is no causal connection between Petitioner's accident on February 8, 2008 and her left ulnar neuropathy. The Commission also finds that Petitioner is entitled to payment for all medical bills as they pertain to her face, neck, and low back through the end of physical therapy in April of 2008.

The Commission modifies the Arbitrator's award of permanency to 5% person as a whole.

All else is affirmed.

Petitioner was involved in a motor vehicle accident on February 8, 2008. She was treated at Northwest Community Hospital on that date complaining of generalized pain including neck and jaw pain. She also had pain to her lower back. At the emergency room, she received x-rays

to her lumbar/sacral spine, which showed mild degenerative spurring. She also had a CT scan of her pelvis. These two tests were negative. She also received a CT scan of her brain, which was normal. (Petitioner Exhibit 1)

She came under the care of Dr. Moline on February 18, 2008 and saw him on and off through September 16, 2008. She only started to complain of her left hand problems on August 8, 2008 and August 14, 2008. (Petitioner Exhibit 2) When Petitioner was sent to Dr. Kornblatt for an independent medical exam on April 8, 2008, she gave no history of any pain or numbness in her left hand. (Respondent Exhibit 1)

The Commission finds that Petitioner's left hand neuropathy is not causally connected to the accident on February 8, 2008 because it took 6 months from that date for her symptoms to appear. Dr. Munoz, a neurosurgeon, found the cervical injury could be causally connected to the accident on February 8, 2008 but felt that Petitioner's neuropathy of her left ulnar was not. (Petitioner Exhibit 5)

The Commission further finds that Respondent is liable for all medical bills pertaining to Petitioner's face, neck, and lower back through the end of her physical therapy in April 2008. All of her medical bills for treatment of her left hand are the responsibility of the Petitioner.

The Commission finds that Petitioner is entitled to 5% loss of use of the person as a whole or 25 weeks. Dr. Munoz on January 8, 2009, found that Petitioner did not give full cooperation and showed a low level of compliance in his tests. He further indicated that there did not appear to be a good patient effort. He did note a herniated disc at C6-7 on MRI, but based on his examination it is of dubious significance due to the patient's lack of cooperation. Munoz further stated, "I do not think that her left elbow tenderness has anything to do with the herniation." (Petitioner Exhibit 5)

Petitioner's request for penalties under §19(l) and §19(k) are denied. Petitioner's request for attorney's fees under §16 is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $260.00 per week for a period of 8 5/7 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 $260.00 per week for a period of 25 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent loss of use of the person as a whole to the extent of 5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the Petitioner for medical expenses under §8(a) of the Act and 8-2 as they pertain to her neck, back and face through the end of her physical therapy in April 2008.

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

16IWCC0116

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 $6,800.00. 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: FEB 11 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/15/15
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBERTS, AUDREY
Employee/Petitioner

Case# **08WC042751**

RICH LEE VANS
Employer/Respondent

16IWCC0116

On 11/13/2014, 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:

0307 ELFENBAUM EVERS & AMARILIO PC
KAROLINA M ZIELINSKA
940 W ADAMS ST SUITE 300
CHICAGO, IL 60607

0208 GALLIANNI DOELL & COZZI LTD
ROBERT J COZZI
20 N CLARK ST 18TH 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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Audrey Roberts
Employee/Petitioner

v.

Rich Lee Vans
Employer/Respondent

Case # **08** WC **42751**

16IWCC0116

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 **July 18, 2014 and August 20, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 8, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**20,090.72**; the average weekly wage was $**386.36.**

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 $ **2,502.17** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $ **2,502.17**.

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 $**260.00**/week for **8 5/7**^{ths} weeks, commencing **February 8, 2008** through **April 7, 2008**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **February 8, 2008** through **April 7, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $**2,502.17** for temporary total disability benefits that have been paid.

Respondent shall pay $**68,059.07** for medical services, as provided in Section 8(a) of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any group health insurance provider and shall provide payment information to Petitioner relative to any credit issue. 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 pay Petitioner permanent partial disability benefits of $**260.00**week for **50** weeks, because the injuries sustained caused the **10**% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's request for penalties and attorney's fees are denied, because that Respondent was reasonable in its reliance on Dr. Kornblatt's opinions.

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

November 12, 2014

Date

NOV 13 2014

FACTS

Petitioner was employed by Respondent as a school bus driver. On February 8, 2008, she was being driven to the bus yard by a fellow bus driver in one of Respondent's buses. The bus was hit by a truck causing her to hit her head several times on the bus window. An ambulance took Petitioner to Northwest Community Hospital where she was admitted. No fractures were evident on radiology studies. Petitioner was discharged on February 10, 2010. Pet. Ex. 1)

Petitioner then was seen by primary care physician, Dr. Bryan G. Moline, on February 18, 2008. She complained of neck and back pain. She was given medication and sent for physical therapy for her neck and back. (Pet. Ex. 2)

Petitioner was examined at the request of Respondent by orthopedic surgeon, Dr. Michael Kornblatt, on April 7, 2008. Dr. Kornblatt opined that the petitioner sustained cervical and lumbar strains, that she was capable of returning back to work, and that she should finish her physical therapy over the next one to two weeks at which time she will be at maximum medical improvement. (Resp. Ex. 1)

Petitioner was examined by Dr. Moline of April 18, 2008. Dr. Moline found tenderness of the lower back. Dr. Moline released her to return to full duty work. Petitioner was seen by Dr. Moline on June 16, 2008 and made no complaints of her neck and back. Petitioner saw Dr. Moline on August 14, 2008 complaining of numbness in the left fourth and fifth finger as well as neck and low back pain. He ordered an EMG which revealed ulnar mononeuropathy, diagnosed left ulnar neuropathy, and referred her to neurologist, Dr. Lenny Cohen. (Pet. Ex. 2)

Petitioner was examined by Dr. Cohen on September 2, 2008. He found sensory deficits in the left ulnar distribution and mild weakness of the left upper extremity. He noted the EMG study showed a left ulnar mononeuropathy and mild left C5-6 and C8-T1 abnormalities. He ordered an EMG of the lower extremity which was normal. An MRI was performed on October 10, 2008 which showed degenerative changes as well as a disc herniation at C6-7. On 11/7/08, Dr. Cohen diagnosed Petitioner with cervical radiculopathy, neck pain, C6-C7 herniated disc with central canal stenosis and left ulnar mononeuropathy. (Px 3, p. 18). Dr. Cohen referred the petitioner to orthopedic surgeon, Dr. Lorenzo Munoz. (Pet. Ex. 3)

Petitioner saw Dr. Munoz on January 8, 2009. Dr. Munoz advised Petitioner that depending on her level of pain, she may want to consider cervical spine surgery (Px 5, p. 3-5). Petitioner did not have the surgery. Petitioner testified that she was afraid to have the surgery after the procedure and risks were explained to

her. She testified that she was told there was no guarantee that she would be better after surgery and it was possible that she would not be able to speak or use her neck.

Petitioner returned to Dr. Cohen on September 16, 2009. The examination revealed tenderness to the left forearm on palpation. He diagnosed myositis and ordered blood work to determine the etiology of her complaints. In the spring of 2010, Petitioner underwent epidural steroid injections to the cervical spine. She testified that these did not help.

Petitioner continues to notice neck and back pain. She has difficulty with stairs, washing dishes, and sleeping.

On further questioning, Petitioner stated she has not seen a doctor the injuries she sustained in the accident for over four years. She continued working as a bus driver through 2010. Each year she had to undergo Illinois of Department of Transportation physicals and each time she was cleared to drive a school bus. The records of Stroger Hospital (Resp. Ex. 4) reflect that she had injured her back in August of 2007, when she fell. (Resp. Ex. 4, p 2)

CAUSATION

Petitioner's treating physician, Dr. Cohen, opined that Petitioner suffered from more than just cervical and lumbosacral strains as a result of her work-related motor vehicle accident. Dr. Cohen opined Petitioner's injuries included a C6-C7 disk herniation, cervical radiculopathy, cervical neuroforaminal stenosis and left ulnar mononeuropathy for which she required epidural injections.

The Arbitrator is persuaded by Dr. Cohen's opinions. The Arbitrator finds that Petitioner has met her burden of proof by a preponderance of the evidence that her condition of ill-being with respect to her neck and low back is causally related to her work accident.

MEDICAL AND TTD

These disputes are premised on causation, which has been resolved in favor of Petitioner. Therefore, these claimed benefits are awarded.

NATURE AND EXTENT

Based upon the foregoing, the Arbitrator finds that Petitioner has sustained the 10% loss of the person as a whole.

PENALTIES AND FEES

Respondent based its denial of further benefits and compensation on the opinion of orthopedic surgeon, Dr. Kornblatt. The Arbitrator finds that Respondent was reasonable in its reliance. Therefore, Petitioner's request for penalties and attorney's fees are denied.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cecil Smith,

Petitioner,

vs. No. 10 WC 19691

City of Elgin,

16IWCC0111

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 causal connection, medical expenses, benefit rates, temporary disability and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, who is currently chief of police for a municipality in Florida, testified on direct examination that he worked for Respondent for 25 years. On April 16, 2010, while working for Respondent as a deputy chief of police, Petitioner sustained injuries when he was moving furniture in preparation for the swearing in ceremony for the new chief of police. Petitioner explained that he was stacking some chairs onto a movable dolly when the chairs began to fall. He reached up to grab the chairs to prevent them from falling and felt a pop in his neck and right shoulder, followed by a sharp pain in the neck and the shoulder.

Petitioner admitted previously injuring his right shoulder and neck in 1999, which was a duty-related injury while working for Respondent. As a result of the injury, Petitioner underwent cervical spine surgery in 2001 and shoulder surgery in 2007. Petitioner stated he had no problems with the right shoulder after he recovered from the surgery and returned to work full duty. Before the accident on April 16, 2010, Petitioner also served a tour of duty in the Air

Force and attended a ten week academic and physical training program at the FBI National Academy. Petitioner denied having any limitations relative to the right shoulder.

Petitioner further testified that after the accident on April 16, 2010, he received initial treatment at Sherman Hospital. As part of the diagnostic work-up, he underwent an MRI. He followed up with Dr. Wen for the neck condition and Dr. Berkson for the shoulder condition. After Dr. Berkson retired, Petitioner treated with his partner, Dr. Kazaglis. Following unsuccessful conservative treatment, Petitioner underwent surgery on the right shoulder on December 7, 2012.

The accident report Petitioner completed on April 19, 2010, describes the accident consistently with his testimony. However, Petitioner reported he only "popped" his neck, and the neck pain progressively worsened. The report does not mention an injury or symptoms in the right shoulder.

The medical records in evidence show that on April 20, 2010, Petitioner underwent a cervical MRI at Sherman Hospital after complaining of pain and radiating weakness in the arms. The medical records from Dr. Wen at Elgin Barrington Neurosurgery contain only one office note postdating the accident. On April 26, 2010, Petitioner followed up with Dr. Wen after not seeing him for three years. Petitioner complained of an exacerbation of his neck symptoms "after jerking neck, occiput, interscapular, got worse to a point a few days later he went to SH ER." On physical examination, Dr. Wen noted "fair ROM neck, sl tender lower cervical, *** vague sl pp loss whole rt arm and hand." Dr. Wen's diagnosis related to Petitioner's cervical spine, and not the right shoulder.

The next post-accident doctor's note is dated June 21, 2012. Petitioner returned to Dr. Berkson at Associates in Orthopaedic Surgery for evaluation of his right shoulder condition. Dr. Berkson noted: "He has only had shoulder pain a couple of weeks, although he was treated surgically by me in the past. *** Symptoms are variable in nature and are exacerbated with activity. Pain when present is at a level of 7 on a scale to 10. He definitely notes decreased range of motion. He has some complaints of numbness as well. It should be noted that this patient's original surgical repair was related to a work injury. *** This re-injury is clearly consistent with his prior condition." Dr. Berkson suspected a recurrent rotator cuff tear and referred Petitioner to Dr. Kazaglis. An MRI of the right shoulder performed June 28, 2012, showed, in addition to prior postoperative changes: "Tendinosis and partial tear with attenuated tendon substance at the posterior supraspinatus/anterior infraspinatus, involving less than 25% of tendon substance. There is also tendinosis in the rest of the distal supraspinous tendon at the insertion." On July 19, 2012, Dr. Kazaglis noted the following history: "[The patient] subsequently [after the surgery in 2007] reinjured the shoulder at work moving furniture and has had pain in the right shoulder which has gotten worse since then. He said that over the past two to three months he has had increasing pain and stiffness in the right shoulder." Dr. Kazaglis diagnosed an impingement, "[r]ecurrent chronic partial tearing of the rotator cuff," and AC joint arthrosis.

On October 16, 2012, Dr. Levin, an orthopedic surgeon, examined Petitioner at Respondent's request. Dr. Levin noted a history of "another injury in 2010," in addition to the right shoulder injury in 1999. Petitioner reported the right shoulder pain recurred four months before Dr. Levin's examination. Dr. Levin interpreted the MRI study from June 28, 2012, as showing a chronic rotator cuff tear with some tendinitis. Dr. Levin opined: "Based upon this patient's history, physical exam, and radiographic studies, his current complaints are related to right shoulder pain with AC joint pain and possible recurrent right shoulder rotator cuff tear. * * * In regards to the patient's relationship to injuries back in 1999, the patient did have a rotator cuff tear in the past and underwent surgical intervention. There is what appears to be chronic changes in the same area that he underwent the surgical intervention." Dr. Levin recommended surgery. Dr. Levin did not address whether the accident on April 16, 2010, aggravated Petitioner's preexisting right shoulder condition.

On December 7, 2012, Dr. Kazaglis performed an arthroscopic revision rotator cuff repair and subacromial decompression. Postoperatively, Petitioner made slow progress in physical therapy and had pain with overhead activities. Petitioner last saw Dr. Kazaglis on March 7, 2013, before moving to Florida. He rated the pain a 2/10. On physical examination, he only had a 3/5 strength in the supraspinatus. Dr. Kazaglis instructed Petitioner to continue physical therapy and anticipated maximum medical improvement approximately a year after the surgery. During the arbitration hearing, Petitioner described significant residual problems with the right shoulder.

Pre-accident medical records from Dr. Berkson show that in October of 2007, he performed an open repair of the right shoulder rotator cuff and distal clavicle excision. On December 9, 2008, Dr. Berkson declared Petitioner at maximum medical improvement, noting mild residual symptoms, including "occasional stiffness and achiness and a grating sensation on a variable basis." An arbitration decision filed May 23, 2008, in case No. 99 WC 62832 awards Petitioner permanent partial disability benefits of 30 percent loss of use of the right arm for the 1999 right shoulder injury. Petitioner testified that neither party appealed the arbitration decision.

On cross-examination, Petitioner acknowledged the accident report he completed on April 19, 2010, only mentions an injury to the neck, and not the shoulder. Petitioner confirmed that he continued to work after the accident.

The Commission finds that Petitioner failed to prove his right shoulder condition is causally connected to the accident on April 16, 2010. As noted, the accident report and the medical records do not corroborate Petitioner's claim of an injury to the right shoulder on April 16, 2010. Petitioner first mentioned right shoulder symptoms during a visit to Dr. Berkson on June 21, 2012, more than two years after the accident. Petitioner told Dr. Berkson his symptoms started a couple of weeks before the visit. Likewise, Petitioner reported to Dr. Levin the right shoulder pain recurred four months before the examination on October 16, 2012, *i.e.*, in June of

2012. None of the doctors specifically connected the right shoulder condition to the April 16, 2010, work accident.

Respondent acknowledges that Petitioner's medical rights under section 8(a) of the Workers' Compensation Act (the Act) remain open with respect to the 1999 work accident. Respondent had authorized the revision right shoulder surgery as being related to the 1999 work accident and paid temporary total disability benefits in the sum of $2,889.56. Respondent contends the Commission cannot award any further temporary or permanent disability benefits with respect to the 1999 work accident because Petitioner failed to timely file a petition for review under section 19(h) of the Act. Respondent does not seek reimbursement of the temporary total disability benefits it had paid to Petitioner in connection with the revision surgery, only a finding that no additional temporary total disability benefits are owed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 20, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is vacated. Pursuant to Respondent's stipulation, Petitioner does not owe a reimbursement of the temporary total disability benefits he received in the sum of $2,889.56.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of permanent partial disability benefits relative to the right shoulder is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $664.72 per week for a period of 5 weeks, as provided in §8(d)2 of the Act, for the reason that the injury to the neck caused the 1 percent disability to the person as a whole.

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

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 10 2016
o-01/21/2016
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, CECIL
Employee/Petitioner

Case# **10WC019691**

16IWCC0111

CITY OF ELGIN
Employer/Respondent

On 1/14/2015, 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:

1380 MURPHY AND MURPHY
DANIEL E MURPHY
39 S LASALLE ST SUITE 720
CHICAGO, IL 60603

5541 FRED J BEER LAW OFFICES
2295 VALLEY CREEK DR
SUITE K
ELGIN, IL 60123

16IWCC0111

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Case # 10 WC 19691

Consolidated cases: N/A

Cecil Smith
Employee/Petitioner

v.

City of Elgin
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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **November 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On April 16, 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 accidents 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 this accident as explained *infra*.

In the year preceding the injury, Petitioner earned $86,122.23; the average weekly wage was $1,656.20.

On the date of accident, Petitioner was 50 years of age, *married* with 3 dependent children.

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

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

Respondent shall be given a credit of $2,889.56 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $2,889.56.

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

ORDER

Temporary Total Disability

As stipulated by the parties, Respondent shall pay Petitioner temporary total disability benefits of $1,500.00/week for 3 and 6/7th weeks, commencing December 7, 2012 through January 2, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $2,889.56 for temporary total disability benefits that have been paid.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act, for the injury to the right shoulder.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 5 weeks, because the injuries sustained caused the 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act, for the injury to the neck.

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

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

Signature of Arbitrator

January 5, 2015
Date

JAN 14 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Cecil Smith
Employee/Petitioner

v.

City of Elgin
Employer/Respondent

Case # **10** WC **19691**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute in this case include causal connection and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he is currently employed as the Chief of Police of Sanford in Sanford, Florida. Previously, he worked at the Elgin Police Department for a little over 25 years. On April 16, 2010, Petitioner was employed as the Deputy Chief of Police and he had been so employed for approximately four years. He is right-hand dominant.

Petitioner injured his neck, throat and right shoulder before this accident in November of 1999 while working for Respondent. He explained that he was in a foot pursuit with an individual whom he chased for a mile and a half. Petitioner underwent a discectomy at C5-C6 in 2001. A decision was issued after arbitration on May 23, 2008 in Case No. 99 WC 62832, which was not reviewed by either party with the Commission. PX6.

According to Petitioner's testimony, the arbitration decision, and medical records, on February 27, 2001, Dr. Wen performed a discectomy surgery and fusion of C5–C6. PX2 at 17-19; PX6 at 4. On October 9, 2007, Petitioner also underwent an open right rotator cuff repair with subacromial decompression and distal clavicle excision with Dr. Berkson. PX3 at 46-47. The Arbitrator in Case No. 99 WC 62832 awarded Petitioner 30% loss of use of a man as a whole for his cervical fusion injury, 10% loss of a man as a whole for his throat injury, and 30% loss of use of his right arm for his right shoulder injury. PX6.

On October 9, 2007, Petitioner underwent surgery performed by Dr. Berkson to address a rotator cuff tear and impingement syndrome in the right shoulder. PX3 at 45-47. Between 2001 and his accident on April 16, 2010 injury Petitioner testified that he had no limitations to the neck or right shoulder or any medical treatment other than seeing his own physician. Petitioner testified that he was working full duty during this period of time.

Petitioner explained that he was a First Sergent and was called to insulate Turkey and later, between 2008 and 2010, he attended the 10 week academic and physical training camp to be certified with the FBI. Petitioner testified that his injuries did not limit his ability to participate in his military service or FBI participation.

[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.

April 16, 2010

Petitioner was preparing for the promotional ceremony for Chief Svoboda at which time he would be sworn in to the office. He testified that he was in the process of setting up chairs and moving tables with the assistance of a secretary, and in particular he was in the process of restacking chairs on a movable dolly. Petitioner explained that the chairs began to fall and he reached to stop them from falling at which time he felt a sharp pain in his shoulder and neck.

Medical Treatment

A few days later, Petitioner sought medical treatment at Sherman Hospital and saw Dr. Edelson. On cross examination, Petitioner testified that he was injured on April 16, 2010. On April 19, 2010, Petitioner completed an employee injury report. RX2.

Petitioner underwent a recommended MRI of the neck on April 20, 2010. PX1 at 4. The neck MRI showed post-surgical changes at C4-C6 with no focal disc herniations or evidence of compression or nerve encroachment. *Id.*

Petitioner saw Dr. Dennis Wen at Elgin Barrington Neurosurgery on April 26, 2010. PX2 at 2-4. Dr. Wen noted that Petitioner had previously had occasional episodes of severe neck pain that usually resolved on their own, but recently had an exacerbation episode. *Id.* He also noted Petitioner's report that these previous episodes did not affect his whole hand and arm as this last episode did. *Id.* Dr. Wen ordered physical therapy and medications, and diagnosed Petitioner with a cervical strain. *Id.*

On October 7, 2010, Petitioner underwent another cervical MRI and a thoracic MRI. PX2 at 73-74. The interpreting radiologist noted the following with regard to the cervical spine: (1) post-surgical changes with a solid bony fusion at C5-C6; (2) focal midline herniated disc at T3-C4; (3) bulging discs at C5-C6 and C6-C7 with bony encroachment on intervertebral foramina bilaterally at C6-C7 most prominent on the left; (4) no pathologic areas of enhancement; and (5) a bulging disc at T3-T4. *Id.* With regard to the thoracic spine, the radiologist noted the following: (1) a prominent herniated disc at T6-T7 that compressed on the thoracic spinal cord; (2) bulging discs at multiple levels; (3) anterior osteophytes at multiple levels; and (4) no pathologic areas of enhancement. *Id.*

On June 21, 2012, Dr. Berkson ordered another MRI of the right shoulder. PX3 at 35-36. Petitioner underwent the recommended MRI on June 28, 2012, which the interpreting radiologist found to show post-surgical changes of the right shoulder, tendinosis and partial tear with attenuated substance at the posterior supraspinitus/anterior infraspinatus involving less than 25% of the tendon, and tendinosis in the rest of the supraspinous tendon at insertion. PX3 at 55-56.

When Dr. Berkson retired, Petitioner transitioned his treatment to his partner, Dr. Kazaglis.

Petitioner returned to Dr. Kazaglis on July 19, 2012, he administered a subacromial cortisone injection. PX3 at 31-34. Petitioner testified that the injection temporarily relieved his pain for about 30 days. As of August 21, 2012, Dr. Kazaglis noted that Petitioner's right shoulder had been in pain ever since the incident moving furniture at work, and that the pain had been increasing over the past five months. PX3 at 28-30. He noted that Petitioner's right shoulder pain had persisted despite activity modification, anti-inflammatory medication, and a subacromial injection and he recommended right shoulder surgery. *Id.*

Petitioner testified that, at this time, his right shoulder tingled and he had weakness and inability to completely raise his right arm. With regard to his neck, he had some difficulty turning his head left and right, numbness and tingling into his right hand, and headaches.

Section 12 Examination – Dr. Levin

Petitioner submitted to an independent medical evaluation at Respondent's request with Dr. Mark Levin on October 16, 2012. RX1. After taking a history from Petitioner, reviewing various medical records from his current treatment and prior treatment to the neck and shoulder, and examining Petitioner, Dr. Levin rendered various opinions. *Id.*

Specifically, Dr. Levin diagnosed Petitioner with right shoulder pain with AC joint pain and possible recurrent right shoulder rotator cuff tear. *Id.* He indicated that surgery and post-operative physical therapy would be appropriate. *Id.* He also indicated that Petitioner's condition was in the same area of the shoulder related to Petitioner's prior injury in 1999. *Id.*

Continued Medical Treatment

On December 7, 2012, Petitioner underwent an arthroscopic revision of a right rotator cuff repair and subacromial decompression surgery with Dr. Kazaglis for a chronic right rotator cuff tear and subacromial impingement. PX3 at 19; PX7.

Dr. Kazaglis ordered post-operative physical therapy for six weeks. PX3 at 12-14. Petitioner's work restrictions were graduated during visits on January 3, 2013 through February 7, 2013. PX3 at 15-18.

On March 7, 2013 Petitioner reported continued pain with overhead reaching. PX4 at 10. Dr. Kazaglis indicated his expectation that Petitioner would reach maximum medical improvement approximately one year after surgery. *Id.* Petitioner was then discharged from physical therapy on March 26, 2013 after one more scheduled visit. PX4 at 7. He reported that he continued to have weakness in his right arm, but that he felt he was getting stronger. *Id.* His greatest limitation was with repetitive resistive activities and overhead flexion or abduction. *Id.*

Petitioner underwent an additional MRI of the cervical spine on October 29, 2014. PX9 at 3-4. The interpreting radiologist noted cervicothoracic dextroscoliosis, straightening of the upper cervical lordosis, and broad based disc bulges or herniations at several levels with varying levels of stenosis. *Id.*

Additional Information

After returning to work in January of 2013, Petitioner testified that he had some difficulty lifting the arm, weakness, and difficulty sleeping on the right side. With regard to his neck, he had some neck pain, swelling, difficulty turning his lead left to right, and a throbbing pain in the back of his neck.

Petitioner testified that he experiences some sharp neck pain that radiates into his right hand to the index and middle fingers, pain under the right biceps, sharp shoulder pain and a numbing feeling when sleeping. He also wakes up in the middle of the night and sleeps on his back with his right arm elevated. Petitioner testified that this pain has been constant over the last three weeks.

Petitioner testified that his right shoulder and neck pain have not completely resolved since his injury. He explained that his current job it is a more sedentary role, but acknowledged that he must qualify with several firearms and pass a physical fitness exam each year. He explained that he adjusts to meet the requirements of his job.

Petitioner also testified that he types a great deal and is hunched over so he gets pain in the right side of the neck and shoulder. He has difficulty swimming, playing baseball or basketball, or fishing. He has difficulty raising his right arm above his head, and difficulty with continuous rotation as when he is fishing. He also knows when the temperature is changing and testified that he feels more crepitus or arthritis then. Petitioner testified that he is stronger in the left arm than in the right arm.

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 conditions of ill-being in the neck and right shoulder are causally related to the injury sustained at work on April 16, 2010. In so concluding, the Arbitrator relies on the credible testimony of Petitioner which is corroborated by contemporaneous medical records and Petitioner's incident report as well as the lack of evidence of active medical treatment for neck or right shoulder symptoms for approximately a year and a half before this accident.

To recover in a preexisting condition case, a claimant need only establish a causal connection between his work-related injury and claimed current condition of ill-being by showing that his injury aggravated or accelerated the preexisting disease. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, (2003) (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d 30, 36-37 (1982) (an accidental injury will be deemed compensable if it can be shown that the employment was also a causative factor)). It has long been held that an employer takes its employees as it finds them. *Sisbro*, 207 Ill. 2d at 205 (*citing Baggett v. Industrial Commission*, 201 Ill.2d 187, 199 (2003)). As in this case, even where an employee has a pre-existing condition that renders him more vulnerable to an 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." *See Sisbro*, 207 Ill. 2d at 205 (*citing Caterpillar Tractor Co. v. Industrial Commission*, 92 Ill. 2d at 36; *Williams v. Industrial Commission*, 85 Ill. 2d 117, 122 (1981); *County of Cook v. Industrial Commission*, 69 Ill. 2d 10, 18 (1977)).

While the treating medical records reference Petitioner's 1999 injury and the chronic changes seen post-operatively after each surgery, Dr. Berkson explicitly notes that Petitioner re-injured the right shoulder in this work-related accident and there no persuasive evidence was presented that the neck and right shoulder symptoms that arose after April 16, 2010 were due to solely to non-occupational or chronic, pre-existing factors. To the contrary, Petitioner continued to work without limitation from the time of his last surgery for the shoulder in 2007 meeting all of the physical demand requirements of his job until he felt the pop in his neck and shoulders while moving chairs at work on April 16, 2010. Thus, the medical records taken in conjunction with

Petitioner's uncontroverted testimony reflect that Petitioner's neck and right shoulder conditions were stable after the prior work-related injury to the neck and shoulder stemming from a 1999 accident, and establish that Petitioner's current neck and right shoulder conditions are causally related in part to the accident on April 10, 2010 which aggravated his conditions such that he required medical treatment.

Based on all of the foregoing, the Arbitrator finds that Petitioner's conditions of ill-being with respect to his neck and right shoulder are causally related the work accident he sustained on April 16, 2010.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects that Petitioner underwent an arthroscopic revision of a right rotator cuff repair and subacromial decompression surgery followed by post-operative physical therapy and an eventual return to full duty work, but with significant continued symptoms and lifestyle changes—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 15% loss of use of the man as a whole pursuant to Section 8(d)2 for his right shoulder injury.

Based on the record as a whole—which reflects that Petitioner felt a pop in his neck resulting in one instance of medical treatment and a cervical strain diagnosis with no further medical treatment specifically noted for the neck, but with continued minimal ongoing symptoms and lifestyle changes—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 1% loss of use of the man as a whole pursuant to Section 8(d)2 for his neck/cervical spine injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Sutor,

Petitioner,

vs.

NO: 10 WC 48451

16IWCC0115

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of maintenance, nature and extent of permanent disability and §8(d)1 wage differential 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 modifies the Arbitrator's Decision finding that Petitioner failed to prove he was entitled to maintenance benefits for the periods that he was not assisted with job placement with MedVoc. Although Petitioner testified to a self-directed job search when not with MedVoc, he did not bring any documentation of such to the arbitration hearing. Petitioner testified he did not keep a jog log, but would write down who he applied with. Petitioner did not bring this documentation to the arbitration hearing. The March 14, 2013 initial vocational rehabilitation report by MedVoc indicated Petitioner reported that he had been participating in a job search through the City of Chicago for approximately one year and that he dropped off his job logs every Monday. However, Petitioner did not submit into evidence any copies of his documentation for those periods he was not with MedVoc. The Commission affirms the Arbitrator's finding that Petitioner was temporarily totally disabled from August 26, 2010

16IWCC0115

through March 24, 2011, the date that Dr. Goldberg opined Petitioner had reached maximum medical improvement, a period of 30-1/7 weeks. The March 14, 2013 MedVoc report indicates that Petitioner began job placement assistance with MedVoc on March 11, 2013. MedVoc continued job placement assistance through November 1, 2013. Therefore, the Commission finds Petitioner entitled to maintenance benefits from March 11, 2013 through November 1, 2013, a period of 33-5/7 weeks. Job placement assistance with MedVoc resumed on June 5, 2014, according to the July 24, 2014 MedVoc report. MedVoc closed Petitioner's case on March 9, 2015. Therefore, the Commission finds Petitioner entitled to maintenance benefits again from June 5, 2014 through March 9, 2015, a period of 39-5/7 weeks. The total period of maintenance benefits is 73-3/7 weeks. The Commission vacates the Arbitrator's award of maintenance benefits from March 25, 2011 through March 10, 2013 and from November 2, 2013 through June 4, 2014. The Commission also corrects the clerical error on the face sheet to reflect the award of TTD benefits under §8(b), not TPD under §8(a). The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of maintenance benefits from March 25, 2011 through March 10, 2013 and from November 2, 2013 through June 4, 2014 are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $938.67 per week for a period of 30-1/7 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 $938.67 per week for a period of 73-3/7 weeks, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on March 10, 2015, Respondent pay to Petitioner the sum of $624.53 per week for the duration of his disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

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 Commission notes that Respondent paid $28,160.10 in TTD benefits and $193,510.95 in maintenance benefits.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. 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: FEB 10 2016
MB/maw
o12/17/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SUTOR, ANTHONY
Employee/Petitioner

Case# **10WC048451**

16IWCC0115

CITY OF CHICAGO
Employer/Respondent

On 5/4/2015, 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:

4963 NEWLAND & NEWLAND LLP
DANA N BLUMTHAL
121 S WILKE RD SUITE 301
ARLINGTON HTS, IL 60005

0113 CITY OF CHICAGO-DEPT OF LAW
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

16IWCC0115

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

Anthony Sutor
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 10 WC 48451

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **March 13, 2015**. 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] What temporary benefits are in dispute?
   [ ] TPD [x] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0115

FINDINGS

On **August 25, 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 $**73,216.00**; the average weekly wage was $**1,408.00**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**28,160.10** for TTD, $**0.00** for TPD, $**193,510.95** for maintenance, and $**0.00** for other benefits, for a total credit of $**221,671.05**.

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 $938.67/week for 30 weeks, commencing August 26, 2010 through March 24, 2011, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $938.67/week for 206 4/7 weeks, commencing March 25,2011 through March 9, 2015, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $**28,160.10** for TTD and $**193,510.95** for maintenance benefits, for a total credit of $**221,671.05**. Respondent shall receive further credit against permanency for any additional weekly benefits paid to Petitioner after the date of the trial herein.

Respondent shall pay Petitioner permanent partial disability benefits, commencing March 10, 2015, of $624.53/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 at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 4, 2015
Date

MAY 4 - 2015

Statement of Facts

Petitioner Anthony Sutor testified that on August 25, 2010 he was employed by Respondent City of Chicago in the Department of Transportation as a laborer. He had been employed by Respondent since 1991. Petitioner testified that he graduated from St. Rita High School in 1986. School was not easy for him. His duties as a laborer on the date of the accident were in the tear down department. His duties were manual labor including digging ditches and operating a jackhammer. Petitioner testified he did not perform clerical duties.

Petitioner testified he had a prior back injury in 1998. He filed a Workers Compensation claim for that injury. He was treated by Dr. Goldberg and underwent a fusion. Respondent offered the Commission printout for that injury, case number 99 WC 10739 (Rx 1). The date of accident was December 22, 1998. The case was settled on October 24, 2002 for $75,000 representing 32.21% loss of use of the man as a whole. The medical records confirm that Petitioner had a lumbar spine fusion (Px 5). Petitioner testified that he had returned to full duty and was working with no restrictions.

Petitioner testified that on August 25, 2010, he was working with the plumbers. He was earning $37.45 per hour working full time. He was acting foreman on that date, but was only supervising himself. Petitioner testified that he was in a ditch, walking backwards, when he fell into a catch basin that had been covered with rotten plywood. His right leg went into the catch basin and his left leg stayed out. Petitioner testified he felt pain in his low back and left leg. He reported the incident to his superintendant the next day and was sent to MercyWorks for treatment.

The records of MercyWorks were admitted as Petitioner's Exhibit 1. Petitioner was seen by Dr. Diadula on August 26, 2010. He provided a consistent history of accident and complained of low back pain radiating into the right leg and non radiating neck pain. Petitioner was diagnosed with a low back contusion and neck strain. He was taken off work. The August 31, 2010 note records low back pain with radiation into the left leg with numbness and tingling in the toes. Petitioner states he is to see Dr. Goldberg (his orthopedic specialist of choice) who did his prior surgery. Per Dr. Goldberg's request, Dr. Diadula sent Petitioner for an MRI of the lumbar spine, which was performed on September 22, 2010. The report shows post surgical changes at L4-S1, a disc protrusion at L5-S1 with mild/moderate left foraminal stenosis, but no displacement of the left S1 nerve, a small right disc protrusion at T11-T12, and narrowing at the L3-L4 due to facet arthrosis with no focal disc herniation or nerve root impingement (Px 3).

Petitioner saw Dr. Goldberg beginning September 27, 2010. Records of Midwest Orthopedics at Rush were admitted as Petitioner's Exhibit 5. Dr. Goldberg took an initial history of the accident with the development of acute low back pain. He notes the initial neck pain. Petitioner's complaints on September 27, 2010 were of low back pain and left leg radicular-type symptoms. Dr. Goldberg's impression was a spondylolisthesis and mild stenosis causing low back and left leg pain. He recommended physical therapy and epidural injections. He related the condition to the work accident. Petitioner proceeded with physical therapy and underwent two epidural injections on November 29, 2010 and December 15, 2010.

On January 17, 2011, Petitioner was seen by Dr. Goldberg reporting continued pain across the low back radiating down the back of his left leg. His pain is increased with prolonged sitting or walking. He noted no relief from the injections. The physical examination noted a normal gait. Petitioner appeared in pain with lumbar flexion and extension. Straight leg raising was negative. Strength was 5/5. Dr. Goldberg notes Petitioner appears to be suffering from axial low back pain at the L3-4 level with some left L4 radiculopathy.

He notes no improvement with physical therapy or injections. He records that Petitioner has no interest in surgery. He referred Petitioner to Rush Pain Center. Petitioner testified he felt surgery was not in his best interest because there was no guarantee on the result. He testified Dr. Goldberg told him he could be the same or worse.

Petitioner returned to Dr. Goldberg on March 11, 2011. He had not gone to the pain center. Dr. Goldberg reviewed a job description for a foreman to supervise watchman. He stated Petitioner could return to work in that position. Petitioner applied for a watchman position on August 19, 2011 (Rx 3). On the questionnaire he stated he was unable to remain alert at all times.

Petitioner had a Functional Capacity Examination performed on March 16, 2011 at Athletico (Px 5, Px 7). Petitioner's regular job as a Construction Laborer was determined to be in the very heavy demand level. Petitioner's test placed him in the medium physical demand level. He was determined to be unable to return to his previous employment. Dr. Goldberg last saw Petitioner on March 23, 2011. He noted the valid FCE. Physical examination was unchanged. Dr. Goldberg place Petitioner at maximum medical improvement and on permanent restrictions per the FCE. No further appointments were scheduled since Petitioner was not interested in surgery. Future pain management was to be addressed by MercyWorks (Px 5).

Petitioner was seen by Dr. Graf at Respondent's request on March 3, 2011. Dr. Graf disagreed with Dr. Goldberg's assessment of L3-L4 being the area of his problem. He recommended an injection at L5-S1. Dr. Graf agreed Petitioner could do light duty, noting the restrictions could be deceased as he improved (Rx 2).

Petitioner returned to Dr. Diadula on June 1, 2011 for refill on his Vicodin. He was seen on June 26, 2012 for a Pension Board visit. He was found on each occasion to be at MMI and discharged with restrictions per the FCE (Px 1).

Petitioner testified he went back to the doctor with worsening pain in his back and left leg with numbness. He saw Dr. Vucicevic one time on October 17, 2013 (Px 9). He was complaining of pain in the lower back and left leg. He stated he could not get out of bed and had trouble driving any distance. He stated he tried to get up when his leg gave way and he fell and could not get up. He had gained weight. It was listed as 280 pounds. He was walking with a left sided limp. The physical examination notes normal neurological exam with some loss of motion and a mildly positive left straight leg raising. Dr. Vucicevic notes Petitioner is genuine and his problem needs to be further defined. He recommends a repeat MRI and an EMG. Petitioner testified the tests were not performed because they were not paid for. Petitioner was provided with Norco. He was also strongly encouraged to begin a weight loss program (Px 9). A prescription for a cane was issued. Petitioner testified the cane was helpful. He can walk longer with less pain.

Petitioner also saw Dr. Buvanedran at the Rush Pain Center in 2014. Hand written notes were admitted as Petitioner's Exhibit 11. On June 13, 2014, Petitioner was complaining of back pain 9/10 at night and when sitting for long periods. He was diagnosed with left L5-S1 radiculopathy. The plan was to wean him from Norco and start alternate medications. He was given a work release for additional restrictions of 4 hours per day and was to return in four weeks. The July 11, 2014 note states that Petitioner did not tolerate the combination of drugs proposed. He was returned to Norco. The note states the patient does not want a spinal cord stimulator. He was to follow up in two months. Petitioner testified that there was a discussion of a pain pump. He testified that he did not want the pain pump.

Petitioner was seen at his attorney's request by Dr. Chmell on July 26, 2014 (Px 13). Petitioner was now 341 pounds. He was noted to have a prominent limp on the left side and used a cane. Petitioner had positive straight leg raising on the left. Dr. Chmell records atrophy of the left thigh and calf with diminished sensation and reduced left knee reflex and loss of strength. Dr. Chmell opines that Petitioner would be a surgical candidate, but otherwise is at Maximum Medical Improvement. He agrees with the restrictions including the 4 hour per day limitation for part time work only. He believes Petitioner is a fall risk, and opines that Petitioner is not employable (Px 13).

Petitioner testified following his discharge by Dr. Goldberg, he was instructed by Respondent to look for jobs. He testified he looked for ten jobs per week and would drop the paperwork off each Friday. He was provided no classes or training. He looked for jobs in the auto industry including parts counter person, clerk and service advisor. He did this job search for six months. He testified he does not have any records of this search.

Petitioner testified that he was then set up to meet with MedVoc. He met with Lauren Egle. He testified he was excited to meet with her and wanted her help. He had an initial meeting to discuss paperwork, how to address people, how to interview, to prepare a resume and review his job history. He testified he did not have any computer skills. He testified he asked about computer classes and was told they would look into it. He testified that the revised resume was untruthful, included supervisory and computer skills he lacked and made his position look more clerical that laborer. This was 75% fixed. He never received any computer course. Petitioner testified that Ms. Egle was not a nice person and he felt he was set up to fail. She sent him on jobs that were above his restrictions or included clerical skills he lacked. He felt embarrassed and degraded. He testified he was instructed not to tell employers about his injury and to say he was looking for less physical work because he was getting older.

The records of MedVoc were admitted as Respondent's Exhibit 6. The records document an initial evaluation was performed on March 14, 2013. The report confirms Petitioner advised he had a high school education with some remedial courses, limited computer skills. He confirmed a valid driver's license but would need to stretch after 45 minutes. The medical and job history with the city and current restrictions are accurately noted. The consultant noted that he would be a candidate for the automotive jobs he had been seeking. A resume and cover letter were to be prepared. An April 17, 2013 labor market survey found jobs available from $8.25 to $18.25 per hour with mean wage of $11.78 per hour. Petitioner was instructed to follow up on leads developed by MedVoc and to additionally contact ten leads per week which he was to develop on his own, with five being in person. The job placement efforts continued until they were suspended on November 1, 2013. The records disclose continues disputes between Petitioner and Ms. Egle over the documentation of Petitioner's job search. There are repeated episodes of the follow up by MedVoc failing to confirm the person to whom Petitioner reported delivering his resume, either the contact person not existing at the employer listed or the employer not having the resume on file. There is also criticism of the online documentation provided by Petitioner. There is also criticism of Petitioner demeanor either when dropping off resumes or at interviews. He was challenged to be more outgoing and friendly and to get complete information rather than rushing out without names for follow up or details about the job. In July, 2013, there is noted an issue over whether he submitted applications to Jewel and Dominick's and whether computer kiosks existed at the locations (Rx 6, p 78). There were also repeated issues with his receipt of items from MedVoc and their receipt of his logs in a timely manner. In the October 10, 2013 report, Ms. Egle suggests that Petitioner is falsifying his reports and that continuing to do so will be viewed as non cooperation (Rx 6, pp 116-126). The job placement efforts were suspended shortly thereafter (Rx 6, p 134).

Job placement with MedVoc was resumed on June 5, 2014 (Rx 6, p 148). Petitioner advised of his use of a cane and the additional 4 hour per day restrictions after his visit with Dr. Buvanendran on June 13, 2014. There were soon issues with the documentation of job leads, particularly the names of the contact individuals. The job leads from MedVoc expanded to include restaurant hostess and delivery jobs, in part to accommodate the need for part time work. Additional disagreements between Petitioner and Ms. Egle arose over whether job leads continued to exist, the physical requirement of the job leads identified, and feedback from contacts. Disputes also arose over Petitioner's discussion of his back injury (Rx 6, p 205). In the March 9, 2015 report, Ms. Egle, after recapping the most recent job placement efforts, documents her opinion that Petitioner is not cooperating and that the file should be closed (Rx 6, pp 266-271).

Petitioner was seen at his attorney's request by Vocamotive for a vocational evaluation. The report was admitted as Petitioner's Exhibit 14. The counselor, Ms. Helma, conducted a personal interview with Petitioner, including his physical complaints and limitations, vocational history, socioeconomic status and reviewed the medical records, including Dr. Buvanendran limitations and Dr. Chmell's opinion that Petitioner is unemployable. She opined, based in large part upon the 4 hour per day limits, that Petitioner has lost access to any viable labor market.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner had a prior low back injury. He testified to the prior treatment including the lumbar fusion. The Commission printout documents the settlement of that matter in July, 2002 for a loss of use of the man as a whole. Petitioner's unrebutted testimony is that he returned to his full duty capacity and worked without restrictions in a very heavy manual labor position until his accident on August 25, 2010. There is no evidence that he has any medical treatment between 2002 and 2010 for his low back.

Following the August 25, 2010 accident, Petitioner sought immediate medical treatment. Dr. Goldberg provides an opinion that the condition of ill being is due to the work-related accident in his September 27, 2010 record. Dr. Chmell also opines causal connection. Dr. Graf does not provide any contrary opinion as to causation.

The "chain of events" supports a finding of causal connection. The "chain of events" can establish causation in cases involving aggravation of a pre-existing condition. Petitioner, despite the prior surgery, was able to perform his full duty job without seeking any medical care until the August 25, 2010 accident. Thereafter he was disabled and underwent additional medical care. Further, the only medical opinions on causal connection state that the accident was the cause of the current treatment and disability.

Based upon the record as a whole, including the testimony of the Petitioner and the medical exhibits submitted, the Arbitrator finds that, as a result of the accidental injuries sustained on August 25, 2010, Petitioner sustained an aggravation of his pre-existing condition of ill being in the low back and that the treatment and disability thereafter is causally connected to said aggravation.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation-Maintenance, the Arbitrator finds as follows:

The Petitioner was found to be at maximum medical improvement by Dr. Goldberg following the FCE performed and discharged from his care on March 24, 2011. Dr. Goldberg released Petitioner to return to work pursuant to the restrictions of the FCE.

Thereafter, Petitioner was engaged in an ongoing job search through the termination of vocational services by MedVoc on March 9, 2015. He testified that initially he submitted his logs directly to the Respondent, and thereafter to MedVoc when they began placement services in March, 2013. In October, 2013, the MedVoc file was "placed on hold." Petitioner sought additional medical treatment with Dr. Vucicevic around this time. He testified that he continued to look for work for two and a half years submitting over 2000 resumes. Petitioner returned to job placement with MedVoc in June, 2014. The MedVoc records note his expressed confusion, since he thought his case was being tried or settled. He continued though the termination of job placement services on March 9, 2015. At that time Ms. Egle reported that termination of services were due to "issues with cooperation and following MedVoc protocols." While Petitioner testified that he has not given up on his job search since that time and is still looking for work, he provided no updated logs to corroborate his efforts since the termination of the MedVoc efforts.

Based upon the record as a whole and in accordance with the stipulation of the parties, the Arbitrator finds that Petitioner is entitled to temporary total disability for the period of 30 weeks from August 26, 2010 through March 24, 2011. The Arbitrator further finds that Petitioner is entitled to maintenance benefits for a period of 206 4/7 weeks for the period from March 25, 2011 through March 9, 2015.

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

Pursuant to the stipulation of the parties, Respondent is entitled to credit for all benefits paid up to the date of the hearing in this matter of $221,671.05 and is entitled to further credit against the permanent compensation awarded herein for any additional weekly compensation paid to Petitioner after the trial date herein.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Permanent Total Disability: Petitioner is seeking compensation for permanent total disability. An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life.

Petitioner has submitted the report of Dr. Chmell to support the position that petitioner is medically unable to perform gainful employment. The Arbitrator finds this opinion unpersuasive. Dr. Chmell does not review the recent notes of Dr. Buvanedran, but simply accepts the additional restriction of 4 hours per day as an ongoing limitation. His opinion that Petitioner cannot work outside the home because he is a fall risk is not addressed in any other records, nor did Petitioner testify to ongoing issues of repeated falling. His opinion is further contradicted by Petitioner's ongoing activities as testified to and

documented in his job search in the MedVoc records and his testimony. The Arbitrator also notes that Petitioner's decision to seek the additional treatment with Dr. Buvanedran and the setting of the examination with Dr. Chmell corresponds to the renewed efforts by Respondent at job placement with MedVoc where Petitioner expressed confusion since he thought he was getting ready to try or settle his case. The Arbitrator finds the restrictions of Dr. Goldberg and the Functional Capacity Evaluation more persuasive as to the Petitioner's physical capabilities. Dr. Goldberg and the FCE found Petitioner able to perform work in the medium physical capacity.

Even if he is capable of some gainful employment, Petitioner can still obtain a permanent total disability under the "odd lot" category. The odd-lot category for purposes of a PTD award arises when a 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. In these situations, the claimant can establish that he is entitled to PTD benefits under the "odd-lot" category by proving the unavailability of employment to persons in his circumstances. The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." If the claimant establishes that he fits into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists.

Based upon the Petitioner's testimony and the vocational records submitted, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is an "odd lot" permanent total disability.

Petitioner testified to and the MedVoc records document an extensive job search. But the mere volume of contacts does not equate to a diligent job search. In *Levato v. Ill. Workers' Comp. Comm'n, 2014 IL App (1st) 130297WC; 14 N.E.3d 1195; 2014 Ill. App. LEXIS 477; 383 Ill. Dec. 584 (1st Dist, 2014),* the Court notes that 10 contacts per week with a total of 200 was unimpressive based upon the search itself. In the present case, the MedVoc records document recurring and ongoing inability to verify Petitioner's contacts. While Petitioner claims that he was being set up, and the records clearly demonstrate escalating conflict between Petitioner and Ms. Egle, there is no dispute that, despite specific requirements of how to document his contacts, Petitioner repeatedly failed to provide the proper documentation per the protocol, both proper verification of online contacts and necessary information on his in-person contacts. The records also document episodes where outside individuals corroborate the inaccuracy of Petitioner's reporting such as the Jewel and Dominick's kiosks and the conversation with Kayla at LaSalle Network. There were also documented repeated episodes of Petitioner not taking the extra effort in personal interaction to succeed in an interview by being more flexible or more engaging. While some initial inaccuracies or misunderstandings could be excused, the consistent, ongoing failure of Petitioner to provide the necessary information in a timely, accurate manner demonstrates a lack of commitment to the process as outlined by MedVoc.

The Arbitrator also notes that following June, 2014 additional issues arose as to the limitation to part time work and Petitioner's apparent lack of flexibility in that regard. The Arbitrator views Petitioner's effort in conjunction with the evidence of Petitioner's receipt of his pension, his decision to reject every medical recommendation for treatment to improve his physical condition including surgery, and thereafter weight reduction, even though he had previously undergone successful surgery. The

Arbitrator also notes the timing of his return to treatment in June, 2014, apparently only for the purpose to obtain additional restrictions, since he rejected the proposal for a trial of a spinal cord stimulator and did not follow up as requested following July, 2014. Petitioner's motivation must be considered in evaluating the interaction with Ms. Egle. Having heard Petitioner's testimony and observed Petitioner's demeanor and the documentary evidence submitted, the Arbitrator finds that, despite the number of contacts and the extended period of the search, Petitioner failed to establish that he engaged in a diligent job search.

The Arbitrator also finds that Petitioner failed to establish by a preponderance of the evidence that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. The MedVoc labor market survey documented many areas in which Petitioner could be employed and found multiple job openings for Petitioner to apply to. When the job search efforts were restarted in June, 2014, job leads were located even with the part time restrictions. As discussed above, the Arbitrator finds Dr. Buvanedran's June 13, 2014 four hour work date limitation unpersuasive. The June 13, 2014 note was in conjunction with a change of medication. When this was unsuccessful, Petitioner was put back on Norco. Follow up was scheduled but Petitioner did not comply. The Arbitrator does not find that the June 13, 2014 restriction for four hours per day was a permanent increase in Petitioner's limitations. The Vocamotive report finds no stable job market in large part based upon this part time restriction. The Arbitrator finds the opinions of MedVoc more persuasive as to the job market for Petitioner and finds the initial labor market survey more persuasive and supported by the ongoing, multiple job leads identified and Petitioner's testimony that he believed he could perform various job duties, and still wanted to return to work.

Based upon record as a whole including the medical evidence, Petitioner's testimony and the vocational records and reports, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he is permanently totally disabled either medically or as an "odd lot."

Wage Differential Pursuant to Section 8(d)1: Section 8 of the Act governs the "amount of compensation which shall be paid to the employee for an accidental injury not resulting in death." Section 8(d) details two types of compensation for employees who are permanently and partially disabled; subparagraph 1 provides for a wage differential award and subparagraph 2 provides for a percentage of the person as a whole award. The Supreme Court has expressed a preference for wage differential awards. See *Gallianetti v. Industrial Comm'n, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487, 248 Ill.Dec. 554 (2000).* The Supreme Court explained that "[i]t is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage partial loss of use." *General Electric Co., 89 Ill. 2d at 437, 433 N.E.2d at 673-74.* The Appellate Court held that "the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity." *Gallianetti, 315 Ill. App. 3d at 728, 734 N.E.2d at 488.*

In order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment in earnings. A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment.

The restrictions imposed by Dr. Goldberg pursuant to the Functional Capacity Evaluation prevent Petitioner from returning to his usual and customary line of employment. The release to the medium physical capacity is below the very heavy capacity needed to perform his regular duties for Respondent. Respondent did not offer Petitioner return to work at his prior employment after Dr. Goldberg's release from care.

Petitioner presented sufficient evidence to establish the impairment of earnings. The parties stipulated that the Petitioner's average weekly wage at the time of his injury was $1408.00 per week. This is in general agreement with Petitioner's testimony that he was earning $37.45 per hour on the day on the date of the accident. The average weekly wage at the time of the accident has been used to establish earnings before the accident. *Levato v. Ill. Workers' Comp. Comm'n, supra.* The Arbitrator finds the MedVoc labor market survey persuasive as to the potential earning potential of the Petitioner following the accident and in accordance with the restrictions imposed by Dr. Goldberg and the FCE. The mean wage was established as $11.78 per hour. A full time job at this hourly rate would result in earnings of $471.20 per week.

The wage differential would therefore be $1408.00 minus $471.20 or $936.80 resulting in a benefit under Section 8(d)1 of two thirds or $624.53 per week.

Based upon the record as a whole, including the Petitioner's testimony, the medical evidence admitted and the vocational records admitted, the Arbitrator finds that Petitioner has established entitlement to permanent disability pursuant to Section 8(d)1 of the Act in the amount of $624.53 per week for the duration of the disability.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JONATHAN MALLEY,

Petitioner,

vs. NO: 12 WC 21425

MENARD CORRECTIONAL CENTER, **16IWCC0117**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and permanency, and being advised of the facts and law, reverses the Decision of the Arbitrator in part, as stated below.

The Petitioner, a correctional officer working for Respondent on June 3, 2012, was involved in an altercation where he was attacked by two inmates on June 3, 2012. He sustained a neck injury, and underwent surgery on November 5, 2012 with Dr. Raskas, involving removal of hardware from a prior C5/6 fusion, a new anterior C4/5 and C6/7 fusion with plating from C4 to C7, and a C4/5 discectomy. The Petitioner was awarded medical expenses and 35% of the person as a whole as a result of the cervical injury. The Petitioner also alleged that he suffered post-traumatic stress disorder (PTSD) as a result of this incident. The Arbitrator determined that Petitioner had failed to prove that his work activities caused PTSD, and thus awarded no benefits in this regard.

As to the latter determination, the Commission reverses the Arbitrator and finds that the Petitioner's PTSD diagnosis was causally related to the June 3, 2012 accident.

16IWCC0117

The Petitioner testified that he suffered from nightmares, flashbacks and anxiety because of the attack at the prison, and continues to take Prozac for PTSD. (Tr. 10-11, 17-19). His initial visit to Chester Memorial Hospital (Px3) on the date of accident indicated Petitioner was assaulted by two inmates, resulting in multiple injuries and diagnoses, including head trauma. On June 4, 2012, Petitioner reported having vision issues and headaches. By June 8, 2012, he indicated to the Chester Eye Clinic that when he bent over he would see "what looks like someone running towards him, but when he looks up there is no one there". (Px4).

At his second visit with Dr. Molnar on June 13, 2012 (Px5), Petitioner was diagnosed with likely post-concussive syndrome, and he reported increased forgetfulness. On August 7, 2012 Petitioner told Dr. Molnar that he had anxiety issues that had not previously been present, noting frequent visualizations of the two inmates who attacked him. Dr. Molnar diagnosed PTSD, noting Petitioner "certainly would have reason to have (it)." Petitioner had anxiety about returning to work at the prison, and he was referred for psychological counseling.

Petitioner began counseling with psychologist Dr. Plumb on August 30, 2012. Dr. Plumb testified (via deposition on June 28, 2013, Px13) that his initial intake indicated Petitioner had no known preexisting conditions or prior mental health issues. Petitioner reported symptoms of re-experiencing the attack, both while awake and while dreaming. Dr. Plumb testified that PTSD occurs with a trauma where one feels threatened and frightened for their life, with a characteristic set of symptoms, including a loss of control over one's usual belief system with consequent anxiety and possible depression (pp. 10-12). He further testified that the National Center for PTSD indicated four types of symptoms: 1) reliving the event, 2) avoidance of reminders of the event, 3) negative changes in beliefs or feelings, and 4) hyperarousal. (pp. 29-31). Dr. Plumb indicated that anxiety from this type of an incident normally would arise within a day or two, but at times it could take several months to appear. (pp. 35-36). He noted that the both Petitioner and his wife informed him that Petitioner's symptoms arose prior to August, 2012. (pp. 36-37).

Petitioner reported to Dr. Plumb that he was not taking psychotropic medication due to a fear based on a prior incidence of medication dependence. Dr. Plumb indicated he hadn't referred Petitioner to a psychiatrist for this reason, and when he attempted to do so, Petitioner refused. (pp. 24-25, 34-35). Dr. Plumb noted that Petitioner would develop panic symptoms when thinking about returning to the prison, or even driving by it. (pp. 12-14). When he last saw the Petitioner on June 18, 2013, he was improved but had persistent nightmares. He had begun to participate in some personal activities that he had been avoiding, and he had obtained new employment outside of the prison. (pp. 14-15). Dr. Plumb did not believe the Petitioner was malingering, and noted that while he doubted Petitioner could return to work again as a prison guard as he had previously, he could possibly work among inmates again at some time in the future. (pp. 15-16, 17-19).

Petitioner's treatment for PTSD appears to have consisted of a prescription for Prozac and counseling with Dr. Plumb. (Tr. 23-24). He testified that since he changed jobs out of the prison, his hypervigilance and nightmares have improved, but nevertheless continue. (Tr. 26-27).

The Commission finds that the Petitioner proved that he developed PTSD as a result of the June 3, 2012 accident. The June 3, 2012 incident involved a significant attack and beating that left Petitioner severely injured. While it appears he did not initially report his anxiety type symptoms, we note the multiple areas of trauma the Petitioner was dealing with, particularly his neck. We also note that Dr. Plumb testified that while symptoms normally appear within days of such incident, they can occur months later. Thus, whether the Petitioner complained of such symptoms immediately or not until August, 2012, our conclusion is the same.

The Commission further finds, however, that the Petitioner's refusal to take prescribed psychotropic medication or referral to a psychiatrist indicates that the PTSD condition abated. This is further supported by the testimony of Petitioner and Dr. Plumb, in that Petitioner has obtained a new job, has started to participate in his normal recreational activities and has begun to interact with his friends again. This is further documented by the comments of Dr. Plumb regarding his last visit with the Petitioner prior to his deposition testimony. That last visit occurred on June 18, 2013.

The Commission notes that the Petitioner did testify that when he was attacked by the inmates, "two guys just jumped me with homemade knives and started pounding away" and tried to stab him (Tr. 19-20), and the Arbitrator noted this in finding Petitioner failed to prove a causal connection of PTSD. While we agree that no other contemporaneous evidence supports the attackers having knives or weapons, we do not believe that this discounts the significant beating that the Petitioner sustained, or our finding that his PTSD diagnosis is causally related to the June 3, 2012 accident. He also testified that he had never been attacked previously, had no prior psychological treatment and took no medications for psychological treatment. (Tr. 20-21). We also do not agree with the Arbitrator's determination that Dr. Plumb's opinions are not valid because he is a psychologist, and not a psychiatrist and medical doctor. Dr. Plumb was entitled to testify within a reasonable degree of psychological certainty, as that was the basis of his expertise. It is the province of the Commission to then determine the weight to be given to such opinions.

We also note with interest that, based on the testimony of Petitioner and Dr. Plumb, that the Respondent had the Petitioner evaluated psychologically in February, 2013. The record indicates Respondent did not attempt to submit the report of this evaluation into evidence. Dr. Plumb's testimony indicates that he reviewed the report, as he noted that it appeared consistent with what the Petitioner told him. (Px13, p. 17). He also agreed that Respondent's examiner had recommended MMPI-2 testing, but Dr. Plumb did not feel that the expense of such testing was warranted.

With regard to permanency, the Commission finds that in addition to the 35% of the person as a whole awarded by the Arbitrator for Petitioner's cervical condition, he is further entitled to an additional 10% of the person as a whole based on his condition of PTSD. This results in a total permanency award of 45% of the person as a whole pursuant to Section 8(d)(2) of the Act.

16IWCC0117

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed in part to find that the Petitioner's PTSD condition was causally related to the June 3, 2012 accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses previously awarded by the Arbitrator under §§8(a) and 8.2 of the Act, as well as additional medical expenses of Dr. Plumb incurred through June 18, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $688.01 per week for a period of 225 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the permanent loss of 45% of the person as a whole.

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

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

DATED: FEB 11 2016
TJT: pvc
O 12/14/15
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENTING OPINION

I respectfully dissent. The decision of the Arbitrator with regard to PTSD was sound and should have been affirmed by this panel.

There is no question that the Petitioner was brutally attacked by two inmates on June 3, 2012. However, the Petitioner appears to have had no complaints relating to PTSD until his August 7, 2012 visit to Dr. Molnar. Dr. Molnar specifically pointed out that Petitioner had made no such complaints prior to that time. While Dr. Plumb opined that PTSD can surface months after a triggering event, he also opined that this was a rare occurrence and that normally it surfaces within days. Here, there was no evidence whatsoever that Petitioner was suffering from any type of anxiety until August, 2012.

Reviewing the records of Dr. Plumb thereafter, it appears Petitioner's complaints were rather contrived and exaggerated. In 2014 Dr. Plumb noted that Petitioner's alleged PTSD condition had backtracked, not as a result of the attack, but rather because of the pendency of his workers' compensation claim. It is my impression that while Petitioner suffered some level of mental distress as a result of the June 3, 2012 incident, it did not rise to the level of PTSD. The Petitioner's testimony regarding the attackers attempting to stab him with knives further evidences a focus by the claimant to make the attack sound more dangerous for purposes of making his allegations of a PTSD diagnosis. The contemporaneous evidence at the time of the accident and in the immediate aftermath does not support that the attackers had knives, or that Petitioner had symptoms of PTSD. I would affirm the Arbitrator's decision.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MALLEY, JONATHAN
Employee/Petitioner

Case# **12WC021425**

MENARD CORRECTIONAL CENTER
Employer/Respondent

16IWCC0117

On 4/2/2015, 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:

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON J OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MANAGEMENT SYSTEMS
WORKERS' COMP CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

APR 2 - 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0117

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

JONATHAN MALLEY
Employee/Petitioner

v.

MENARD CORRECTIONAL CENTER
Employer/Respondent

Case #12WC 021425

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 **Herrin**, on **02/11/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/3/12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**59,628.00**; the average weekly wage was $**1146.69**.

On the date of accident, Petitioner was **41** 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 $**All TTD Paid** for TTD, $- for TPD, $**All Paid** for maintenance, and $- for other benefits, for a total credit of $**All TTD and Maintenance Paid**.

Respondent is entitled to a credit of $**any benefits paid through group** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$688.01**/week for **175 weeks**, because injuries sustained to Petitioner's cervical region caused a **35%** loss of Man as a Whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services listed in Arbitrator's Exhibit 3, with the exception the Out of Pocket Expenses in the amount of 50.96 as Petitioner has not met his burden of proof as to these chargers, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.
Respondent shall pay said award in weekly payments beginning on May 16, 2013.

Respondent shall be given a credit of all TTD/Maintenance from May 16, 2013 to February 11, 2015.

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

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

Carl Lee
Signature of Arbitrator

3/30/15
Date

APR 2 - 2015

16IWCC0117

The Arbitrator makes the following findings of fact:

The issues in dispute are causation, medical care and nature and extent of injury.

The petitioner, a 41-year-old Correctional Officer for Respondent who worked at Menard Correctional Center (Arb. Ex. 2)

On June 3, 2012, Petitioner attacked by several inmates while working for respondent. The Petitioner testified "2 guys jumped me with home made knives...". (Transcript line 8, page 19). The accident or incident reports did not refer to home made knives nor did the histories in the medical records.

Following the attack, Petitioner was examined at the Chester Memorial Hospital. Petitioner then followed up on June 4, 2012 with Chester Eye Care with complaints of flashes and floaters in his eye. He was diagnosed as having a vitreous detachment of his eye. At trial he testified that he still has some floaters in his eyes.

On June 5, 2012 Petitioner saw his family physician, Dr. James Molnar. At that time he had complaints of double vision. Petitioner returned to Dr. Molnar on June 13, 2012. At that time he had complaints of flashing lights in his eyes and right sided neck pain. Dr. Molnar referred Petitioner to Dr. David Raskas an orthopedic surgeon for his neck pain. On July 3, 2012, Petitioner had an appointment with Dr. Molnar but did not attend. On July 7, 2012, Petitioner returned to Dr. Molnar and had complaints of vision problems and neck pain. Petitioner next saw Dr. Molnar on August 7, 2012. At this visit, Dr. Molnar noted that Petitioner first complained of anxiety from the attack. Petitioner was referred to psychology for his anxiety.

Petitioner began treating with a psychologist, Gordon Plumb. Dr. Plumb is not a medical doctor. Dr. Plumb testified via deposition. Dr. Plumb did not review any of the emergency room records, records of Dr. Molnar or Dr. Raskas. Dr. Plumb took a history from Petitioner and based upon his subjective complaints, diagnosed Petitioner as having post-traumatic stress disorder. Dr. Plumb recommended Petitioner to see a Psychiatrist to treat Petitioner with anti-depressants; however, Petitioner declined the referral and refused to take anti-depressants.

Dr. Plumb testified that Petitioner and his wife reported that Petitioner suffered symptoms consistent with post-traumatic stress immediately after the accident. Dr. Plumb stated that persons with post-traumatic stress disorder generally experience symptoms within one or two days after the event. Dr. Plumb stated that Petitioner experienced symptoms immediately after the incident.

Petitioner saw Dr. Raskas on June 20, 2013. Dr. Raskas noted that Petitioner had a previous C5-6 anterior fusion in 1993. Dr. Raskas diagnosed Petitioner as having

a disc herniation at C6-7 as a result of this accident and keep Petitioner off work. Petitioner failed conservative treatment and Dr. Raskas performed surgery on November 7, 2012. Dr. Raskas performed a decompression fusion at C4-5 and C5-6 and placed biomechanical spacer at C4-5 and C6-7.

Following surgery, Petitioner continued to treat with Dr. Raskas. On May 6, 2013, Petitioner was released to full duty no restrictions to return to work as a correctional officer as it pertained to his neck and was at maximum medical improvement.

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

A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987).

Petitioner must prove that he suffered a condition from the alleged incident based upon a reasonable degree of medical certainty. Benecke v. Illinois Department of Employment Security, 14 I.W.C.C. 4294. In Benecke, the Commission held that Petitioner's treating psychologist's was not a medical doctor and her opinions as to post-traumatic stress disorder were not based upon a reasonable degree of medical certainty as required by law. Id.

In this case, Dr. Plumb was asked, "did you within a reasonable degree of psychological certainty reach an assessment or diagnosis? A: Yes. Q. What would that be, please? A: It would be posttraumatic stress disorder, chronic . . . . " (Px. 13, pg. 10)

Further, Dr. Plumb did not review any records of the previous treating providers. Dr. Plumb opinion is based upon the history that Petitioner suffered symptoms immediately after the accident. Dr. Molnar's records show that Petitioner did not have any of this complaints until August 7, 2012, more than two months after the accident. Dr. Plumb testified that he is an advocate for his patient.

The evidence suggests the assailants were not carrying home made knives opposite to what the Petitioner had testified, supra.

Based on the above, Petitioner has failed to meet his burden of proof that his work activities caused his post traumatic stress disorder.

The Arbitrator finds that Petitioner suffered a disc herniation at C6-7 as a result of the June 3, 2012 incident. This was surgically treated by an anterior fusion at C4-5 and C6-7 with anterior plating from C4-C7. (PX11).

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 Act requires employers to provide all reasonable and necessary medical care required to diagnose, relieve, or cure the effects of an injury that is causally related to a work accident. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d 13 (2nd Dist. 2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

Based upon the above findings as to causal connection, Respondent shall pay the medical expenses outlined in Petitioner's group exhibit 1, as all of the expenses therein were necessary to diagnose, relieve or cure the effects of Petitioner's work-related accidental injury. 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.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Correctional Officer at the time of the accident The Arbitrator finds this work to be physically demanding and considering Petitioner's injury gives significant weight to this subsection.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner's job change is not related to the accident. Because of the voluntary job change, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner complaints of disability coupled with the treatment of cervical fusions as set forth in the records The Arbitrator therefore, gives *great* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 35% loss of use of Man as a Whole pursuant to §8(d)2 of the Act.

Therefore, the Arbitrator concludes that:

1. Petitioner failed to prove that he suffered posttraumatic stress disorder as a result of the June 3, 2012 incident.
2. That Petitioner suffered 35% loss of use of Man as a Whole.

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

Debra Dammerman,

Petitioner,

vs.

NO: 12WC 33665

Lakeland College ,

16IWCC0120

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent, herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, 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 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, 2015, 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.

16IWCC0120

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 $12,392.00. 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: FEB 1 1 2016
MJB/bm
o-02/08/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

DAMMERMAN, DEBRA
Employee/Petitioner

Case# **12WC033665**

LAKELAND COLLEGE
Employer/Respondent

16IWCC0120

On 3/6/2015, 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
RICHARD K JOHNSON
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602-2983

0180 EVANS & DIXON LLC
KIM M PARKS
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

16IWCC0120

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DEBRA DAMMERMAN,
Employee/Petitioner

v.

LAKELAND COLLEGE,
Employer/Respondent

Case # **12** WC **33665**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Champaign**, on **2/11/15**. 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. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Nature and Extent**

16IWCC0120

FINDINGS

On the date of accident, **8/21/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**22,369.36**; the average weekly wage was $**430.18**.

On the date of accident, Petitioner was **50** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $286.79/week for 42-6/7 weeks, commencing 4/18/14 through 2/11/15, as provided in Section 8(b) of the Act.

The Respondent shall pay reasonable and necessary medical services for treatment of petitioner's right knee from 6/21/13 through 2/11/15, as provided in Sections 8(a) and 8.2 of the Act.

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

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

3/3/15
Date

ICArbDec19(b)

MAR 6 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Although this hearing is being held pursuant to Section 19b of the Act, the parties stipulate that should the arbitrator find the petitioner has reached maximum medical improvement as a result of her injury, the arbitrator can make findings as to the issue of the nature and extent of petitioner's injury.

Petitioner, a 50 year old employee of Lakeland College, sustained an accidental injury to her right knee that arose out of and in the course of her employment by respondent on 8/21/12 when she caught her foot on a rubber mat on the floor and fell on both her knees and then struck her left hip. This claim was initially heard pursuant to Section 19b on 6/20/03 by the Honorable Douglas McCarthy. The issues in dispute at that time were causal connection, medical, prospective medical and temporary total disability. On 7/29/13 Arbitrator McCarthy issued his decision and found that petitioner's right knee condition was causally related to the injury she sustained on 8/21/12. Arbitrator McCarthy found that the findings and opinions of respondent's Section 12 examiner Dr. Kostman, that petitioner's right knee condition was not related to her injury, were based on an incorrect understanding of the petitioner's mechanism of injury which was corroborated by her history to her employer in her accident report, and the history she provided her initial treating doctors. He awarded petitioner temporary total disability benefits from 9/17/12 through 6/20/13 (the date of hearing) and authorized the surgery for petitioner's right knee that was recommended by Dr. McKenchnie. Arbitrator McCarthy found petitioner was only capable of doing light duty after her work injury, and remained in effect as of arbitration. Arbitrator McCarthy also awarded petitioner medical bills related to her right knee treatment.

At the hearing on 2/11/15 the parties stipulated that respondent has paid petitioner temporary total disability benefits and medical benefits from 6/21/13 through 4/17/14. During this period petitioner continued to treat with Dr. McKenchie. Dr. McKenchie continued petitioner off work pending surgery. Petitioner also remained in physical therapy at Central Illinois Physical Therapy up to the time of surgery.

The evidence deposition of Dr. McKenchie was taken by respondent on 3/11/13. Although this deposition took place prior to the hearing by Arbitrator McCarthy, its admission into evidence was not objected to by respondent's counsel. The arbitrator notes that since this evidence is dated prior to the hearing by Arbitrator McCarthy on 6/20/13, the proper time for this evidence to be admitted was prior to the hearing on 6/20/13. Having noted that Arbitrator McCarthy found petitioner's right knee condition on 6/20/13 causally related to the injury on 8/21/12, the arbitrator finds all opinions rendered by Dr. McKenchie in this deposition only relate to his treatment of petitioner through 3/11/13, which is incorporated into Arbitrator McCarthy's decision dated 7/29/13.

On 11/5/13 petitioner underwent an arthroscopy, lateral meniscectomy, abrasion chondroplasty, and microfracture medial, lateral, and patellofemoral compartments. The procedure was performed by Dr. James McKenchie. Petitioner's pre-operative diagnosis was internal derangement of the right knee. Petitioner's post-operative diagnosis was tear, right lateral meniscus, traumatic arthritis, and chondromalcia of the right knee. Petitioner followed up post operatively with Dr. McKenchie and underwent a course of physical therapy at Central Illinois Physical Therapy through April of 2014, when it was stopped being paid for by respondent based on the opinions of its Section 12 examiner Dr. Nogalski. Petitioner had some improvement with her symptoms following the surgery and physical therapy, however, she did report some swelling in her knee when in physical therapy. Dr. McKenchie noted on 3/11/14 that petitioner's right knee was slowly improving, although she had significant popping beyond 15 degrees extension of the knee limiting her ability to full straighten the knee.

On 4/7/14 the petitioner underwent a Section 12 examination by Dr. Michael Nogalski, at the request of the respondent. Petitioner reported that she was not working and had last worked sometime in September of 2012, when she was laid off by respondent as part of a reduction of force. Dr. Nogalski reiterated the accident history Dr. Kostman had in his records that petitioner fell on her left hip and then onto both knees, which Arbitrator McCarthy found on 6/20/13 to not be corroborated by the credible evidence. Petitioner reported ongoing weakness and stated that she was working to strengthen her knee. She stated that it was hard to lift her leg, and she has swelling. Petitioner told Dr. Noglaski that although she used to play extensive amounts of tennis and basketball she did not really recall any problems with the right knee. Following an examination and record review Dr. Noglaski's impression was status post right knee arthroscopy with debridement of multiple zones and microfracture. Dr. Nogalski was of the opinion that petitioner had reached a plateau and continues to have consistent objective findings relative to subjective complaints. He noted that petitioner showed solid eccentric muscle control, but not active control, which he found was inconsistent findings. He believed she could do more with her right leg. Dr. Nogalski noted severe osteoarthritis of the lateral and patellofemoral compartment, and fairly classic valgus knee with patellofemoral and lateral compartment osteoarthritic issues. Dr. Nogalski was of the opinion that "it is not clear that she did, indeed, sustain a specific "injury" to the knee and her bone marrow signal findings as noted in the MRI of October 29, 2012 would more reasonably be correlated with degenerative issues within the knee especially in the absence of any specific contusion or objective documentation of a distinct injury to the knee on that date". Dr. Nogalski believed that it appeared that petitioner was not clearly benefitting from medical treatment, does not require any further treatment, and had reached maximum medical improvement with respect to her right knee. He again questioned the fact

that petitioner sustained an injury to her right knee on 8/21/12. Dr. Nogalski opined that petitioner could work full duty, despite the fact that she would have some difficulty with her knee because of her severe osteoarthritis. He recommended weight loss and low impact exercise.

Following the examination by Dr. Nogalski respondent terminated all of petitioner's medical and temporary total disability benefits.

On 4/21/14 Dr. McKenchie noted only limited improvement in petitioner's right knee. Petitioner was able to flex to 120 degrees but had the dry grinding with extension beyond approximately 30 degrees, due to severe erosion of the articular cartilage in the patella femoral joint. Dr. McKenchie was of the opinion that petitioner was still not able to return to work because she could not stand for extended times and could not kneel, squat or climb. He told petitioner she might need to have a patellectomy done at some time in the future, but wanted petitioner to have an opportunity to improve by continuing with the exercises. He was of the opinion that petitioner had not yet maximum medical improvement.

On 5/19/14 Dr. McKenchie was of the opinion that petitioner was better able to fully extend her knee with less crepitus than before. X-rays showed a spur along the medial margin of the patella in the patella femoral joint, and a medial spur of the femur at the joint line and lateral spurs of the femur and tibia at the joint line. Dr. McKenchie was of the opinion that given the degree of degenerative change it was likely that petitioner would benefit from a total knee arthroplasty rather than a patellectomy. He noted that petitioner was still not able to kneel, squat, or climb. He continued her off work and prescribed Norco.

On 6/20/14 petitioner returned to Dr. McKenchie. She continued to be significantly limited by the symptoms in her knee. She could not fully extend her knee, or hold a position of full extension when resisting the weight of her leg against gravity. Petitioner had marked patella femoral grinding. Dr. McKenchie was of the opinion that petitioner would have to have something done surgically, either a patellectomy or complete knee replacement. Petitioner was given a new prescription for Norco. Since Dr. McKenchie was retiring she indicated that she would be continuing treatment with Dr. Jones. He continued petitioner off work indefinitely.

On 9/11/14 petitioner presented to Dr. Tyler Jones at Edmund W. Raycraft M.D. and Tyler N. Jones, for her right knee pain. Petitioner reported that her knee improved temporarily after surgery. Petitioner reported that she failed to get better postoperatively in therapy. She reported that she had not had any injections or NSAIDS post operatively. Petitioner reported that at some point she stopped

improving and has had no further improvement. Dr. Jones examined petitioner and noted that at the time of the scope she had areas of osteoarthritis that were bone on bone. He recommended a steroid injection. He noted that petitioner was headed for a replacement, but she wanted to try a steroid injection first. Dr. Jones took some right knee x-rays that showed both medial and lateral moderate and severe osteoarthritis, joint space narrowing and periarticular osteophytes. Petitioner was told to contact his office in two weeks if no improvement.

On 11/19/14 Dr. Frank Petkovich performed a Section 12 examination and impairment rating of petitioner, at the request of the respondent. Petitioner reported that she tripped and fell to the floor injuring her right knee. Following an examination and record review, Dr. Petkovich noted no right knee joint effusion and no muscle atrophy in her right leg. He noted pain on range of motion consistent with some degenerative arthritic changes. He noted no acute findings. He diagnosed a tear of the right lateral meniscus, and degenerative arthritis of the right knee. He was of the opinion that the tear of the right knee lateral meniscus occurred as a result of the accident on 8/21/12; that her degenerative arthritis in her right knee was present prior to the incident, and that the accident did not cause any aggravation or acceleration of the preexisting degenerative arthritic changes in her right knee that were present prior to 8/21/12. Dr. Petkovich opined that no further treatment was needed for petitioner's right knee as a result of the accident on 8/21/12, and that she had reached maximum medical improvement. Dr. Petkovich was of the opinion that petitioner could work her regular duty job without restrictions. Dr. Petkovich was of the opinion that petitioner has a 3% impairment of her right lower extremity as a result of the accident on 8/21/12.

On 1/22/15 petitioner returned to Dr. Jones. She noted that she does not work outside the home. She reported that she got about 10 weeks of relief from her injection, and takes Norco 10 occasionally. She denied any new injury. A repeat injection was performed.

Petitioner offered into evidence the treating records of Dr. Janice Venderveer, her primary care physician. All records made reference to her right knee pain.

At trial petitioner testified that she has lost a lot of strength in her right knee. She testified that it buckles quite often and for this reason she has a disability card, and uses a cane for stability. Petitioner reported constant pain in her right knee and stated that her right knee is bowed and shaped differently. Petitioner testified that her knee was swollen at trial. The arbitrator and counsel looked at petitioner's right knee with her jeans on and agreed that it appeared to be larger than her left knee. Petitioner testified that she does home exercises that includes an exercise bike and exercise band, and has recently joined the

YMCA. Petitioner is trying to wean herself off Norco, and uses a cane when she has to walk far distances. She also testified that she has a walker at home. Petitioner denied any problems with her right knee prior to 8/21/12.

Petitioner testified that she has not been released to work by any of her treating doctors, and for that reason has not looked for any work. Petitioner denied any reinjury to her right knee since 8/21/12.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

In his decision dated 7/29/13 Arbitrator McCarthy found petitioner's current condition of ill-being as it relates to her right knee is causally related to the injury she sustained on 8/21/12. He based this decision in part of the fact that he found the accident history Dr. Kostman based his opinions on flawed and not supported by the credible evidence. He even went so far as to find that petitioner's history that she fell and landed on both knees was corroborated by her history to respondent in the accident report, as well as the history she provided to her initial treating doctors.

The evidence respondent offered into evidence on the issue of casual connection during this hearing were the opinions of Dr. Nogalski, their Section 12 examiner, and Dr. Petkovich, another Section 12 examiner who was also asked to provided an AMA impairment rating. Both Dr. Nogalski and Dr. Petkovich opined that petitioner's current condition of ill-being as it relates to her right knee is not causally related to the injury on 8/21/12. The arbitrator gives no weight to the causal connection opinion of Dr. Nogalski given the fact that his opinions are based on the same erroneous accident history that Dr. Kostman relied on, namely that "petitioner fell on her left hip and then onto both knees". The arbitrator reiterates that this accident history was found not to be accurate by Dr. McCarthy, and this arbitrator sees no credible evidence to support any change in petitioner's accident history. Although Dr. Petkovich diagnosed a tear of the right knee lateral meniscus and opined that it occurred as a result of the accident on 8/21/12, Dr. Petkovich then went on to opine that petitioner's degenerative arthritis in her right knee was present prior to the accident, and the accident did not cause any aggravation or acceleration of the preexisting degenerative arthritic changes in her right knee. The arbitrator gives lesser weight to Dr. Petkovich's opinion based on the fact that petitioner presented unrebutted evidence that she did not sustain any injury her right knee prior to the accident on 8/21/12; that she did not have any treatment for her right knee prior to the injury on 8/21/12; that she did not sustain any reinjury to her right knee after the injury of 8/21/12; that she used to play extensive amounts of tennis and basketball and did not really recall any problems with the right knee; and that she has been either off work or on restricted duty since the accident on 8/21/12.

Given the fact that the issue of whether or not petitioner's current condition of ill-being as it relates to her right knee being causally related to the injury she sustained on 8/21/12 was decided in the affirmative by Arbitrator McCarthy in his decision dated 7/29/13, and the arbitrator finds the causal connection opinions of Dr. Nogalski are based on a flawed accident history, and the opinions of Dr. Petkovich are inconsistent with the credible evidence, the arbitrator finds petitioner's current condition of ill-being as it relates to her right knee is still causally related to the injury she sustained on 8/21/12.

The arbitrator further finds the fact that petitioner has remained off work since 6/20/13, the fact that her condition has only temporarily improved intermittently since that time with surgery and ongoing conservative treatment, and the fact that no credible evidence exists to support a finding of an intervening accident, all support the finding that petitioner's current condition of ill-being as it relates to her right knee is still causally related to the accident on 8/21/12.

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?

Having found the petitioner's current condition of ill-being as it relates to her right knee is still causally related to her injury on 8/21/12, the arbitrator finds all medical treatment petitioner received for her right knee from 6/21/13 through 2/11/15 was reasonable or necessary to cure or relieve petitioner from the effects of the injury she sustained on 8/21/12.

The Respondent shall pay reasonable and necessary medical services for treatment of petitioner's right knee, as provided in Sections 8(a) and 8.2 of the Act.

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

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims she was temporarily totally disabled from 4/18/14 through 2/11/15. Respondent claims petitioner was not temporarily totally disabled after 4/17/14 based on the findings and opinions of Dr. Nogalski and Dr. Petkovich. Having found the petitioner's current condition of ill-being as it relates to her right knee is still causally related to the injury she sustained on 8/21/12, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 4/18/14 to 2/11/15, a period of 42-6/7 weeks.

N. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found petitioner's current condition of ill-being as it relates to her right knee is causally related to the accident on 8/21/12; that petitioner has remained under active treatment since 8/21/12; that petitioner has not sustained any intervening accident to her right knee since 8/21/12; that petitioner has not been released to work by any treating physician as of 2/11/15, the arbitrator finds it is premature for this arbitrator to make any findings as to the nature and extent of petitioner's right knee injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ 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

Linda Gray,

Petitioner,

vs. NO: 13 WC 14188

Bank Of America,

16IWCC0112

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, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 5, 2015 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: FEB 10 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/17/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GRAY, LINDA
Employee/Petitioner

Case# **13WC014188**

16IWCC0112

BANK OF AMERICA
Employer/Respondent

On 5/5/2015, 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:

2988 CUDA LAW OFFICES
ANTHONY CUDA
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0238 WOLF & JACOBSON LTD
PETER W JACOBSON
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

16IWCC0112

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ 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

LINDA GRAY
Employee/Petitioner

v.

BANK OF AMERICA
Employer/Respondent

Case # **13** WC **014188**

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago/Wheaton**, on **12/1/14 & 2/18/15**. The matter was subsequently reassigned to Arbitrator Doherty following Arbitrator Luskin's appointment to the Commission. After reviewing all of the evidence presented, Arbitrator Doherty 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. xxx 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. xxx 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. xxx What temporary benefits are in dispute?
☐ TPD ☐ Maintenance xxx TTD
L. xxx 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 **4/13/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 $**113,999.60**; the average weekly wage was $**2,192.30**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds the Petitioner did not sustain an accident arising out of and in the course of her employment on April 13, 2013. Benefits under the Act are 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.

Cecilyn D Nardy
Signature of Arbitrator

5/1/15
Date

MAY 5 - 2015

The Arbitrator notes that this matter was tried by Arbitrator Luskin in December 2014 and February 2015. Following Arbitrator Luskin's subsequent appointment to the Commission the matter was assigned to Arbitrator Doherty who issues the following Decision.

FINDINGS OF FACT

At trial, Petitioner testified that she has worked 25 years for Respondent. Petitioner has held the title of Project Manager for 10 years and as such is responsible for operation control. Petitioner works between 45 and 50 hours per week. Petitioner testified that her concurrent title with Respondent is Co-Chair Bank of America Community Volunteers Team Illinois. As such, Petitioner is responsible for establishing relationships between the bank and the community, including non-profits as well as different lines of businesses within the bank. Petitioner supervises 30 bank employees as part of this program which encompass five different committees involved with the program. T. 13. Petitioner testified that the volunteer network operates as the "face of the bank" to the community and essentially performs marketing for the bank. T. 17.

Petitioner testified that she is reimbursed as "part of her salary" for the services she performs as co-chair of the community volunteers team. T. 18. Petitioner explained that her salary stays the same regardless of whether she volunteers. T. 76. Other employees are paid up to two hours per week paid for volunteer work. However, as long as the volunteer time is approved by a manager, the volunteer is paid for the time spent on volunteer projects which could exceed the two hours. T. 18. Petitioner testified that the target volunteer hours she is responsible for fulfilling is 45,000 hours per year. T. 18. As co-chair, Petitioner is required to volunteer. Other employees are encouraged to volunteer to meet the 45,000 hour goal. T. 80. As part of her own corporate development plan Petitioner chose to act as co-chair. The development plan covers both her position as project manager and her co-chair position. T. 81.

Petitioner further testified that the volunteers are required to keep track of their hours, including Petitioner, so that volunteer awards can be given to employees and grants given to non-profits. All of the employees report their hours to a cyber branch. T. 19-21. Petitioner identified PX 11 which contained expense reports she submitted for her attendance at various volunteer events in 2013. T. 24-25. Petitioner submitted the expense reports to her manager Sam Schwartz. T. 25. Petitioner testified that when she attends these events she passes out her business cards to non-profit organization representatives as well as peers in order to network for the Respondent. T. 30. PX 11 also contains Petitioner's 2013 performance review which references her volunteer work. Finally, PX 11 contains corporate documentation of the Bank's promotion of volunteer work by its employees on behalf of the bank including step by step instructions and guides on how to volunteer and plan volunteer events. T. 34-35. PX 11 contains documentation of extensive volunteer work references as volunteering pertains to an employee's "Developmental Planning." PX 11 also contains Bank documents which state the "Volunteerism is woven into the culture of Bank of America." PX 11, p. 648. On cross, Petitioner was asked, "Obviously, it appears you volunteer a lot?" and she responded "It is my job." T. 88.

PX 11 also contains an email dated April 6, 2013 which was written by Zammy Arcos, the individual leading the organization of a volunteer event to take place on April 13, 2013 for the Girl Scouts Camp Cleanup. The document explaining the event does not reference Bank of America as a sponsor of the event but does reference the event as a Girl Scouts of America

event. PX 11, p. 685. Bank of America volunteers as well as friends and family were invited to attend. Petitioner received the email and appeared at the event on April 13, 2013 in order to pick up branches and hand them to the operator of a wood chipper. The event took place at a Girl Scouts camp in Woodridge, Illinois. T. 42. Petitioner testified the event was sponsored by Bank of America and she was scheduled to be there from 9 am to noon. T. 43. 15 to 20 Bank of America employees appeared to volunteer at the event and they were given gloves to wear when picking up branches. T. 45. Some of the volunteers including Petitioner wore red shirts supplied by Zammy Arcos and bearing the logo of Bank of America Community Volunteers. T. 47. The Respondent Bank of America pays for the t-shirts. T. 50. Petitioner further testified that non-employee friends and family members were encouraged to volunteer in order to meet the hours goal and were present at the April 13, 2013 event. T. 90.

On April 13, 2013, Petitioner was at the event and picking up branches when she fell backwards and broke her left leg. Petitioner testified that the bone was sticking out of her leg and her leg was bleeding. T. 52-53. Petitioner was taken by ambulance to the ER at Edward Hospital. Petitioner underwent emergency surgery to her leg during which the leg was repaired using a rod, plates and screws. T. 56. The rod extends from her left knee down to her left ankle. T. 56. Thereafter, she remained in the hospital through April 15, 2013 and remained non weight-bearing thereafter for 2 months. During that period she had 24 hour care as she could not get out of bed without assistance. Petitioner also underwent PT at home through July 1, 2013. Thereafter when her weight bearing increased, she continued PT at an ATI office through November 9, 2013. Petitioner was driven to and from PT by ATI. T. 61-64. During PT Petitioner used crutches and a cane.

At her visit with her treating doctor, Dr. Kim, on November 9, 2013, Dr. Kim ordered a left ankle MRI which indicated a healing ankle bone with continued swelling. Petitioner was advised to keep the leg elevated. T. 65. Petitioner's last visit with Dr. Kim was on June 13, 2014. Dr. Kim kept Petitioner off work from April 13, 2013 through September 30, 2013 during which time she was paid disability. T. 66. Petitioner testified that her leg is currently painful and stiff with weather changes. Walking on her leg for more than a half mile around the park causes pain. She has no difficulty with stairs. She no longer can wear high heels. Petitioner testified that her leg and ankle injury has not affected her work ability as she works from home. T. 69. She still physically attends volunteer events but is not as active or hands on as she was before the accident. T. 70. The weather is the main trigger of her pain and if her pain is great she will use her cane. T. 71. When she has pain she uses Motrin over the counter. T. 71.

Respondent called Zammy Arcos to testify at trial. Ms. Arcos currently works for Respondent as a portfolio manager for commercial real estate lending. T. 96. In April 2013, Ms. Arcos worked for Respondent as a sales support associate and as such was required to input her hours worked. T. 97. She has never worked with directly with Petitioner but has attended events with Petitioner. T. 99. In April 2013, Ms. Arcos was a member of LEAD, the Leadership Enterprise Advancement and Development for women which she described as a "volunteer employee network." T. 99. She testified that she is not paid for her participation in LEAD. T. 100. Participation in the group is offered to all bank employees and information on the events is distributed through the bank to all employees, which numbers in the thousands. T. 101. She is familiar with the Community Volunteers Team and testified that it is the "biggest volunteer employee network for the Chicagoland area." T. 102.

Ms. Arcos arranged the Girl Scouts clean up event for April 13, 2013. She was told only 30 volunteers would be needed at the event. T. 104. She testified that Petitioner's Community Volunteer program ordered the t-shirts and anyone who participated at the event, including non bank employees, received a t-shirt. T. 105. Family members and friends are welcome to join the event. T. 106. She does not recall passing out her own business cards at the event. T. 106. Ms. Arcos testified that the Bank does not require its employees to volunteer at the event but if they do participate, the Bank asks the employee to sign a waiver. T. 107. This event took place on a Saturday. She has never felt any pressure from the Bank to participate and her raises and promotions were not contingent on participating. T. 108. If she volunteered on a week day during business hours then she put in for PTO pay for up to two hours as was company policy for non-exempt salaried employees. T. 109. She testified that the Bank keeps track of how many hours an employee is volunteering "whether its bank related or not" on a website where volunteer hours are reported. T. 109. Bank of America does have a goal number of volunteer hours and the LEAD hours get counted toward the Bank goal. T. 110. She is not aware of any negative repercussions if the goal is not met. T. 110. She considers her role in LEADS as completely separate from her role as a bank employee and testified that "it is something personal. It has nothing to do with how I am doing in my job. It is a personal choice." T. 111. She further testified that although the Bank promotes volunteerism through the employee networks, her participation is not "tied" to her job. T. 111.

On cross exam, Ms. Arcos testified that she does not go to the events to develop business opportunities but her "purpose there is to meet other employees and to learn more about what the bank is doing." T. 113. She denied receiving any financial compensation for her participation. T. 115. She does not know of anything in writing which prohibits an employee from getting PTO for volunteering outside of work hours. T. 117.

Respondent called Shanna Bentley to testify at trial. Ms. Bentley is a vice president and business analysis for Bank of America and has worked 29 years for Respondent. She is a salaried exempt employee as is Petitioner. T. 124. She is a friend of Petitioner's and has volunteered with Petitioner but has not worked directly with Petitioner at the Bank. T. 125. She has worked with several Bank volunteer networks. T. 126. Ms. Bentley was the Chair of LEAD and now has an advisory position with LEAD which is still considered a leadership position. T. 127. She was at the Girl Scouts event on the date of Petitioner's accident. In her opinion, between 10 and 25 employees show up on average at an event like the Girl Scouts event. T. 132. 6,000 Bank employees receive the invitation to volunteer. T. 132. There are no written or unwritten Bank requirements for volunteering. T. 133. She has never been told that her compensation is tied to volunteering. T. 133. She explained the PTO policy for non-exempt and exempt salaried employees to mean that with a manager's approval "you're allowed two hours a week to use towards volunteer time." T. 134. Weekend volunteering is not included in PTO. T. 135,140-141. She further testified that the employee recognition program is not generally tied to volunteerism but rather going above and beyond in her job. T. 137. Ms. Bentley further testified that friends and family were invited to the Girl Scouts event. T. 137.

On cross-exam, Ms. Bentley testified that she has no way of knowing whether Petitioner received employee recognition rewards from volunteering as the recognition comes from a manager. T. 139. She further refused to agree that Respondent Bank of America receives any corporate or professional benefit from its employee participation in the volunteer organizations.

T. 149-158. Ms. Bentley is not familiar with the structure and operation of Bank of America Community Volunteers as she is a member but is not involved in a leadership role. T. 165.

Respondent also presented the testimony of Mr. Sam Schwartz via evidence deposition. RX 1. The evidence deposition was taken via video conference on August 11, 2014. Mr. Schwartz testified that he currently works for Respondent as a program delivery lead and that as such he managers different project managers for the Bank all over the country. RX 1, p. 5. Petitioner is one of the Bank employees that he manages. Petitioner is active in the Bank volunteer program and he is aware that she was a co-chair of the "local chapter that represents the Bank of America volunteer programs." RX 1, p. 8. There is no written Bank policy that require employees to participate in any volunteer programs. RX 1, p. 13. The Bank encourages employees to participate and volunteer to give back to the community and volunteer hours are logged but there are no requirement or mandates attached. He further testified that there is no recognition or reward for volunteer hours. RX 1, p. 13. He further testified there is no compensation given for volunteer hours put employees are given PTO for up to two hours per week of volunteer time taken away from normal work hours. RX 1, p. 14. This is to show the Bank's support for employee volunteerism. RX 1, p. 15. Petitioner was paid her same salary regardless of whether she volunteered. RX 1, p. 15. To his knowledge, volunteering on a Saturday is outside of work hours. Further, to his knowledge, Petitioner did not receive extra compensation for her volunteer work on Saturday April 13, 2013 nor should she have received reimbursement for personal expenses associated with her volunteer time. RX 1, p. 17. As Petitioner's manager, all of Petitioner's expense requests go through him. RX 1, p. 17. The Bank encourages volunteering but does not require or compensate employees for volunteering. RX 1, p. 18-20.

On cross-exam, Mr. Schwartz testified that volunteer hours are tracked for the purpose of quantifying the total number of volunteer hours for the Bank. He does not believe the Bank expects a benefit from the volunteer programs other than to have the employees "feel comfortable with their organization encouraging and supporting them in their ability to participate in community involvement." RX 1, p. 23. At the Girl Scouts event on April 13, 2013, the Bank provided water to the volunteers but he is not aware of t-shirts being provided. RX 1, p. 24. The volunteer opportunity was advertised to all Bank employees. RX 1, p. 25. With regard to the Girl Scouts event, Mr. Schwartz testified that the Bank did not sponsor the event but rather the Bank participated in a "community sponsored event." The Bank was participating in the event through its volunteer program. RX 1, p. 28. The Bank encourages, through the volunteer program, to attend and participate in the Girl Scout park clean up day. RX 1, p. 29. Employees are not paid to attend the event but will get two hours of PTO if the event is during a work day. RX 1, p. 31. As Petitioner's manager, he testified that he does not look at her volunteer hours when completing her performance review. He only looks at her job performance as criteria. RX 1, p. 35. Petitioner did not coordinate her attendance at the Girl Scout event through Mr. Schwartz and he had no knowledge of her attendance at the event until after the event when he learned of her injury. RX 1, p. 41.

At trial, Respondent's counsel requested leave to take another evidence deposition of Mr. Schwartz in rebuttal to Petitioner's live testimony at trial given on December 1, 2014. The request was granted and the trial was bifurcated for this purpose. Mr. Schwartz presented rebuttal testimony via evidence deposition taken on January 28, 2015. RX 2. In rebuttal, Mr. Schwartz testified that Petitioner's role as co-chair of the "BACCV internal organization in

Illinois" is in no way part of her job description. Petitioner is not required to inform him or ask his permission to do volunteer work other than when requesting time away from her daytime responsibility as a project manager to do volunteer work. RX 2, p. 6. The primary focus of his review of Petitioner's job performance is her job performance as a project manager. He also looks at competencies that Petitioner demonstrates as a project manager. Mr. Schwartz mentioned Petitioner's extensive volunteer work in her 2013 job performance review as he felt it indirectly enhanced her competency and ability to communicate with work partners. RX 2, p. 7.

Mr. Schwartz further testified that any reimbursement for mileage expenses incurred by Petitioner in traveling to a volunteer event which he approved as reflected in PX 11 was done in error and against bank policy. RX 2, p. 7-8. This error determination was made in 2014 and not at the time the expenses were submitted in 2013. RX 2, p. 12-13. Finally, he testified that the employee recognition program was to recognize employees who go above and beyond in their normal bank jobs and is not intended to recognize participation in volunteer events. RX 2, p. 9.

At the bifurcated hearing on February 18, 2015, Petitioner was called to testify in rebuttal to the rebuttal testimony of Sam Schwartz. She testified that Sam Schwartz knew that her expense request was for volunteer time expenses and the he approved the expenses. The first time she learned that volunteer expenses could not be submitted was in December 2014. T. 179. PX 14 is Petitioner's 2014 job performance review prepared by Petitioner and Mr. Schwartz. The 2014 review again references Petitioner's desire to promote philanthropy as a major goal of her management plan. T. 183. Mr. Schwartz signed the review.

RX 3 is Respondent's Global Expense Standard explaining the Bank's policy on how to submit expenses. Petitioner testified that Mr. Schwartz referred her to Section 14 of RX 3 in advising her that her volunteer expenses were not covered. Specifically, since Petitioner worked from home on the Bank's flexible work plan, Petitioner reviewed Section 14 of RX 3 which addresses expenses covered for an employee working flexibly. Section 14 does not address expenses for volunteer work. However, Petitioner testified that Section 14 does address reimbursement for employee parking and states that parking, mileage and other transportation expenses are not reimbursable. Section 14 then refers the reader to Section 9.72.11 Employee parking which is not found in RX 3. Rather, Petitioner found Section 9.7.10 that states parking fees incurred at the employee's primary office location are non-reimbursed and that non-travel related parking expenses will be rejected unless approved by a band two manager. RX 3, p. 52. Mr. Schwartz is a band 4 manager which Petitioner testified is not above a band two manager. T. 190. Mr. Schwartz previously approved Petitioner's parking expenses. T. 190.

Petitioner again testified that she was rewarded under the Global Recognition Awards System with a certificate and a dollar amount reward for her volunteering. T. 191. She further testified that she made Mr. Schwartz aware of every occasion on which she volunteered including Saturday volunteer work as she was a salaried employee paid to work 24/7. T. 193. She further testified that she believed her presence at the volunteer Girl Scouts event benefitted the Bank as she was the face of the Bank and connected with non-profit organizations. T. 196. Her purpose as co-chair was to network for the Bank and to advise non-profits of Bank opportunities at these events. T. 197. Again, she testified that the Bank highly encourages volunteer work. T. 201. PX 15 is a portion of the Bank's Annual Report which references "volunteerism" as one of the strategic ways the Bank can "increase the impact" of its services. Illinois has met its goal of

45,000 volunteer hours. T. 203. Petitioner again testified that volunteering was part of the Bank's strategic goals. T. 205.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

Pertaining to (C), whether an accident occurred that arose out of and in the course of the Petitioner's employment, the Arbitrator finds as follows:

Based on the preponderance of the credible evidence at trial, the Arbitrator finds the evidence insufficient evidence to show that Petitioner's injury occurred from an activity that was compulsory or occurred in the course of her employment. In so finding, the Arbitrator notes that Petitioner was neither ordered nor assigned to participate in any volunteer program or activity by Respondent and specifically was neither ordered nor assigned to participate at the Girls Scouts event on April 13, 2013 where she was injured. Rather, the Arbitrator notes that Petitioner's participation at this event was purely under her own volition and not mandated by Respondent.

In so finding, it is not lost on the Arbitrator that Respondent Bank of America undeniably promoted and encouraged its employees to volunteer in the community via participation in its elaborate volunteer system. Petitioner clearly testified that volunteerism was promoted and encouraged by Respondent and that she avidly participated in the volunteer network. Petitioner testified that she did so because she enjoyed volunteering and included her volunteer committee activities in her own corporate development plan, which was also encouraged by Respondent. Further, she testified that the volunteer programs "increase the impact" of the Bank's services in the community and thus the Bank derives benefit from employee attendance at these events. However, the Arbitrator finds the fact that Petitioner was not paid any extra salaried compensation for her participation and that her corporate salaried compensation and performance reviews were not tied to her volunteer participation to be more relevant to this analysis under the Act. The Arbitrator finds that any recognition program or PTO policy is not tantamount to compensation but rather only acts as further evidence of Respondent's encouragement of employee volunteerism and does not elevate the opportunity to volunteer to the level of mandate. Furthermore, the Arbitrator notes that the Girls Scouts event was not sponsored by Bank of America. Rather, Respondent's volunteer core was a participant at the event, with employee family and friends invited to attend in addition to the employee. Finally, the fact that Respondent's corporate presence in the community may have resulted in some benefit incidental to its actual business of banking is too tenuous and intangible to be persuasive in this case.

Finally, the Arbitrator notes that Petitioner's capacity with Respondent is one of project manager. She was not hired or compensated for her role as co-chair of the Bank of America Community Volunteer Committee and as such her co-chair position was again of her own volition. Her duties as project manager were in no way related to her position as a volunteer co-chair. Petitioner's volunteer work was cited in her performance review. However, there is no credible evidence to suggest that the reference enhanced her project manager performance review nor any evidence to suggest her review as a project manager would suffer without the volunteer work. Lastly, the Arbitrator further notes that the decision to volunteer is up to the individual employee and that many other Bank employees choose not to participate in the volunteer networks without negative effect.

Based on the above, the Arbitrator finds that Petitioner did not sustain an injury arising out of and in the course of her employment on April 13, 2013. Compensation is denied under the Act. Accordingly, all remaining 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Garcia,
Petitioner,

vs.

NO: 13WC 21783

Azcon Corporation,
Respondent,

16IWCC0124

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 benefit rates, incurred medical, prospective medical, 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. 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 20, 2015, 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: FEB 16 2016
o021016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

Mark as Unlisted

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

GARCIA, JOSE
Employee/Petitioner

Case# **13WC021783**

AZCON CORPORATION
Employer/Respondent

16IWCC0124

On 5/20/2015, 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:

4324 LASHLY & BAER PC
ANDREW G TOENNIES
741 LOCUST
ST LOUIS, MO 63101

1337 KNELL LAW LLC
MATT BREWER
504 FAYEET ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSE GARCIA
Employee/Petitioner

v.

AZCON CORPORATION
Employer/Respondent

Case # 13 WC 21783

Consolidated cases: _____

16IWCC0124

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 **March 19, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0124

FINDINGS

On the date of accident, **6/18/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,468.12**; the average weekly wage was $**701.31**.

On the date of accident, Petitioner was **47** 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 $**21,832.64** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.** for other benefits, for a total credit of $**21,832.64**.

ORDER

- **THE ARBITRATOR FINDS THAT THE PETITIONER'S CURRENT CONDITION OF ILL BEING IS NOT CAUSALLY RELATED TO THE 6/18/13 ACCIDENT.**
- **THE ARBITRATOR FINDS THAT THE PETITIONER REACHED A POINT OF MAXIMUM MEDICAL IMPROVEMENT ON 2/18/14 CONSISTENT WITH THE OPINIONS OF DR. BERNARDI**
- **THE PETITIONER IS NOT ENTITLED TO 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

5/11/15
Date

ICArbDec19(b)

MAY 20 2015

16IWCC0124

FINDINGS OF FACT

The Petitioner is a resident of St. Louis, MO. Petitioner testified that he began working for the Respondent AZCon in January 2010. AZCon Corp. is a scrap metal and recycling company. The Petitioner described running and operating the non-ferrous and non-magnetic metal portion of AZCon's facility. This was described as non-magnetic metals being separated from magnetic metals and this machine ran essentially as an assembly line. Petitioner testified that he operated the entire machine. Petitioner testified that his shift usually started at approximately 2:30 p.m.

On 6/18/13 the Petitioner testified that the metals on the conveyors got stuck. Petitioner then went to remove the metal and climbed on a concrete pillar next to the conveyor. The Petitioner described the conveyor being approximately six feet off of the ground and the concrete pillar he was standing on was approximately two to three feet off of the ground. As the Petitioner went to remove the metal he pulled with his right hand and then fell to the ground landing on his feet. The Petitioner described noticing immediate pain.

The Petitioner did not finish his shift and left early. Petitioner immediately sought treatment on the date of his accident at Barnes Jewish Hospital. Petitioner described having pain in his low back up through his mid back. X-rays were taken and the Petitioner was prescribed pain medicine and a muscle relaxer. The Petitioner was then sent by his employer to Midwest Occupational Medicine.

After the Petitioner appeared at Midwest Occupational Medicine he then presented for treatment with his primary care physician Dr. Ellsworth. Dr. Ellsworth ordered an MRI as well as physical therapy. Petitioner underwent physical therapy at the Rehab Institute of St. Louis. Petitioner testified that the physical therapy did not help.

The Petitioner was then referred to Dr. Rastogi who performed epidural steroid injections as well as facet blocks. The Petitioner testified that the first injection provided him relief for approximately two weeks and thereafter the remainder of the injections did not help much at all.

The Petitioner testified he also had leg pain which continued through the summer of 2013 on his left side. The Petitioner did undergo a total of eight injections which provided him no permanent relief. Petitioner testified he still occasionally experiences leg pain.

Dr. Ellsworth eventually referred the Petitioner to a surgeon however no medical records were submitted into evidence from that visit and the petitioner could not recall the name of the surgeon Dr. Ellsworth referred him to.

The petitioner was eventually sent to Dr. Wilkey. The Petitioner testified that he was sent to Dr. Wilkey by his attorney. Petitioner initially presented to Dr. Wilkey on 4/14/14. An exam was taken and the Petitioner's MRI was reviewed. Dr. Wilkey then ordered a new MRI as he felt the first one was of poor quality. The Petitioner's second lumbar spine MRI was performed in May 2014.

In August 2014 the Petitioner continued to treat with Dr. Wilkey and testified that he experienced improvement of his leg complaints. It was at this time according to the petitioner that Dr. Wilkey indicated that the petitioner could either live with his current condition or surgery would be an option. Dr. Wilkey has recommended that the Petitioner undergo a fusion at L4-5 and L5-S1 which he feels is related to the accident in question.

The Petitioner has not worked since the date of his accident. Petitioner did however testify that he is able to do things around the house. Petitioner described rehabbing a home and being able to go to Home Depot and move 2 X 4s into the cart. Petitioner also described being able to carry propane tanks. These propane tanks were described as being used for a barbeque grill.

Petitioner testified that as of the time of trial he still has pain in the center of his back and into his left side. Petitioner testified that his leg pain is inconsistent. Petitioner testified that he is unable to move quickly and cannot lift heavy things.

The Arbitrator asked the Petitioner whether he wanted the surgery that had been proposed by Dr. Wilkey. The Petitioner testified "yes and no." The Petitioner was apprehensive as to whether or not he wanted to undergo the surgery but he is not satisfied with his current condition. The Petitioner did testify that if Dr. Wilkey called to schedule the surgery that the Petitioner would go forward with it.

The Petitioner was paid TTD from 6/19/13 through 5/6/14. The Respondent also paid $24,915.37 in medical expenses on behalf of the Petitioner.

On cross examination the Petitioner was asked questions in regards to his specific reporting of the accident to not only his employer but to various medical providers. The supervisor's accident report was admitted as Respondent's Exhibits #1. That report states the Petitioner was "pulling a long bar jammed in belt, stating he wrenched his back". Petitioner confirmed that there is no indication in the supervisor's incident report of the Petitioner falling and landing on his feet. The Petitioner also reviewed Dr. Bernardi's IME report which is admitted as Respondents' Exhibit #9. Petitioner again agreed that there is no mention of the Petitioner falling from the conveyor or the concrete pillar contained in Dr. Bernardi's report. Lastly, the Petitioner was asked to review his initial emergency room visit at Barnes Jewish Hospital which was admitted as Respondent's Exhibits #4. The Petitioner confirmed there is again no mention of him falling and landing on his feet in the initial emergency room records. The Petitioner confirmed that the history that he provided at the time of trial and the history that he gave to Dr. Wilkey, is contrary to the incident report, Dr. Bernardi's report, and the initial emergency room records developed in this case.

The Petitioner confirmed that Dr. Ellsworth, his primary care physician released him to return to work without restrictions as of 11/20/13. This is contained in Respondent's Exhibits #7.

The Petitioner confirmed that 11/20/13 was the date that he presented to Dr. Bernardi. Dr. Bernardi did place the Petitioner under work restrictions and the Petitioner did confirm that his TTD was continued at that time. Dr. Bernardi also ordered work hardening. The Petitioner testified that he was not initially aware that Dr. Bernardi had ordered work hardening but the Petitioner did later become aware of this recommendation.

Petitioner testified that he wanted to attend work hardening. The Petitioner also testified that he gave full effort in cooperation with work hardening.

Contrary to the Petitioner's testimony, the work hardening records from Pro Rehab were admitted as Respondent's Exhibit #8. The Petitioner's work hardening entrance evaluation was conducted on January 6, 2014. The Petitioner demonstrated evidence of cogwheeling. Additionally it was noted that the Petitioner provided variable overall effort which was less than the maximal effort during testing according to heartrate analysis. Additionally it was noted that the Petitioner self-limited during material handling. Petitioner also gave high scores on his subjective questionnaires. Furthermore on the Global Effort Rating: Consistency and Quality of Effort Indicators, the Petitioner was found to have 6 out of 13 unexpected results. The unexpected results were under the criterion for pain behavior and function, inappropriate symptoms questionnaire, perceived disability score, fear avoidance believe questionnaire, rapid exchange grip, and heartrate analysis.

The Petitioner's first actual visit with work hardening was on January 17, 2014. A subjective portion of that record states that "worker further went onto state that if he gets in pain he has a lawyer and that he would come after you (this therapist) and this facility." The record form this visit also goes onto state that the Petitioner ended his session early on his own stating "he was not going to do anymore."

The Petitioner ended several work hardening visits on his own quitting early. The work hardening records also show that the Petitioner refused to do various exercises as requested by the work hardening therapists.

On the 1/29/14 work hardening visit it was indicated that the Petitioner had been rehabbing his house and had been going to buy supplies. On 2/3/14 the work hardening therapist observed the Petitioner swinging a piece of wood in a golf club swinging motion several times throughout the 2/3/14 session. As of 2/6/14 the Petitioner informed work hardening that his attorney had given him permission to not come for his work hardening visits anymore because it was "not helping."

Petitioner did not see Dr. Wilkey the first time until two months after he had stopped work hardening. Dr. Wilkey did order an updated MRI and an EMG. The EMG performed was completely normal. Additionally, according to Dr. Wilkey's records the Petitioner reported that his leg pain had resolved and the only remaining pain he was having was in his low back.

Petitioner testified that he has not worked since the date of his accident. Petitioner has testified that he has also not looked for work. Despite this the Petitioner did confirm he was able to do things around his house, is able to carry things including propane tanks and grocery bags. Petitioner is able to drive. Petitioner did also testify that he has been able to rehab his kitchen. Petitioner also testified that he is able to remove snow from his cars. Petitioner also testified that he is was a smoker for 38 to 39 years of his life.

Surveillance reports and video were admitted at the time of trial as Respondent's Exhibit #12. The surveillance was conducted by Sedgwick's in-house investigation team on February 10th, February 14th, and February 17th of 2014. Surveillance was also later conducted on February 20th, 21st, and 24th of 2014. The last surveillance efforts of Sedgwick and the Respondent were performed on June 20th, 24th, and 26th of 2014. The surveillance reports and video admitted into trial do show the Petitioner moving without discomfort. The surveillance video also shows the Petitioner carrying grocery bags from his car into his home.

Dr. Wilkey testified on this matter on behalf of the Petitioner. Dr. Wilkey initially met with the Petitioner on 4/14/14 for the purpose of an independent medical examination at the request of Petitioner's attorney. Petitioner followed up with Dr. Wilkey on 6/2/14 for the purposes of reviewing the MRI which had been recommended by Dr. Wilkey at his initial examination as well as the EMG. The Petitioner reported that his left leg pain at the time was better. Dr. Wilkey further opined at this visit that the work hardening recommendation made by Dr. Bernardi was certainly a reasonable recommendation. On the Petitioner's 8/12/14 visit with Dr. Wilkey his left leg symptoms had resolved. Dr. Wilkey believed that the Petitioner had sustained an aggravation of a preexisting low back condition at the time of his 6/18/13 accident. Dr. Wilkey has recommended that the Petitioner undergo a fusion at L4-5 and L5-S1 which he feels is related to the accident in question.

Dr. Wilkey testified that he felt the Petitioner was credible and was not malingering. Despite this testimony Dr. Wilkey was shown the Petitioner's work hardening records which revealed the Petitioner was self-limiting and put forth less than maximal effort. Dr. Wilkey did not believe that the work hardening evaluation was worth anything.

Dr. Bernardi also testified in this matter. Dr. Bernardi was hired by the Respondent to perform an independent medical examination which occurred on 11/20/13. Dr. Bernardi took a history of the Petitioner's accident as well as reviewed medical records and performed a physical examination. Dr. Bernardi also administered Oswestry questionnaire at the time of his examination which revealed that the Petitioner felt he was severely disabled. Dr. Bernardi also administered a Zung depression index, a modified somatic perception questionnaire as well as a pain disability questionnaire. Dr. Bernardi testified that the Petitioner's scores on these tests were high and indicated the Petitioner felt he was severely disabled.

Dr. Bernardi's physical examination revealed borderline Waddell's signs. Petitioner was neurologically normal and the only positive exam findings made by Dr. Bernardi were tenderness over the greater trochanters as well as pain with hip range of motion testing.

Dr. Bernardi also reviewed the Petitioner's initial 7/29/13 lumbar spine MRI. Dr. Bernardi had the actual films from this study and believed that they were of extremely good quality. Dr. Bernardi noted that the Petitioner appeared to have a partially sacralized L5 vertebra. Dr. Bernardi noted mild degenerative disc disease at L3-4 and L4-5 with loss of disc hydration. The remainder of the lumbar disc were unremarkable. Dr. Bernardi did not feel as though there were any acute abnormalities on the MRI of 7/29/13 nor was there any stenosis at any segment.

Dr. Bernardi testified that the Petitioner's accident would have caused the Petitioner's onset of low back pain. The Petitioner's accident however did not cause the lumbo sacral segmentation abnormality, the Petitioner's degenerative disc disease or the Petitioner's facet disease which were present on the MRI.

Dr. Bernardi could not explain the Petitioner's ongoing complaints based upon the MRI or his physical examination findings. Dr. Bernardi testified there was nothing on the MRI or during his physical examination that would warrant surgery and the Petitioner was not a surgical candidate. Dr. Bernardi did not believe the Petitioner required any additional injections and he could not identify the cause for the Petitioner's ongoing symptomatology.

At the time of his examination Dr. Bernardi recommended the Petitioner undergo a six week program of work hardening. Dr. Bernardi felt the Petitioner could work with a 20 pound lifting restriction.

Following Dr. Bernardi's examination he was later provided additional medical records which included the Petitioner's work hardening records. Dr. Bernardi was also given Dr. Wilkey's initial 4/14/14 record.

Dr. Bernardi noted the findings from the work hardening entrance evaluation. Dr. Bernardi testified that the Petitioner's behavior during work hardening was inconsistent and non-compliant. It was noted that the Petitioner's main limiting factor were his subjective complaints of pain.

Dr. Bernardi was aware at the time of his evidence deposition that Dr. Wilkey felt the initial MRI of the lumbar spine taken on 7/29/13 was of poor quality. Dr. Bernardi was further aware that the repeat MRI was recommended by Dr. Wilkey using a 1.5 tesla magnet. Upon learning this information Dr. Bernardi contacted the facility where the Petitioner's initial MRI of 7/29/13 was conducted. Dr. Bernardi was informed that the MRI machine used for the Petitioner's initial 7/29/13 MRI was taken on a 3.0 tesla magnet. Dr. Bernardi testified that the 3.0 tesla magnet is 2X stronger than the 1.5 tesla magnet that Dr. Wilkey was recommending a repeat MRI be performed on. Again, Dr. Bernardi testified that the Petitioner's initial 7/29/13 MRI was of excellent quality.

Dr. Bernardi also did not feel as though the Petitioner required an EMG study.

Dr. Bernardi was aware that Dr. Wilkey found the Petitioner's subsequent MRI performed on 5/28/14 showed internal disc derangement at L4-5 and L5-S1. The Petitioner however, presented to Dr. Wilkey with a negative straight leg raise as well as normal neurological findings. Dr. Bernardi also noted that the Petitioner's EMG and nerve conduction study were found to be completely normal in regards to the Petitioner's lower extremities.

Dr. Bernardi disagreed with the recommendation for the Petitioner to undergo a fusion. Dr. Bernardi testified that a fusion for a patient with strictly back pain and no radiculopathy should only be performed in two situations, #1 when a patient has bone-on-bone findings at one level in the lumbar spine and the remainder of the lumbar spine is normal, or #2 when there is a spondylolysis. Dr. Bernardi testified that the Petitioner had neither bone-on-bone findings nor a spondylolysis. As such Dr. Bernardi disagreed with Dr. Wilkey's recommendation to perform a two level fusion on the Petitioner. Dr. Bernardi testified that this recommendation would not be unreasonable and unnecessary, but the success rate for such a procedure would be very low.

Dr. Bernardi testified that the Petitioner's subjective complaints did not match his objective findings. Dr. Bernardi testified that the Petitioner would have reached a point of maximum medical improvement at the conclusion of the Petitioner's work hardening in February 2014. Dr. Bernardi also testified that at the conclusion of work hardening in February 2014 the Petitioner would have been at full duty and not require the need for any ongoing work restrictions. Dr. Bernardi did causally relate the Petitioner's medical care from the date of his accident as well as the need for 20 pound work restrictions up through the final work hardening visit of 2/18/14.

ARBITRATOR'S ORDER

1. The Arbitrator finds that the Petitioner's current condition of ill being is not causally related to the 6/18/13 accident. The Petitioner sustained at most a low back sprain/stain at the time of the accident. This is shown by the minimal and non-acute findings on both of the Petitioner's MRI's. Dr. Bernardi's opinions are found to hold greater weight than those of Dr. Wilkey and Dr. Bernardi's opinions are found controlling in this case.

2. The Petitioner is not entitled to prospective medical care and the Arbitrator finds that the Petitioner reached a point of maximum medical improvement on 2/18/14 consistent with the opinions of Dr. Bernardi. No medical care the Petitioner has underwent after he completed work hardening is related to the accident in question. This finding is supported by the Petitioners normal EMG, minimal findings on MRI and on exam.

   The denial of prospective medical care is also supported by the Petitioner's own behavior. Petitioner admitted that he is capable of rehabbing his home, and can carry propane tanks. Petitioner was also found to be swinging a piece of wood like a golf club during work hardening. Although the surveillance video admitted is not superbly probative, it does show the Petitioner to move around fluidly and without discomfort. The Petitioner does not require the large procedure ordered by Dr. Wilkey, that being a two level lumbar spine fusion.

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

Marilyn McCarthy,
Petitioner,

vs. NO: 13 WC 27581

Menard Convalescent Center,
Respondent.

16IWCC0125

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, 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 April 14, 2015 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.

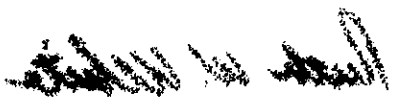
DATED: FEB 17 2016

Joshua D. Luskin

Ruth W. White

Charles J. DeVriendt

o-02/10/16
jdl/wj
68



ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCARTHY, MARILYN
Employee/Petitioner

Case# 13WC027581

MENARD CONVALESCENT CENTER
Employer/Respondent

16IWCC0125

On 4/14/2015, 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:

2427 KANOSKI BRESNEY
TOM EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0385 BONALDI CLINTON & DAVIS LTD
DAVID C DAVIS
2900 FRANK SCOTT PKWY #988
BELLEVILLE, IL 62223

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Marilyn McCarthy
Employee/Petitioner

v.

Menard Convalescent Center
Employer/Respondent

Case # 13 WC 27581

Consolidated cases: n/a

16IWCC0125

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 Springfield, on February 23, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On March 3, 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 $37,648.00; the average weekly wage was $740.32.

On the date of accident, Petitioner was 59 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 $10,082.52 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $10,082.52.

Respondent is entitled to a credit of amounts paid 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

April 7, 2015
Date

APR 14 2015

On February 28, 2011, Petitioner began physical therapy at Menard Medical Center. At that time, Petitioner informed the physical therapist that she had been experiencing pain and swelling since the right shoulder surgery. Petitioner rated that pain, at its worst, as 9/10. Petitioner also stated that the pain was better with medication but that she "lives with ice packs." Further, Petitioner stated that the pain caused her to experience sleep deprivation and interfered with activities of both daily living and work. Petitioner stated that her goal for therapy was to "fix her arm." (Respondent's Exhibit 6; p 5).

The physical therapist's examination of February 28, 2011, revealed swelling, pain with range of motion and scapular weakness of the right shoulder. The physical therapist set a number of goals for Petitioner to obtain between two and four weeks (Respondent's Exhibit 6; p 6). At trial, Petitioner testified that prior to the accident of March 3, 2011, the only right shoulder symptoms she had was some swelling.

Petitioner was cross-examined at length regarding the condition of her right shoulder prior to the accident of March 3, 2011. Specifically, Petitioner was questioned about the recorded statement she gave to the adjuster on March 8, 2011. Petitioner stated that when she told the adjuster that she never had any similar complaints to the right shoulder prior to March 3, 2011, it was because she was experiencing a totally different pain. When questioned why she did not tell the adjuster that she just begun physical therapy on February 28, 2011, three days prior to the accident, she responded because her right shoulder was still symptomatic and she could only say that she did not know why.

Respondent's Section 12 examiner, Dr. Milne, was provided with Petitioner's pre-accident medical records. Following his review of these records, Dr. Milne prepared a supplemental report dated August 27, 2012. Based on his review of these records, Dr. Milne recanted his prior opinion regarding causality. He opined that the work accident may have been a temporary aggravation of Petitioner's right shoulder symptoms but that Petitioner had rotator cuff pathology and pain prior to the work injury. He further opined that Petitioner's need for right shoulder surgery was not related to the work accident of March 3, 2011 (Respondent's Exhibit 1; Deposition Exhibit 4).

Dr. Wolters was deposed on October 30, 2013, and again, on May 16, 2014. His deposition testimony was received into evidence at trial. On direct examination, Dr. Wolters opined that the right shoulder pathology was caused by the accident of March 3, 2011, based on his understanding that there was a significant increase in symptoms following the accident and that his review of the records that pre-dated the accident did not show evidence of rotator cuff pathology (Petitioner's Exhibit 2; pp 28-29; 37-39).

On cross-examination, Dr. Wolters stated that he had reviewed Dr. Herrin's office record of January 24, 2011, but that, prior to being cross-examined, he had not reviewed the physical therapy record of February 28, 2011. Dr. Wolters agreed that, as of February 28, 2011, Petitioner's complaints and findings on examination were consistent with the pathology he found during the surgery. When Dr. Wolters reviewed the March 11, 2011 record of Dr. Sharma, he likewise agreed that Petitioner's complaints and findings on examination were similar to what they had been on February 28, 2011 (Petitioner's Exhibit 2; pp 51-58).

Dr. Milne was deposed on September 29, 2014, and his deposition testimony was received into evidence at trial. Dr. Milne's testimony was consistent with his medical reports. In regard to causality, he reaffirmed the opinion stated in his supplemental report of August 27, 2012, that the accident of March 3, 2011, may have temporarily aggravated Petitioner's right shoulder condition for a matter of hours, but that it did not cause any structural difference in Petitioner's right shoulder that precipitated the need for surgery (Respondent's Exhibit 1; pp 21-27).

Conclusions of Law

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

The Arbitrator concludes that Petitioner did not sustain an accidental injury arising out of and in the course of her employment for Respondent on March 3, 2011.

In support of this conclusion the Arbitrator notes the following:

There were discrepancies in the mechanics of how the injury allegedly occurred. At trial, Petitioner stated that she put her right arm underneath the patient's right arm; however, in her recorded statement Petitioner stated that her right arm was behind the patient holding on to the gait belt.

At trial, Petitioner testified that the patient went back down which caused the "sharp pain" in Petitioner's right arm. In the Report of Injury and her recorded statement, Petitioner stated that the patient was pushing against her and the co-worker and that this caused a "pull" in both of her arms.

Petitioner's statements to the medical providers who examined and treated her subsequent to the alleged accident of March 3, 2011, were both self-serving and deceptive.

Petitioner had right shoulder surgery performed on September 1, 2010, approximately six months prior to March 3, 2011; however, on March 11, 2011, she told Dr. Sharma that she had right shoulder surgery one year prior and, on June 28, 2011, she told PA Royer that she had right shoulder surgery a couple of years prior.

Petitioner informed Dr. Sharma that her right shoulder was pain-free and fully functional prior to the accident of March 3, 2011. Petitioner made essentially the same statement to PA Royer stating that she had recovered from the prior surgery and had "no problems."

The preceding is totally inconsistent with the fact that on February 28, 2011, three days prior to the alleged accident of March 3, 2011, Petitioner had just begun physical therapy and rated her right shoulder pain as being 9/10 as well as having other significant right shoulder symptoms.

Petitioner was also deceptive when she gave her recorded statement to the adjuster on March 8, 2011, stating that the prior surgery was about one year ago and that she denied experiencing prior similar complaints.

Further, in spite of the fact that Petitioner underwent a significant surgical procedure on September 1, 2010, when Petitioner gave the recorded statement to the adjuster, she attempted to characterize it as a removal of "calcium deposits." When Petitioner discussed the prior surgery with Dr. Milne, she attempted to characterize the surgery as being for bone spur removal.

When Petitioner was examined by Dr. Milne, she advised the doctor of the prior surgery, but she omitted any reference to her prior shoulder surgeries when she completed the health questionnaire.

It is obvious to the Arbitrator that Petitioner was still experiencing significant right shoulder symptoms just three days prior to the alleged accident.

Although it is not necessary for the Arbitrator to make a determination regarding causality, he does note that the testimony of the Petitioner's primary treating physician, Dr. Wolters, does not support a finding of causality nor does the testimony of Respondent's Section 12 examiner, Dr. Milne.

Based on the preceding, the Arbitrator finds Petitioner was totally lacking credibility.

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

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☒ 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

Terri Robbins,

Petitioner,

vs. NO: 13 WC 28754

Jo-Ann Stores, Inc.,

16IWCC0110

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, extent of temporary total disability, maintenance, wages and rate, nature and extent of permanent disability, medical expenses, and a motion to strike the deposition and report of Dr. Watson 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 the Arbitrator's finding that Respondent failed to show that Dr. Watson's estimate during his deposition testimony that he reviewed 6 to 7 inches of Petitioner's medical records, when it was actually 1 inch of records, is a sufficient basis upon which to bar his entire testimony. The Commission affirms the Arbitrator's finding that Dr. Watson's estimate that he reviewed 6 to 7 inches of records was simply a mistake and his testimony during his deposition is consistent with Petitioner's medical records offered into evidence by Petitioner and not objected to by Respondent. The Commission further affirms the Arbitrator's finding that Respondent failed to show that there was any testimony during Dr. Watson's deposition from which one could reasonably infer that it was based on medical records of Petitioner that were not offered into evidence. The Commission affirms the Arbitrator's denial of Respondent's Motion to Bar the Testimony of Dr. Watson. The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 24, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Bar the Testimony of Dr. Watson is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $538.67 per week for a period of 26-6/7 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 $538.67 per week for a period of 7-6/7 weeks, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services for treatment of Petitioner's lumbar spine from June 26, 2013 through March 5, 2015, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits commencing March 24, 2014 of $179.69 per week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in §8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $14,313.12 in TTD benefits and $5,817.60 for indemnity advance, for a total credit of $20,130.72.

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

16IWCC0110

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,600.00. 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: FEB 8 - 2016
MB/maw
o12/10/15
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBBINS, TERRI
Employee/Petitioner

Case# **13WC028754**

16IWCC0110

JO-ANN STORES INC
Employer/Respondent

On 3/24/2015, 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:

0834 KANOSKI BRESNEY
CHARLES EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

16IWCC0110

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TERRI ROBBINS,
Employee/Petitioner

v.

JO-ANN STORES, INC.
Employer/Respondent

Case # **13** WC **28754**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Quincy**, on **3/5/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/26/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**42,016.00**; the average weekly wage was $**808.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** 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 $**14,313.12** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**5,817.60** for indemnity advance, for a total credit of $**20,130.72**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Respondent's Motion to Bar the Deposition of Dr. Watson is denied.

Respondent shall pay Petitioner temporary total disability benefits of $538.67/week for 26-6/7 weeks, commencing 6/26/13 through 7/20/13, and commencing 8/18/13 through 1/27/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $538.67/week for 7-6/7 weeks, commencing 1/28/14 through 3/23/14, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services for her lumbar spine from 6/26/13-3/5/15, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits, commencing 3/24/14, of $179.69/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, 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 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

3/20/15
Date

MAR 24 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 42 year old manager, sustained an accidental injury to her low back that arose out of and in the course of her employment by respondent on 6/26/13. As a manager for respondent petitioner oversaw all aspects of the business, including bringing merchandise in, stocking the shelves, customer service scheduling, hiring, firing, self audits and ordered supplies. Petitioner started working for respondent on 4/15/13.

Prior to 6/26/13 petitioner had undergone a fusion of her low back in 2007. This procedure was performed by Dr. Reynolds, a neurosurgeon. Petitioner testified that following her discharge from care by Dr. Reynolds in 2007 she had no ongoing problems with her back that required her to follow up with him, or any other doctor. However, petitioner did state that she underwent an MRI of her low back in 2010. This test was ordered by Dr. Raif. Petitioner testified that she was not sure why she had the MRI of her low back in 2010. Petitioner denied any back pain in 2013 prior to the accident. She also testified that she was not under any restrictions when she went to work for respondent.

On 7/19/10 petitioner presented to Dr. Raif, her primary care physician. She reported that she heard a pop in her low back when she was bent over picking something up the day before. She reported pain and difficulty ambulating. She stated that her right leg felt weak and she had radiating pain down her leg. She was assessed with low back pain and right sciatica. She was prescribed Flexeril. An MRI of the low back was ordered. She was restricted from lifting. There are no further records in the Quincy Medical records regarding any follow-up after this incident until the accident on 6/26/13.

In addition to her job with respondent, petitioner lives on a farm and operates her farm. She testified that she was limited when she worked the farm before the accident on 6/26/13.

On 6/26/13 petitioner arrived early at work to unload freight from a semi-truck that had come in the night before that they did not get done. Both the operations and merchandising managers also arrived early to help. At one point, petitioner went back to the office to get cash together for the deposit. She then went to the office where all the merchandise was. While walking there she passed the bathroom and noticed no one had cleaned the bathroom floors the night before. As a result, she went and got the commercial grade janitor mop bucket to fill with chemicals and water. As she was filling the mop bucket, with the squeegee handle off to the side, she leaned forward to grab the metal handle. The handle was stuck. She gave it a pull and felt a pop in her back. She experienced excruciating pain in her back. It was a sharp stabbing pain in her low back on the right side. She held onto the mop handle and hollered for someone to help her. Her co-workers came to her assistance.

Petitioner's husband took her to see Dr. Raif, that same day. She was also seen by Karen Powers, FNP. She gave a consistent history of the accident that day. Petitioner was assessed with back pain with radiation and lumbar disc disorder due to prior surgery with pin and screws. Petitioner underwent a Toradol injection and was prescribed medication. She was also referred to her prior neurosurgeon for possible movement of hardware after prior surgery. Petitioner was taken off work pending recheck.

On 6/27/13 petitioner underwent x-rays and a CT scan of her lumbar spine. The impression was postsurgical change without acute osseous abnormality. These films were reviewed by Dr. Reynolds.

On 6/28/13 Dawn Kindle, LPN, from Dr. Reynolds office, called Dr. Raif's office regarding Dr. Reynold's review of the CT scan performed 6/27/13. It was noted that Dr. Reynolds was of the opinion that the imaging was okay. In a report dated 6/28/13 he noted that petitioner had a left L5-S1 TLIF, and the fusions were solid. He noted that there was no hardware complication. He was of the opinion that it was certainly some kind of muscular event. He saw no concern.

On 7/2/13 petitioner was reexamined and continued to complain of pain in her low back. She was prescribed a course of physical therapy and continued off work. On 7/9/13 petitioner followed up with Dr. Raif. It was noted that Dr. Reynolds had reviewed the CT scan, and petitioner was still in therapy. She reported that her pain was improving, but she still had difficulty with moving and changing positions frequently. She was assessed with a sprain/strain of the lumbar spine. Petitioner was continued in physical therapy and off work.

On 7/16/13 petitioner followed up with Powers. She noted that she was doing better. She was continued in physical therapy and on prescription medication. She was released to work with a ten pound weight restriction, and 80% desk work effective 7/21/13. On 7/22/13 petitioner noted that physical therapy had been helping. She stated that she had been working 45 hours a week, and her boss had given her more desk time. She felt 9 hours a day was too much because by the end of the day she was real sore. Petitioner was prescribed a home TENS unit by Powers, and returned to work with restrictions on working only 4 hours a day, 5 days a week. She was continued in physical therapy. On 8/5/13 her condition was essentially unchanged and her restrictions were continued, with an additional 10 pound weight restriction. Her assessment remained the same.

Petitioner testified that while working 4 hour days leaning forward to cut materials hurt her back. She also testified that reaching overhead hurts her back. She stated that awkward positions and twisting bothered her and caused her pain.

On 8/19/13 petitioner returned to Dr. Raif's office and reported that she still had her TENS unit and was still in therapy. She reported that she still had a lot of muscle tension and did not feel she was progressing well.

She denied any radicular symptoms. She stated that she was still having difficulty at work with prolonged sitting and standing.. Her assessment remained unchanged. Dr. Raif took petitioner off work.

On 9/4/13 petitioner followed-up with Dr. Raif. She reported that she was feeling better and ambulating better. She reported that she had been discharged from therapy. Petitioner has some residual muscular pain. She was instructed to continue with her home exercises and TENS unit. She was restricted to work with a 20 pound weight restriction. Dr. Raif told petitioner that she may need to consider a change in work if she continues to have persistent low back pain. He told her she may need to consider more sedentary work if she continues with persistent low back pain. Dr. Raif noted that he would consider lessening petitioner's restrictions on her next visit if she was better.

Petitioner testified that after she got these restrictions she talked to Amy McCartney with respondent. She testified that McCartney told her that they had no position to offer her within her restrictions. She testified that respondent never offered her any vocational rehabilitation. As a result, petitioner began looking for a job within her restrictions. She testified that she did most of her job searches online. She testified that she went to Monster.com a lot to look for a job.

On 10/7/13 petitioner followed up with Dr. Raif. Petitioner reported that she had primarily muscular pain in the right gluteal, was only using Motrin as needed, had completed therapy, was still having some pain and stiffness with activity, was ambulating okay with occasional sharp pain activity related, no radicular pain, no weakness, and a pain level from 4 to 7 on a scale of 10. Petitioner was still off work pending a Functional Capacity Evaluation (FCE). Dr. Raif examined petitioner and was of the opinion that she was slowly improving and had probably reached maximum medical improvement. He recommended continued use of medications and TENS unit as needed. He noted that if her pain persisted she might want to consider trigger point injections. He continued petitioner's 20 pound weight restriction until she has her FCE. Respondent did not authorize the FCE.

On 1/10/14 petitioner underwent a Section 12 examination by Dr. Mirkin, an orthopedic surgeon and spinal specialist, at the request of the respondent. Dr. Mirkin reviewed her medical records including the MRI report for the MRI of the lumbar spine taken 7/20/10. He noted that it revealed postoperative changes at L5-S1, and mild degenerative changes at L4-L5. Petitioner complained of occasional tightness in the right buttock. He noted that she told him that she wanted to return to work. Dr. Mirkin also performed a physical examination. His impression was preexisting degenerative spine disease, disc protrusion at L4-L5, and signs of a fusion at L5-S1. He was of the opinion petitioner sustained a lumbar strain as a result of the work accident on 6/26/13, and was now doing very well. He was of the opinion that petitioner's lumbar strain had resolved. He opined that petitioner sustained an aggravation of her preexisting back condition and a lumbar strain as a result of the work

injury. He was of the opinion that petitioner had reached maximum medical improvement and was capable of returning to full duty work without restrictions.

On 3/3/14 petitioner underwent a FCE at Quincy Medical Group. She gave a maximum voluntary effort and no extreme overt pain behaviors were seen during the evaluation. The Waddell testing was negative for nonphysical low back pain. Petitioner's gait deficit was not consistent. Petitioner was found to be capable of lifting 20-25 pounds and working at the Medium Physical Demand Level. Work conditioning was recommended. It was noted that petitioner's current job was not at this physical demand level.

On 3/5/2014 petitioner was extended a job offer as In-House Agent Assistant from Whitetail Properties Real Estate, LLC. The position was a full time position. Petitioner accepted the offer and began working on 3/24/14.

On 3/10/14 Dr. Raif gave petitioner permanent weight restrictions of 20-25 pounds. He noted that petitioner had pain with repetitive activity and lifting, that is controlled with medications.

On 3/26/14 Dr. Mirkin drafted an addendum report after reviewing records and petitioner's FCE. He opined that the restrictions placed on the petitioner in the FCE were not reasonable and/or necessary. He did not believe there was any objective reason petitioner needed permanent restrictions. He did not believe petitioner needed to limit sitting to 20 minutes, standing to 5 minutes, and walking for 30 minutes. He noted that petitioner sat for more than 20 minutes in his waiting room. He reiterated his opinion that petitioner could return to work without restrictions if she so desired.

On 6/24/14, the General Manager at Whitetail Properties, proposed a 90 day increase. It was an increased salary of $26,500. This increase was agreed to by Jeff Propst, Mark Williams, and Gabe Adair on 6/23/14 via email. From January through December 2014 petitioner earned $5,776.53.

On 7/8/14 respondent had MedVoc perform a file review and Labor Market Survey. This was performed by Julie Bose, Rehabilitation Counselor. Bose reviewed the records provided, and reviewed the job description of petitioner's current position as an in-house broker assistant, and her job description with respondent. She also reviewed the personnel records from Christopher and Banks, as well as Claire's Boutique, and petitioner's resume. Based on all this Bose was of the opinion has acquired skills transferable to positions such as a retail store manager and retail district manager trainee. Bose found petitioner was petitioner was currently employable as a retail store manager or retail district manager trainee at an entry level salary of $38,633 per year.

Bose provided her Labor Market Survey Results. She noted that she contacted 34 prospective employers. Of the 34 prospective employers contacted, 16 did not respond. 18 prospective employers agrees to participate in the Labor Market Survey. Of the 18 that participated, 3 indicated that petitioner would not be an appropriate candidate for a position in their organization, 2 indicated that they would be unable to accommodate petitioner's work restrictions, and 3 indicated that they require a bachelor's degree. 15 prospective employers were of the opinion that petitioner had the work history and residual functional capabilities necessary to perform work at their organization. Of these 15, 8 indicated that they were hiring, and 7 stated that they did not have a hiring need. Of the 8 that indicated that they were hiring, the salary range varied from $30,000 to $50,000 annually. Bose identified the mean salary of the positions targeted as $38,633. Bose was of the opinion that petitioner was employable within the restrictions outlined in the FCE as a retail store manager or retail district manager trainee. Bose was of the opinion that petitioner could anticipate a starting salary of $38,633 per year, and this salary would increase with advancement and promotion opportunities. The prospective employers were identified in Bose's report. These prospective employers included The Cash Store, Russell Stover Candies $30,000 - $35,000 annually; Denver Mattress Co. $40,000 to $45,000 annually; and Sleep Number, $45,000 to $50,000 annually. Petitioner testified that these jobs were in Springfield, IL, which is 90 miles from her home.On 10/7/14 petitioner underwent a Section 12 examination by Dr. Michael Watson, an orthopedic surgeon, at the request of her attorney, Charles Edmiston. Petitioner reported that she currently worked for Whitetail Properties, a real estate group, as a broker specialist. She reported that the majority of her day is spent using a computer, managing emails, faxing, and other clerical duties. Petitioner testified that her job does not require any lifting, and she is able to change positions and move around to take walks whenever needed. Dr. Watson noted that Dr. Raif's office notes indicate that petitioner was evaluated for low back pain by him on 7/19/10, but there were no office notes for that visit provided. Petitioner complained of pain in the right buttock region that radiates dnto the sciatic notch, with tightness. He noted no significant radiation of pain into the leg or radiculopathy. Dr. Watson noted that petitioner was uncomfortable throughout her examination and requested that she be allowed to change positions and sit and stand at times, to relieve her discomfort. Petitioner was tender in the right lumbosacral region and in the sciatic notch. She had pain with straight leg raising that was limited to the sciatic notch only, with no radiculopathy. No focal weakness was noted in the right lower extremity. She could bend to her knees. Beyond that she had severe pain. She also had pain with hyperextension and lateral bending.

Upon completion of his record review and examination of petitioner, Dr. Watson's diagnosis was degenerative disc disease. He believed this was preexisting , and the work injury as described, accelerated and aggravated this condition to the point where she needed treatment, and to that point continues to have pain, and will likely continue to have pain. He based this opinion on the fact that petitioner had been asymptomatic for

years, and since the injury she has continued to have pain in the low back which has not improved despite conservative treatment. Dr. Watson believed that petitioner's treatment had been reasonable and necessary and causally related to the work related injury. He believed petitioner needs work restrictions, and those restrictions are causally related to the work related accident.

Based on her history, her physical examination and her work capacity evaluation, Dr. Watson believed that petitioner's work restrictions should include no lifting greater than 15 pounds occasionally, and no lifting greater than 5 pounds frequently. He was of the opinion that petitioner could do sedentary work, but be able to stand or walk occasionally, perhaps every 10-15 minutes of each hour to alleviate her low back pain. Dr. Watson believed petitioner's prognosis was fair. He also believed she was at maximum medical improvement, and these restrictions were permanent. Dr. Watson noted that he reviewed Dr. Mirkin's Section 12 examination of petitioner. He noted that petitioner told him that Dr. Mirkin's statements that on several occasions she was doing well and that she had been requesting to return to work without restrictions, were untrue. He noted that she never told this to Dr. Raif and Dr. Raif never denied such requests because they were never made.

Petitioner offered into evidence her Job Search records from mid January 2014 through 2/23/14. Petitioner applied for jobs online. These applications/resumes were sent to US Bank Sales & Service, Quincy Compressor, CGB Grain Division/CGB Enterprises, Inc., Fifth Gear, Bartlett and Company, Quincy Herald, Clearing Building Corp, Bank of Springfield, GSHQ, State Farm, Maschhoffs, Harpole's Heartland Lodge, Pike Highway, and Home Depot.

On 12/29/14 the evidence deposition of Dr. Mirkin was taken on behalf of the respondent. Dr. Mirkin sees patients in his office three days a week and does elective spinal surgeries two days a week. Occasionally he does some general orthopedic surgery as well. He spends about 10% of his practice doing medical reviews on patients he does not treat. Dr. Mirkin noted the L4-L5 bulging disc on the July 2010 MRI was the same as that seen on the April 2006 MRI, and the CT scan taken following the injury. He opined that it was just an anatomic finding. Dr. Mirkin opined that petitioner sustained a lumbar strain at work in June 2013, and her strain resolved. He opined that this was a temporary aggravation. He stated that it is common for patients who have lumbar fusions and disc bulges and protrusions to have episodal back pain. Dr. Mirkin opined that petitioner had no physical reason why she could not return to work as a manager for respondent if she wanted to. He testified that petitioner told him in her initial interview that she wanted to return to work and did not know why she was off work. Dr. Mirkin questioned the findings of the FCE because on the first page it says she is capable of working at the medium physical demand level, and later in the report states she can work at the sedentary level. He also noted that there were recommendations for further treatment, which is not the role of the FCE provider.

He saw no physical reason why petitioner should be restricted to lifting only 25 or 26 pounds. Dr. Mirkin opined that there were no changes in her physical abilities from the date of the injury that would make her be able to do less now than she could before the date of the injury.

On cross-examination Dr. Mirkin testified that people with a disc bulge may or may not have associated pain. He agreed that petitioner's injury could have aggravated or flared-up her preexisting condition. He was of the opinion that if petitioner's testimony, that she had no pain in the year preceding her injury was true, and she had pain after the injury, then the accident could possibly be a contributing cause of the flareup and symptoms. Dr. Mirkin was of the opinion that petitioner only had very mild subjective complaints when he examined her, and for that reason was of the opinion that she did not have to change her career. Dr. Mirkin stated that he has done previous examination for Spiegel & Cahill, including about 1-3 in the last six months.

On 1/28/15 the evidence deposition of Dr. Watson was taken on behalf of the petitioner. He testified that 10% of his practice is taking care of spine cases. He also reported that he does approximately one Section 12 examination a week, primarily for workers' compensation cases, with approximately 50% for petitioner and 50% for respondents. In the past it was primarily for petitioners. Dr. Watson opined that petitioner had degenerative disc disease that was preexisting and accelerated or aggravated by the work accident. He opined that the accident made her asymptomatic condition symptomatic. He opined that the treatment she received for her low back since the accident has been causally related to the accident. He further opined that petitioner was restricted from lifting greater than 15 pounds occasionally, and no lifting greater than 5 pounds frequently. He opined that petitioner could do sedentary work, but be able to stand or walk occasionally, perhaps every 10-15 minutes of each hour to alleviate her low back pain. Dr. Watson opined that these restrictions were permanent.

On cross examination Dr. Watson estimated that he reviewed 6-7 inches of records for petitioner. He testified that over the past ten months he stacked up all his records in his basement. His intent to was to start throwing them away or shredding them after a year. He testified that he went to that pile to look for petitioner's records and they were not there. Dr. Watson testified that he did not used to keep records for independent medical evaluations because all his records are electronic, and he does not consider these people his patients. He stated that he did not know the legality of keeping these records. Dr. Watson testified that he did not do any independent gathering of records for petitioner. He testified that he was forwarded the records. Dr. Watson noted that there were no acute changes when petitioner's scan from 2006 and 2013 were compared, based on the radiologist's report. Dr. Watson testified that he has not been involved in any spine surgery since 1991. Dr. Watson testified that petitioner was not taking pain medications when he examined her. Dr. Watson was of the opinion that the ability to forward flex would be impacted by a fusion. Dr. Watson was of the opinion that

symptoms can wax and wane and just because someone is determined to be at maximum medical improvement does not necessarily mean that they are not going to get any better. He was of the opinion that petitioner could improve.

On 2/3/15 petitioner's attorney Edmiston, drafted a letter to Miles Cahill, respondent's attorney. The letter stated "Enclosed are the records you requested that were sent to Dr. Watson prior to the IME appointment for our client Terri L. Robbins." Attached to this letter were the referenced records which were about 1 inch thick.

Petitioner testified that she currently earns $28,000 annually. She testified that she has her own office and can come and go as she pleases because she is salaried. She testified that she can also work from home. Petitioner does not do any lifting, and can stand and sit as needed.

Petitioner testified that she can sit for a period a time before she needs to get up and walk and stretch. She reported difficulty with vacuuming and cleaning carpets. She stated that making beds causes her pain. She testified that she is not nearly as active as she used to be and has gained a lot of weight. She also testified that she used to help out a lot more on the farm than she has over the last couple years. She testified that her job was driving the tractors but the motion bothers her now. She testified that she does not ride motorcycles a lot anymore. She also stated that physical things with her husband are not the same. Petitioner takes Tylenol and Motrin as needed, about 2-3 times a week. Petitioner also has a TENS unit that she wears at night depending on her activity that day. She stated that she may use it once a week or can go many weeks without using it. She testified that if she tries to drive a truck on the farm, she has pain over the next couple of days. She complained of tense muscles on the right side of her low back. Petitioner complained of pain daily, with some days worse than others. Petitioner denied any problems before the accident, but stated that her pain has been real bad since she got hurt on 6/26/13.

Petitioner testified that prior to 2014 she was a volunteer for the volleyball league and helped with fundraising. She testified that she only drives the tractor or 2 ton truck if needed. She stated that the tractor has air seats. She testified that she drove the truck 3 times in 2014, but did not drive it in 2015.

Petitioner testified that she did not see Reynolds after the accident on 6/26/13. She testified that she had no surgical recommendation or injections after the accident. She further testified that after her initial course of physical therapy following the accident, she did not have any other therapy.

Gary Robbins, petitioner's husband, was called as a witness by petitioner. He testified that he was present when Dr. Mirkin examined petitioner. He testified that petitioner did not tell him that she wanted to return to work without restrictions. He testified that she told him she would like to return to work, but for the pain and

restrictions. Mr. Robbins testified that Dr. Mirkin checked reflex action in the knees. He testified that Dr. Mirkin's told petitioner to go back to work, and that she would have pain for the rest of her life.

Medical records prior to the accident on 6/26/13 show that petitioner presented to Dr. Reynolds on 5/23/06 for a herniated disc after she fell off a trailer. Dr. Reynolds then performed a one level fusion in the summer of 2006. On 8/31/06 petitioner told Dr. Reynolds that she was driving a tractor, using a vacuum and mowing. Dr. Reynolds told her that that was too much activity. On 1/4/07 petitioner reported pain and radiating pain in her back despite reduced activities. On 5/31/07 petitioner was riding motorcycles with her husband and noticed leg numbness. At that time Dr. Reynolds evaluated her fusion to see if it was solid and noticed tissues pressing on the nerve root at L5-S1.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The parties stipulate that petitioner sustained an accidental injury to her low back that arose out of and in the course of her employment by respondent on 6/26/13. Differing opinions exist as to whether or not petitioner's injury on 6/26/13 caused a temporary aggravation of her preexisting condition, or caused a permanent aggravation, exacerbation of her preexisting condition. In support of these positions, position offered the opinions of Dr. Raif and Dr. Watson. Alternatively, respondent offered the opinions of Dr. Mirkin.

It is unrebutted that petitioner underwent a one-level fusion to her low back in 2007. This procedure was performed by Dr. Reynolds. Following post-operative treatment petitioner was released to full duty work without restrictions. In 2010 petitioner had some complaints that necessitated the need for her to undergo a MRI of her lumbar spine. Following this, petitioner was again released to full duty work without restrictions.

When petitioner began working as a store manager for respondent on 4/5/13 she did not have any restrictions. In fact, petitioner worked a heavy duty job for respondent that included the unloading of merchandise from the trucks and stocking the shelves. Petitioner worked without incident until she sustained her unrebutted injury to her low back on 6/26/13.

Immediately following the injury petitioner sought treatment and received a Toradol injection. She also underwent a CT scan that was reviewed by Dr. Reynolds. Dr. Reynold's noted that CT scan was okay, and her left L5-S1 TLIF and fusion were solid. He noted no hardware complication, and believed she had sustained some kind of muscular event.

From the date of accident petitioner continued with complaints of lumbar spine pain. She reported difficulty moving and changing positions frequently. Based on her complaints petitioner underwent a course of physical therapy. For a while petitioner was taken off work. Thereafter she was released with restrictions.

Petitioner attempted to work within her restrictions, but continued to experience increased pain. From the date of the injury, through the present date, petitioner has been either authorized off work, or restricted to light duty work by her treating physician, Dr. Raif. She has also continued to complain of increased pain and stiffness with activity, and occasional sharp pain with activity.

On 10/7/13 Dr. Raif was of the opinion that petitioner had reached maximum medical improvement. He recommended continued use of medications and a TENS unit as needed. He gave her a 20 pound weight restriction pending an FCE that respondent would not authorize. Additionally, respondent indicated that they had no work for respondent within these restrictions.

Three months later respondent finally had petitioner examined by Dr. Mirkin, an orthopedic surgeon. He opined that she sustained an aggravation of her preexisting back condition and lumbar strain that had resolved, as a result of the injury on 6/26/13. He believed she was doing very well, had reached maximum medical improvement and could return to full duty work.

On 3/3/14 petitioner finally underwent the FCE recommended by Dr. Raif in October of 2013. It was noted that petitioner gave maximum effort and had no extreme overt pain behaviors. Her Waddell testing was also negative. Petitioner was found capable of lifting 20-25 pounds and working at the Medium Physical Demand Level. Work conditioning was recommended, however, none was provided. Respondent agreed that petitioner's current job did not meet these restrictions. On 3/10/14 Dr. Raif indicated that petitioner would have permanent restrictions in line with the FCE.

After reviewing the FCE, Dr. Mirkin opined that the restrictions placed on the petitioner in the FCE were not reasonable and/or necessary. He found no objective basis for these permanent restrictions.

On 10/7/14 petitioner was examined by Dr. Watson, an orthopedic surgeon. Dr. Watson opined that the injury on 6/26/13 as described accelerated and aggravated her preexisting lumbar spine condition to the point where she needed treatment, and continues to have pain. Dr. Watson found it significant that petitioner had been asymptomatic and had received no treatment for her lumbar spine for years preceding the injury, and in fact worked a heavy duty job for respondent for months before she sustained her injury. He opined that petitioner needed permanent work restrictions, that are causally related to her work injury. He provided work restrictions greater than those outlined in the FCE.

In his deposition Dr. Mirkin opined that since petitioner's MRI results in 2006 and 2010, and the results of the CT scan following the injury were essentially the same, that petitioner had only sustained a strain that had resolved. He saw no physical reason why petitioner could not work her regular duty job for respondent. On

cross-examination Dr. Mirkin agreed that petitioner could have aggravated or flared-up her preexisting condition. He also agreed that if petitioner's testimony, that she had no pain in the year preceding the injury was true, and she had pain after the injury, then the accident could possibly be a contributing cause of her flareup and symptoms. Dr. Mirkin testified that he had performed 1-3 Section 12 examinations for respondent in the last 6 months.

In his deposition Dr. Watson opined that he currently does about 50% of his examinations for petitioner, and 50% for respondent, but in the past had done them primarily for petitioners. He opined that petitioner had a preexisting degenerative disc condition that was accelerated or aggravated by the work accident. He opined that she had been asymptomatic for years prior to the injury on 6/26/13 and has been symptomatic since.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Raif and Dr. Watson more persuasive than those of Dr. Mirkin. The arbitrator finds their opinions are more accurately based on the credible medical evidence. It is unrebutted that petitioner had undergone a prior fusion to her lumbar spine in 2006, and after completing treatment was without any significant complaints since then, other than a short time in 2010 when a repeat MRI was performed that was unchanged from the one taken post surgery. The arbitrator further finds that in the years preceding the accident on 6/26/13 there is no credible evidence to rebut the finding that petitioner was working full duty without restrictions and had sought no medical treatment for her lumbar spine.

It is also unrebutted that following the accident the petitioner has remained symptomatic and unable to perform activities at the level she was able to before the injury. The arbitrator finds it significant that no medical provider had opined that petitioner was malingering or exaggerating her symptoms, and she was found to have performed a valid FCE.

The arbitrator finds Dr. Mirken's opinion that petitioner is able to return to full duty work is not consistent with the credible evidence and the results of the valid FCE, and appears to be based solely on the fact that there were no objective findings to her lumbar spine based on the results of the CT scan. The arbitrator finds that although there were no objective changes seem on petitioner CT scan of her lumbar spine, the credible evidence shows that petitioner has remained consistently symptomatic since the accident.

Based on the opinions of Dr. Raif and Dr. Watson, petitioner's consistent complaints following the injury, and the credible findings of the FCE, the arbitrator finds the petitioner has proven by a preponderance of the credible evidence that her current condition of ill-being as it relates to her low back is causally related to the

injury she sustained on 6/26/13. The arbitrator finds the petitioner is capable of working at the Medium Physical Demand Level.

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?

Having found the petitioner's current condition of ill-being as it relates to her low back is causally related to the injury she sustained on 6/26/13, the arbitrator finds all treatment petitioner received for her lumbar spine from 6/26/13 through 3/5/15 was reasonable and necessary to cure or relieve petitioner from the effects of her injury on 6/26/13.

Respondent shall pay reasonable and necessary medical services for petitioner's lumbar spine from 6/26/13 through 3/5/15, as provided in Sections 8(a) and 8.2 of the Act

Respondent shall pay 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.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims she was temporarily totally disabled from 6/26/13-7/20/13, and 8/18/13-3/10/14, a period of 32-6/7 weeks. Respondent disputes this period, and claims petitioner was temporarily totally disabled from 6/26/13-7/20/13, and 8/18/13-1/27/14, a period of 26-6/7 weeks.

Petitioner claims she is entitled to maintenance benefits from 3/11/14-3/23/14, a period of 1-6/7 weeks. Respondent disputes and claims "subject to proof".

The arbitrator finds the parties agree that petitioner was temporarily totally disabled from 6/26/13-7/20/13, a period of 3-4/7, and 8/18/13-1/27/14, a period of a period of 23-2/7 weeks. Therefore the arbitrator will only address the period 1/28/14-3/10/14.

Given the fact that the arbitrator has found petitioner's current condition of ill-being as it relates to her lumbar spine is causally related to the injury she sustained on 6/26/13, that petitioner had reached maximum medical improvement by these dates (1/28/14-3/10/14), and was actively pursuing a job search, the arbitrator finds the petitioner was not temporarily totally disabled during this period, but had reached maximum medical improvement and was entitled to maintenance benefits for this period. Furthermore, since petitioner had attained maximum medical improvement and was still actively pursuing a self directed job search during the period 3/11/14-3/23/14, the arbitrator further finds petitioner is entitled to additional maintenance benefits for this period.

Based on the above, the arbitrator finds the petitioner was temporarily totally disabled from 6/26/13-7/20/13, a period of 3-4/7, and 8/18/13-1/27/14, a period of a period of 23-2/7 weeks, for a total of 26-6/7 weeks, by agreement of the parties. The arbitrator further finds the petitioner was entitled to maintenance benefits for the period 1/28/14-3/23/14, a period of 7-6/7 weeks.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Petitioner is alleging that she is entitled to a wage differential pursuant to Section 8(d)1 of the Act. The respondent claims the petitioner is not entitled to a wage differential pursuant to Section 8(d)1 of the Act, but rather a loss of use pursuant to Section 8(d)2 of the Act.

Having found the opinions of Dr. Raif and Dr. Watson more persuasive that Dr. Mirkin, the arbitrator finds the petitioner, as a result of the accidental injury, became partially incapacitated from pursuing her usual and customary line of employment. The arbitrator bases this finding on the fact that petitioner was found capable of working at the medium physical demand level as a result of her valid FCE and petitioner's job with respondent was not within these restrictions.

After petitioner's restrictions, consistent with the findings of the FCE, were made permanent by Dr. Raif, and respondent could not accommodate these restrictions, and did not offer petitioner any vocational rehabilitation, petitioner began her own self directed job search, and on 3/24/14 began a job with Whitetail Properties Real Estate, LLC, as an In-House Agent Assistant. Petitioner is currently earning $28,000 annually.

On 7/8/14, almost 4 months after petitioner secured alternate employment within her restrictions, respondent hired MedVoc to perform a file review and Labor Market Survey. This was performed by Julie Bose, a Vocational Rehabilitaiton Counselor. Bose determined that petitioner could anticipate a starting salary of $38,633 per year, based on the 8 jobs she determined were hiring and were within her restrictions. However, the arbitrator finds the respondent offered petitioner no assistance in trying to acquire these positions, and most of these positions were 90 miles from her home. Therefore, the arbitrator finds Bose's opinion that petitioner could secure a job with a starting salary of $38,633.00 annually, speculative at best. Additionally, the arbitrator finds it significant that respondent made no attempt to assist petitioner at all with her job search. The arbitrator finds the job petitioner secured, based on her own independent job search, is suitable employment upon which to determine a wage differential pursuant to Section 8(d)1 of the Act.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner is entitled to a wage differential pursuant to Section 8(d)1 of the Act. Given the fact that petitioner offered no evidence to support a finding that the average amount she would be able to earn in the full performance of her duties in the occupation

in which was engaged at the time of the accident was greater than the $808.00 a week she was earning in the year preceding the accident, the arbitrator finds the average amount petitioner would be able to earn in the full performance of her duties in the occupation in which she was engaged at the time of the accident was $808.00 per week. The arbitrator further finds the average amount petitioner is earning or is able to earn in some suitable employment or business after the accident is $538.46 a week, based on an annual salary of $28,000. Therefore, the arbitrator finds the petitioner is entitled to a wage differential pursuant to Section 8(d)1 of the Act in the amount of $179.69 per week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

O. IS THE DEPOSITION OF DR. WATSON'S ADMISSIBLE?

Respondent has objected to the admission of Dr. Watson's deposition based on Dr. Watson's testimony during the deposition that he estimated that he reviewed 6-7 inches of records for petitioner. Dr. Watson testified that over the past ten months he stacked up all his records in his basement. His intent to was to start throwing them away or shredding them after a year. He testified that he went to that pile to look for petitioner's records and they were not there. Dr. Watson testified that he did not used to keep records for independent medical evaluations because all his records are electronic, and he does not consider these people his patients. Dr. Watson testified that he did not do any independent gathering of records for petitioner. He testified that the only records he reviewed were forwarded to him by petitioner's attorney.

Petitioner's attorney, Chuck Edmiston, as an Officer of the Court, testified that the only medical records he forwarded to Dr. Watson for review were the medical records that he offered into evidence at trial, that being 1 inch of petitioner's medical records. Attorney Edmiston stated that Dr. Watson's estimate that he reviewed 6-7 inches of petitioner's was simply inaccurate. The arbitrator finds it significant that Respondent did not object to the admission of any of petitioner's exhibits, including Dr. Watson's report of petitioner's Section 12 examination and petitioner's medical records. The arbitrator also finds it significant that respondent could not show any testimony, opinions or findings by Dr. Watson during his deposition, upon which one could reasonably infer that it was related to records outside those that petitioner's attorney sent Dr. Watson for review, and were admitted into evidence.

Based on the above, as well as the credible evidence, the arbitrator finds the respondent has failed to show that Dr. Watson's estimate that he reviewed 6-7 inches of petitioner's medical records, when it was actually 1 inch of records, is a sufficient basis upon which to bar the entire testimony of Dr. Watson. The arbitrator finds Dr. Watson' s estimate that he reviewed 6-7 inches of records, was simply a mistake, and his testimony during

his deposition is consistent with the petitioner's medical records offered into evidence by petitioner, and not objected to by respondent. The arbitrator further finds the respondent failed to show that there was any testimony during Dr. Watson's deposition from which one could reasonably infer that it was based on medical records of petitioner that were not offered into evidence. The arbitrator denies respondent's Motion to Bar the Testimony of Dr. Watson.

14WC 005682
Page 1

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

Timothy Ooms,
Petitioner,
vs.
The Anderson's Inc.,
Respondent,

NO: 14WC 5682

16IWCC0123

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, 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 26, 2015 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 $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: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

OOMS, TIMOTHY
Employee/Petitioner

Case# **14WC005682**

14WC013639

THE ANDERSON'S INC
Employer/Respondent

16IWCC0123

On 5/26/2015, 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:

0333 SHAY & ASSOCIATES
KATHERINE WOOD
260 E WOOD ST
DECATUR, IL 62523

2904 HENNESSY & ROACH PC
PAUL N BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0123

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIMOTHY OOMS,
Employee/Petitioner

v.

THE ANDERSON'S INC.
Employer/Respondent

Case # **14** WC **5682**

Consolidated cases: **14 WC 13639**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0123

FINDINGS

On the date of accident, **12/4/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**2,1379.10**; the average weekly wage was $**593.86**.

On the date of accident, Petitioner was **49** years of age, *married* 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 $**3,845.93** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**3,845.93**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being is causally related to the alleged injury on 12/4/13. Petitioner's 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.

Signature of Arbitrator

5/20/15
Date

ICArbDec19(b)

MAY 26 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 49 year old bagger, alleges he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent that manifested itself on 12/4/13. This case was heard in consolidation with case 14 WC 13639, with an alleged accident date of 2/28/14. A separate decision has been issued with respect to this claim.

On 8/21/12 petitioner underwent a physical at Decatur Memorial Hospital, performed by Dr. Barnes. This was a pre-placement examination for ADM Birkbeck Grain Elevator EA9. Petitioner's examination was normal.

Petitioner worked for respondent through a temporary agency from November 2012 through March 2013. In March 2013 petitioner was hired full-time by respondent and continued to work for respondent until 12/5/13.

Petitioner was a bagger for respondent. His duties included taking a bag off the table, putting it on the spout of the hopper by clamping the bag onto the hopper, then pulling down the lever with his right hand to fill the bag with corncob. When 50 pounds filled the bag, the hopper would automatically stop. Petitioner would then flip the lever off, release the clamps, and the bag would fall on the conveyor. Petitioner would then step on a pedal that would move the conveyor. The bag would move to the sew area, 20 inches away. Petitioner would fold down the top of the bag together, press another pedal and the sewing machine would sew the top of the bag. Petitioner would then cut the string off the sewing machine right at the end of the sewing machine. Once the bag was filled and sewed, petitioner would pick the bag off the conveyor and place it on the pallet. Other duties that petitioner performed included running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. He testified that he has a lot of duties, but his primary job is bagging.

Petitioner testified that on 12/4/13 he was working all three jobs by himself (filling, sewing and loading the pallet) and the machine was going much faster than normal. He testified that he worked 10 hours that day, and filled seven pallets, each with 50 bags on it. Petitioner testified that throughout the day he was constantly twisting his back, and throwing the lever up and down with his right hand a lot. After he completed his shift petitioner noticed that his back was hurting. He reported the incident to a coworker named Ken Meagher, and to Ed Combs, the production manager. He testified that by the time he got home, which was a 30 minute drive, he could not get out of car because his back hurt. He complained of stabbing pain in his back, and radiating pain through his buttocks and down the backside of his right leg. Petitioner denied any prior problems with his back before this date.

On 12/5/13 petitioner had difficulty getting out of bed, but went into work and told Ed that his back was hurting and his wife was making an appointment for him. Petitioner attempted to run production that day and could not handle it. He worked on the line for about 30 minutes and then went home.

On 12/5/13 petitioner presented to Dr. Kureishy, his primary care physician, with complaints of back pain. He identified the onset of the symptoms as one day ago, and sudden. Petitioner reported that he had taken two Skelaxin. Petitioner reported sciatica with pain shooting down the right leg. Dr. Kureishy ordered physical therapy, and took petitioner off work through Sunday. Dr. Kureishy noted that petitioner had chronic back pain and was taking Skelaxin. On 12/9/13 petitioner returned to Dr. Kureishy and stated that he was not feeling any better. Dr. Kureishy ordered an MRI and took petitioner off work for four days. On 12/20/13 petitioner continued to complain of back pain, and stated that he was unable to sit. Dr. Kureishy continued petitioner off work for 15 days.

On 12/27/13 petitioner completed an Injury Report for Workers' Compensation. Petitioner described his duties as bagging material and stacking 40 to 50 pound bags on a skid, sewing bags with product, cleaning, sweeping, and forklift operator. Petitioner indicated that he worked 50+ hours a week including weekends. Petitioner also indicated that in addition to his job for respondent he had part-time work through November 2013. He stated that he ended this employment due to his increased work hours for respondent. Petitioner identified this concurrent employment as "private care – driving to store, dr. appts, etc." Petitioner noted that he injured himself on 12/4/13 during the duration of the day. He described the injury as back pain and pressure escalating towards the end of the day on the bagging line. Petitioner noted that he reported the injury to Ed Combs first thing on 12/5/13. The history provided was "I had injured my back and 12-4 and was waiting on my wife to get an appointment with doctor. At 8:30 AM I was in too much pain and reported to Ed again that I had hurt my back and was told to go home and see doctor. On 12/6 I gave a report to Tom Keller of what doctor said." Petitioner's symptoms were noted as back pain and stiffness, sharp pain shooting into buttock and right leg, numbness and weakness, tender to light touch with swelling. Petitioner noted that his injury was witnessed by Kent Meagher. He noted that Meagher witnessed him working alone on the bagging line and requesting help during the day on 12/4. Petitioner also noted on the form that on 12/3/13 he worked a double shift for respondent, and on 12/4/13, the date of injury, he worked a 10 hour shift and had made numerous attempts trying to get additional manpower on the bagging line. On 12/5/13 he attempted to go to work but only lasted 1 1/2 hours before the pain was unbearable.

On 1/23/14 petitioner continued to complain of low back pain. Dr. Kureishy recommended a course of physical therapy. He noted that they were still waiting on the MRI of petitioner's low back. Dr.

Kureishy also urged petitioner to lose weight. Petitioner was continued off work. On 1/23/14 petitioner reported that he was still having shooting pains down the right leg, and loses his balance. He complained of pain and numbness in the buttocks.. He stated that he had an appointment with Dr. Krause on 2/28/14.

On 2/6/14 petitioner returned to Dr. Kureishy staggering while walking. He complained of numbness in his right side, glut and hip area radiating down his side. He also complained of numbness in his left little finger. Dr. Kureishy noted a right ulnar nerve entrapment shooting down the outer right forearm. He recommended an EMG/NCV. Petitioner was continued off work. On 2/21/14 petitioner continued to complain of back pain, and hand/arm numbness/tingling. Petitioner stated that his carpal tunnel syndrome was related to repetitive motion at work.

On 2/28/14 petitioner presented to his cardiologist, Dr. Jyothinagaram. He reported that his activity had decreased over the last few months due to a backache. He also stated that he had carpal tunnel syndrome and was scheduled for carpal tunnel surgery and elbow nerve relief surgery. Petitioner noted that he was a smoker from 1983 to 2001, and would smoke one pack a day. After petitioner stop smoking cigarettes he started chewing tobacco, and graduated to chewing snuff. He was instructed to discontinue use of snuff.

On 2/28/14 petitioner also presented to Dr. Robert Krause at Decatur Neurosurgery Associates, for low back pain. His chief complaint was low back pain, and bilateral hand numbness and tingling. Petitioner reported that his lower back pain developed sometime in December. He related a work injury where he was twisting his back and developed symptoms. He complained of pain about his right lower back, that occasionally travels into the leg. He reported that he had been using Norco, Valium, and Neurontin, without any significant relief. Petitioner denied any left leg symptoms. He stated that therapy exacerbated his pain. Petitioner also complained of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the fourth and fifth digits. Dr. Krause saw no obvious weakness in petitioner's hands, but petitioner reported that he had diminished grip strength. Petitioner reported some symptoms in his left hand, but was more worried about the right hand. Petitioner did not report any nocturnal pain. Dr. Krause reviewed the results of petitioner's MRI of the lumbosacral spine dated 1/15/14. He was of the opinion that it showed mild arthritic changes about the low back. No evidence of disc herniation was seen. He also reviewed the EMG nerve testing performed 2/13/14 which revealed bilateral severe carpal, and moderate to severe, right greater than left, cubital tunnel syndrome. Dr. Krause's impression was lumbosacral sprain/strain with mild arthritic changes of the lumbosacral spine; morbid obesity; bilateral carpal tunnel syndrome, right greater than left; cubital tunnel syndrome. Dr. Krause saw no need for spinal surgery. He recommended physical therapy and a

referral to the pain clinic. He released petitioner to light duty activities. He also released petitioner on an as needed basis with respect to his low back. He continued treating petitioner for his bilateral carpal and cubital tunnel syndrome.

On 3/5/14 petitioner presented to Dr. Rehman at Decatur Memorial Hospital Millennium Pain Center, for his lower back pain that started on 12/4/13 when he was working a 12 hour shift, and was doing a three-man job by himself. Petitioner reported that he was doing a lot of turning and twisting, and was also lifting/throwing 50 pound bags. Petitioner reported that by the end of that day, he had moved 8 tons of material. He stated that by the time he got home he could not get out of his car. He reported that his back pain radiates down posterior leg to his knee, right worse than left. He reported that the pain in his back is constant, and the pain in his legs is intermittent. He also complained of some numbness in the right side of the buttocks. Petitioner also stated that he stumbles occasionally and has an unsteady gait. He reported his pain as a sharp, stabbing pain that feels like a knife with a baseball on the end of it. Petitioner reported that he just finished therapy, and was discharged because it was making the pain worse, and he was not improving. Petitioner reported that the TENS unit gave him a few hours of relief. Dr. Rehman was of the opinion that petitioner has many multiple pain generators and he would try to address one at a time, starting with an L4–L5 epidural steroid injection bilaterally. Petitioner was also given a back brace, especially for use at work.

On 3/7/14 petitioner returned to Dr. Kureishy. His history included acute back lumbar sacral pain, sudden onset one month ago, radiating down the right leg, moderate in severity. Dr. Kureishy's diagnoses included chronic low back pain, chronic sciatica, and chronic carpal tunnel syndrome. Then on 3/20/14 petitioner returned to Dr. Kureishy. He complained of back pain since he received a shot in his back. He complained of right-sided pressure on his butt, and stated that his left side felt like a knife following the injection. Petitioner's low back pain complaints included not only the right side but the left side. He reported that they were acute and moderate in severity. He reported that the exacerbating factors are activities. Dr. Kureishy's diagnoses were chronic low back pain and chronic sciatica. Dr. Kureishy noted that petitioner's physical therapy was stopped because it was making things worse. It was noted that petitioner was taking Norco and diazepam.

On 3/21/14 petitioner underwent a right median nerve decompression at the wrist, and right ulnar nerve decompression without transposition, performed by Dr. Krause. Petitioner's postoperative diagnoses were right carpal tunnel syndrome, and right cubital tunnel syndrome. Petitioner followed up postoperatively with Dr. Krause.

On 3/31/14 petitioner reported to Dr. Rehman that he had received at least 50% relief from his lumbar L4–L5 epidural steroid injection performed 3/14/14. Dr. Raymond performed a repeat lumbar L4-L5 epidural steroid injection.

On 4/1/14 petitioner related improvement of his right fourth and fifth digit numbness. He noted no adverse events after the decompression. He reported discomfort in the right and pain in his left hand along his wrist, and numbness and tingling along his left fourth and fifth digits. Petitioner made no complaints of any back pain. Dr. Krause released petitioner to driving, and continued petitioner's lifting restrictions at 20 pounds.

Petitioner followed up with Dr. Kureishy on 4/3/14 and 4/16/14. On 4/16/14 petitioner continued to complain of low back pain, with new complaints of radiating pain into the bilateral thighs. He identified the mechanism of injury as twisting daily. Petitioner reported that injections, medication, physical therapy were not providing any long-term relief.

On 4/23/14 petitioner returned to Dr. Krause with multiple complaints and concerns. He complained of severe lower back pain and severe pain about his left elbow. He also related numbness along his right fifth digit. Dr. Krause ordered a course of occupational therapy. He released petitioner back to work with lifting restrictions of 50 pounds. His prognosis for petitioner was poor. He suspected secondary gain issues.

On 4/30/14 petitioner told Dr. Kureishy that he had undergone four shots into his back without any lasting relief. He reported that he would be undergoing an epidural pain shot at the pain center. He reported that his pain was more on the left side with tingling, as opposed to the right side. From this point on Dr. Kureishy's work releases indicated that petitioner could return to work "pending drs release".

On 5/5/14 Dr. Rehman performed a bilateral sacroiliac joint injection. On 5/19/14 petitioner was seen by Keith Cermak, Dr. Rehman's nurse practitioner. Petitioner reported that he received around 50% relief for approximately 4 to 5 days following the injection and then his pain returned. He stated that he no longer had constant numbness in his buttocks, but his back felt like it did before the injections. Petitioner reported that he was still experiencing the same pain as before, but now worse on the left side instead of the right. Dr. Rehman was of the opinion that petitioner had positive facet maneuvers bilaterally. He suspected spinal facet joint syndrome. On 6/10/14 petitioner underwent a left lumbar facet injection at L3-L4, L4-L5, L5-S1. Dr. Rehman's diagnosis was facet arthropathy.

On 6/18/14 petitioner returned to Dr. Krause with prominent complaints of lower back pain. He did not report any like symptoms. He reported that his right arm and hand were doing better. He complained

of some pain and numbness along the fifth digit only. Petitioner reported that he had been working with the Millennium Pain Center with various injections. Dr. Krause continued petitioner's 50 pound lifting restriction. He also reiterated that he did not see anything on petitioner's low back that would require surgery.

On 6/27/14 petitioner reported to Dr. Kureishy that his back pain was continuing, and he had shooting pain in the back down the legs. He told Dr. Kureishy that he was going to be undergoing a nerve ablation.

On 7/1/14 petitioner underwent an MRI of his lumbar spine. The results revealed posterior disc bulging at L2-L3 greater than at L3-L4; degenerative change; mild foraminal encroachment by disc bulge and broad-based herniation on the left at L2–L3, greater than at other lumbar levels.

On 7/9/14 petitioner returned to Dr. Rehman to discuss the results of his new MRI. Petitioner reported that he was having some low back pain, more on the right side. He stated that his pain was worse when he tried to stand from a sitting position. Petitioner reported some swelling in his low back, more on the right side. With respect to the left lumbar facet injection on 6/10/14, petitioner reported that he was unsure if the injection helped because he was having so much pain bilaterally, and he was unable to determine which side was hurting. Dr. Rehman gave petitioner a TENS unit and scheduled epidural steroid injections bilaterally at L2–L3, which petitioner underwent on 7/22/14.

On 7/14/14 petitioner underwent a Section 12 examination performed by Dr. Carl Graf, at the request of the respondent. Petitioner gave Dr. Graf a history of working for a corncob company which grinds corncobs to be used for products such as Kitty litter, spreading on baseball fields, cleanup, etc. Petitioner stated that he worked in the position of a "bagger" on the assembly-line. Petitioner started in November with a temp agency and then on 3/17/13 he was hired full-time by respondent. He stated that his job required him to place the bags under a spout and then once they were filled, line them up and sew the bag shut, then throw it up onto the pallet. Petitioner reported that this is a three-person job, but since the company was short on manpower and he was working alone on 12/3/13 or 12/4/13, and could not keep up with the machine. He stated that he worked a double shift on both days by himself and completed 17 pallets each day, or 14 tons of material. Petitioner stated that his back hurt when he left that day. He stated that the next day he could not get out of bed at first, and then was finally able to get up. He reported that he went into work and reported the injury. He testified that he filled approximately 5 bags, but then left work and has been off work since that time.

Petitioner rated his pain at a 7/10, and stated that he was on Percocet. He described the pain as being in his low back with numbness in the right buttocks, which is constant. He complained of occasional right posterior thigh pain to the level of the knee, and occasional left buttocks numbness rarely. Petitioner denied any prior problems with his back. An examination revealed a very slow, though normal reciprocal gait. Petitioner had no difficulty stepping up on his tip toes or up onto his heels. He had a very minimal ability to squat and raise from a squatting position, noting pressure on his knees. An examination of the lumbar spine revealed pain to palpation that was light, one finger touch on the right side of the low back. He described his pain as 9/10. Petitioner's chief complaint was low back pain.

Dr. Graf noted that petitioner demonstrated the following non-organic pain signs on evaluation: 1) pain to light, one finger touch on the right side of the low back described as a 9/10; 2) pain in the low back with simulated axial rotation rated as an 8 to 9/10; 3) motor improvement with distraction; 4) non-anatomic distribution of symptoms with complete motor loss to the bilateral lower extremities; and, 5) overreaction to pain.

Following a record review and examination Dr. Graf noted that despite petitioner's claim that he never had any back problems prior to the injury, his first visit following the injury noted a history of chronic back pain. As a result Dr. Graf considered petitioner's back pain to be pre-existing and unrelated to his work activities. Dr. Graf was of the opinion that petitioner did not demonstrate any hard neurologic findings. He noted that petitioner demonstrated multiple inconsistencies and nonorganic pain signs with overreaction of pain. Regardless of causation, Dr. Graf was of the opinion that petitioner may benefit from physical therapy addressing his SI joint with a possible sacroiliac joint injection. Dr. Graf did not feel any work restrictions were necessary due to the fact that petitioner's low back pain was chronic in nature. Dr. Graf opined that petitioner's current complaints of chronic back pain were unrelated to his work activities and should be attributed to his pre-existing condition. Dr. Graf opined that petitioner has long been at maximum medical improvement given his pre-existing condition. He opined that the treatment and care petitioner had received was reasonable and medically necessary, although unrelated to the work injury in question. Dr. Graf opined that petitioner was not in need of any work restrictions as they relate to the injury in question.

On 7/23/14 petitioner followed up with Dr. Krause. He reported concerns regarding his lower back. He stated that he had been undergoing various injections but did not think they had been helpful. He stated that he was still on Percocet and Neurontin. He stated that his hand symptoms were improving, but he still had some discomfort about his left wrist. He did not voice significant digit features, and related numbness along the right elbow. Petitioner did not relate any elbow pain. Dr. Krause reviewed the MRIs

from 1/15/14 and 7/1/14 and noted that there were minimal arthritic changes of the mid lumbar segments. A generalized disc bulge was noted. His impression was low back pain, and status post right median and ulnar nerve decompression. Although petitioner related limitations of lower back pain, Dr. Krause did not think there was a surgery that would improve his disposition there. He believed that petitioner would be best treated in a pain management program, which he noted petitioner was doing. He also indicated that weight reduction, chiropractic treatments, and nonsteroidals would all be helpful. He did not believe that petitioner would be able to go back to work because of pain limiting symptoms. However, from his standpoint, Dr. Krause did not have any particular restrictions for petitioner. With respect to petitioner's peripheral nerve entrapment, Dr. Krause believed petitioner was improving. He noted that petitioner did have some pain and numbness about the elbow area, but suspected that it would improve over the next several months. He had no limitations regarding petitioner's peripheral nerve entrapments. He believed petitioner was tolerating his left side quite well, and did not appear to require surgery at that time. Dr. Krause released petitioner on an as needed basis, and noted that he may continue to work with the pain clinic and his family practitioner for chronic pain management programs. On 7/28/14 Dr. Kureishy noted that petitioner should be off for one month.

On 8/11/14 petitioner underwent a Section 12 examination performed by Dr. William Strecker, at the request of the respondent. Petitioner's chief complaint was pain and numbness in the ring and small fingers. Petitioner gave a history of sustaining a back injury on 12/5/13, and approximately 2 weeks later developed numbness and tingling to the ring and small finger of both hands, more so on the right than the left. Petitioner complained of intermittent numbness of the ring and small fingers on the left. He reported that his job duties are as a bagger, and he is required to fill bags with approximately 50 pounds of corncobs. He then flips the bag, sews it shut, cuts the string, and stack the bag on the pallet. He stated that he usually stacks five bags per layer, eight high, on each pallet. Petitioner reported that prior to his back injury he had been working "shutdown" where he would do a double shift and then a 12 hour shift, seven days a week since August. Petitioner reported that he can typically can do 2 bags in a minute, and was doing approximately 7 tons of material per day during this period. Petitioner reported that he had to maintain his elbows in a fixed and flexed position. Following an examination and record review Dr. Strecker was of the opinion that petitioner had bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. He opined that the treatment to date had been reasonable and necessary. With respect to petitioner's right upper extremity, Dr. Strecker recommended a repeat of his nerve conduction study to ascertain why petitioner had persistent parathesias in the fifth finger, hand and forearm. With respect to his left upper extremity, Dr. Strecker felt that

petitioner was most likely going to require decompression of his median nerve at the wrist, as well as decompression and possible transposition of the ulnar nerve at the left elbow. Dr. Strecker was of the opinion that petitioner could work limited duty, not greater than 50 pounds on a non-repetitive basis. With respect to causation, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker noted that while petitioner described that his elbows were maintained in a fixed hyper flexed position, neither his job description or the video confirmed this. He also noted that petitioner had no complaints of parathesias for two months after his last day of work, as well as only having a limited exposure since he began working full time for respondent, and had not worked since December 2013. Based on the limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel.

On 8/15/14 Dr. Rehman diagnosed herniated lumbar disc, and performed repeat L2–L3 epidural steroid injections. On 9/4/14 petitioner returned to Dr. Rehman's nurse practitioner. He stated that on the date of the injection he was in a lot of pain, but about two days later he started feeling better, only to be in more pain the next day. Petitioner reported that the numbness in his right buttocks returned, and he occasionally gets a pain shooting to his knees. Dr. Rehman recommended bilateral lumbar facet blocks. On 9/22/14 petitioner underwent bilateral lumbar facet injections at L3 – L4, L4 – L5, and L5 – S1, performed by Dr. Rehman.

While petitioner continued to treat with Dr. Krause and at Millennium Pain Center, he also followed up regularly with his primary care physician Dr. Kureishy, and provided updates of his physical condition and treatment he was undergoing. Dr. Kureishy's work notices indicated that petitioner could return to work "pending dr release".

On 10/30/14 when petitioner presented to Dr. Kureishy he complained of back pain, but stated that no further treatment was being offered. He reported that he had had facet joint injections, TENS unit, and ice packs.

On 11/5/14 petitioner underwent a bone scan. The impression was no acute bony abnormality. On 12/3/14 petitioner followed up with Dr. Kureishy. Dr. Kureishy noted that on 1/5/15 petitioner was going to see Dr. Grubb for back pain, but noted that it may not be covered as he is out of state. He also noted that Dr. Krause was not wanting to see petitioner anymore. As a result he had arranged an appointment in

St. Louis for petitioner with Dr. Rehman for his left ulnar and median nerve entrapment. Dr. Kureishy was not sure if he could see him because petitioner was on public aid in Illinois.

On 12/5/14 the evidence deposition of Dr. Kureishy, an internist, was taken on behalf of petitioner. Dr. Kureishy is petitioner's primary care physician. Petitioner first started seeing Dr. Kureishy on 6/13/13 for a checkup. The first time he presented for back pain was on 12/5/13. On 12/5/13 petitioner reported an incident at his place of work. Dr. Kureishy was of the opinion that foraminal stenosis at L4-L5 could cause pain and symptoms in the legs. He was of the opinion that spinal stenosis is an arthritic condition in which the whole spine is being narrowed for some reason. Prior to his deposition, Dr. Kureishy viewed a video of petitioner's job duties. Some of the things in the video were not the job that was at issue. Dr. Kureishy was given a hypothetical in which petitioner would fill 10 pallets per day with 50 pound bags stacked five in a row and eight high, at a rate faster than was seen in the video. Based on that hypothetical Dr. Kureishy believed that this activity could cause a disc bulge at L4 – L5. He was of the opinion that filling, lifting, and twisting the bags in the video with no help could cause the disc bulges at L4–L5. Dr. Kureishy was of the opinion that petitioner did okay over a period of time, but there was an acute injury that happened on the 4th when he said he did a double shift and filled about seven pallets. He was of the opinion that this is probably when the injury happened because petitioner had been working for respondent for a year and had some chronic pain. Dr. Kureishy was of the opinion that petitioner should get a second opinion, from Dr. Rehman, a neurosurgeon.

On cross-examination Dr. Kureishy admitted that on 8/15/13 petitioner mentioned back pain and was prescribed 800 mg of Skelaxin three times. Petitioner provided no detailed history of his back pain at the time. On 9/12/13 petitioner mentioned that his back pain was improved. On 12/5/13 petitioner reported an injury on 12/4/13 to his back. Dr. Kureishy noted that petitioner had chronic back pain, and the mechanism of injury was identified as unknown. Then on 12/9/13, Dr. Kureishy identified the mechanism of injury as heavy lifting. On 1/9/14, the mechanism of injury became more detailed and petitioner reported heavy lifting, 50 pound bags. At this time, Dr. Kureishy continued petitioner on 800 mg of Skelaxin. Dr. Kureishy testified that he was treating petitioner based on his subjective pain complaints, and the MRI findings. Dr. Kureishy testified that he would never question a petitioner's pain. He stated that if they're telling him they are in pain it's his duty to give them medicine.

On 1/15/15 the evidence deposition of Dr. Strecker, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Strecker noted that when he examined petitioner he still had numbness of the small finger, as well as numbness in the ulnar aspect, or the small finger side of his hand, and on the inside portion of his forearm, on the right. He opined that petitioner did not have any complaints on the right

side that would be consistent with carpal tunnel syndrome, or complaints on the left side that would be consistent with cubital tunnel syndrome. Dr. Strecker opined that there is no correlation between nerve conduction and EMG findings and the clinical diagnosis of carpal tunnel syndrome. Based on what the petitioner told him, and the job videotape, Dr. Strecker was of the opinion that the videotape did not show that petitioner had to maintain his arms in a hyper flexed position for prolonged periods of time. Although Dr. Strecker agreed that petitioner had to flex and extend his elbows all day, he did not have to maintain them there. Dr. Strecker was of the opinion that petitioner did not meet any of the thresholds that one would expect to see in somebody who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position. Dr. Strecker was also of the opinion that the other reason he did not think petitioner's cubital tunnels were related to his job duties was the fact that there wasn't a temporal relationship between petitioner's onset of his complaints and his job. Dr. Strecker noted that petitioner did not have any complaints of numbness and tingling until two months after he finished his last day of work for respondent. Dr. Strecker was of the opinion that obesity is a risk factor for the development of carpal tunnel, and petitioner weighed 340 pounds. Dr. Strecker was of the opinion that even though petitioner had electrical findings of carpal tunnel syndrome he had no symptoms, nor did he have any physical or provocative findings of carpal tunnel syndrome.

On cross-examination Dr. Strecker was of the opinion that the job duties that were explained by petitioner and shown in the job video could cause bilateral carpal tunnel syndrome, but petitioner had no symptoms related to carpal tunnel syndrome.

On 1/23/15 the evidence deposition of Dr. Krause, a neurosurgeon, was taken on behalf of the petitioner. Dr. Krause testified that he treated petitioner for his back, as well as his bilateral hands and arms. Dr. Krause opined that when he initially saw petitioner his symptoms were caused by cubital tunnel syndrome and carpal tunnel syndrome, with most of it being associated with cubital tunnel. He testified that the only complaints petitioner had with regard to carpal tunnel syndrome was his subjective complaints of hand weakness. Dr. Krause testified that he did not talk to petitioner about his job duties. He further testified that most of what he evaluated petitioner for was his back, and petitioner complained bitterly of back pain from work. Dr. Krause did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Krause was of the opinion that when you talk about any cubital tunnel activity, flexion of the elbow can cause aggravation. He was further of the opinion that cubital tunnel is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how they carry their arms. Dr. Krause was of the opinion that it

was really hard for him to say exactly what was causing petitioner's cubital tunnel trouble. Dr. Krause was of the opinion that when he saw petitioner on 4/23/14 he was not recommending any further surgeries for petitioner. Dr. Krause was of the opinion that if petitioner had undergone injections before he saw him, that would explain why he may not of been having any back pain when he examined him. Dr. Krause noted that petitioner had some degree of complaints about everything on every visit. Dr. Krause opined that any activity can cause pain, but anatomically and structurally there was nothing objectively wrong with petitioner's low back.

On cross-examination Dr. Krause was of the opinion that if petitioner never had any complaints of arm, hand pain, and finger numbness while he was working, and the first time he reported any of the symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms. Dr. Krause was of the opinion that petitioner would've been capable of working full duty on 4/23/14 as it relates to his back. Dr. Krause noted that petitioner's MRI of his lumbar spine only showed mild arthritic changes, and no herniations. Dr. Krause did not believe that petitioner was a candidate for surgery on his back. Dr. Krause opined that he could not find a discrete abnormality that would substantiate petitioner's back pain.

On 2/3/15 Dr. Graf drafted an addendum report after reviewing additional medical records. These records included a job safety analysis and a video job analysis that was purported to reflect petitioner's job duties. Petitioner was not in the video. He also reviewed additional medical records from 7/1/14 through 1/23/15. After reviewing the additional medical records, MRI, and video job analysis, Dr. Graf's opinions were not only unchanged from his Section 12 examination, but further supported what he stated in his initial report.

On 3/11/15 the evidence deposition of Dr. Graf, an orthopedic and spine surgeon, was taken on behalf of the respondent. Dr. Graf was of the opinion that petitioner's complaints of pain throughout the examination were out of proportion, and it led him to believe that petitioner was not putting forth a full effort. Dr. Graf was of the opinion that petitioner's MRI showed normal hydration of the discs, no disc herniation, mild degenerative changes at L2 – L3, L3 – L4, and a mild bulge with no nerve root compression at L2 – L3. Dr. Graf was of the opinion that these findings were pretty normal. Dr. Graf opined that he agreed with Dr. Krause that there was no role for surgery for petitioner. Dr. Graf testified that as part of his first examination of petitioner he did review a job description.

On cross-examination Dr. Graf testified that petitioner did not tell him the exact bag weight. Dr. Graf opined that based on the job activities that were shown in the video, and assuming that petitioner's

report was accurate, that the type of work that petitioner was doing could cause an injury to the low back, because it seemed to be a pretty heavy job. In general terms, he further opined that it is possible that a job like this could exacerbate a pre-existing condition, but he did not believe that was so in this case.

Tom Keller, Plant Operations Manager for respondent, was called as a witness by respondent. Keller has worked for respondent for over two years. He has oversight and review of the entire plant. He knows petitioner, and worked with him since 2013. He testified that he is familiar with petitioner's job duties, and agreed with the bagging process as described by petitioner. Keller learned of petitioner's alleged accident on 12/4/13, on 12/9/13.

Keller testified that petitioner was not working alone on 12/4/13. He testified that petitioner was working with Kent Meagher. He testified that they were doing the same job together that day. Keller also testified that the company policy is for the employees to work together in teams, and rotate through the different jobs which include bagging, driving a forklift, shrink wrapping, and moving freight from production to storage area. Keller testified that the position he saw petitioner working most often was driving a forklift, shrink wrapping, and moving freight from production to storage area. He stated that there has never been an employee that has worked 10 hours alone. Keller testified that if petitioner had been working alone on 12/4/13 he would have known about it. He testified that he walked throughout the facility regularly and routinely on a daily basis. He testified that it is possible that someone may work alone for a short time while the coworker moves a pallet. With respect to petitioner's alleged injury on 2/28/14, Keller did not find out about that injury until April 2014.

Currently petitioner still has symptoms in his back, and uses a Fentanyl patch every three days. He also takes Percocet and diazepam for his back pain. He testified that the medications affect him and make him feel sluggish. He also attributes his memory loss to the medications. Petitioner complained of numbness from his little finger on his right hand to his elbow. He reported that his wrist hurts all the time. He also stated that he has a trigger finger in his right ring finger. With regards to the left upper extremity petitioner reported that his left hand goes numb on a regular basis, and he has aching in the wrist.

Respondent offered into evidence a video job analysis of the bagger job. The arbitrator notes that there were 2 workers working the bagging line. The operator would take a bag off a table, open it up and put it under a clip on the filler spout. The operator then pulls a lever and the bag is filled. When done the operator pulls the lever again and the bag is released and dropped onto the conveyor belt. The operator controls the speed of the belt with a foot pedal. Most often the operator would press the foot pedal to

move the bag on the conveyor over so that he could fill another bag. Once that one is dropped onto the conveyor the operator presses the pedal to make the conveyor move the bag to the sewing machine. He fold the tops of the bag the together and presses a pedal so that the conveyor moves the bag through the sewing machine. The operator puts the string through a cutter right at the end of the string. The operator then places the bag on the pallet. There are 5 to a level and up to 8 levels per pallet. Once full the operator will use a forklift to remove the full pallet from the area. These jobs were performed by 2 operators. The speed at which this process was performed was controlled by the operator. The conveyor moved at the speed the operator determined since he controlled it with a foot pedal.

Respondent also entered into evidence an office note from Dr. Kureishy dated 8/15/13. Petitioner complained of back pain. He reported that he has a hard time at work lifting 50 pound bags. Petitioner was 303 pounds, and his BMI was 41.97. On 9/12/13 petitioner told Dr. Kureishy that his back pain was improved on Skelaxin 800 mg.

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 alleging an injury to his low back due to repetitive work activities, that arose out of an in the course of his employment by respondent, and manifested itself on 12/4/13.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his low bac, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity.

When claiming a repetitive trauma injury, the injury is not traceable to a specific traumatic event, but the work involves constant or repetitive activity that gradually causes deterioration of or injury to a body part, assuming it can be medically established that the origin if the injury was the repetitive stressful activity. In the case at bar the arbitrator finds it significant that petitioner repeatedly reported to the medical experts that his onset of pain was sudden on 12/4/13. Additionally, Dr. Kureishy repeatedly opined that what petitioner sustained was an acute injury on 12/4/13.

In order for petitioner to prove he sustained a repetitive injury it is not enough to describe a sudden onset of pain, the petitioner must place into evidence specific and detailed information concerning his work activities for respondent, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Petitioner gave a description of the three activities that are performed on the bagging line. Respondent offered into evidence a job video that accurately depicted the three job duties on the bagging line. However, the arbitrator finds that the credible record contains discrepancies as they relate to the frequency, duration and manner in which petitioner performed his duties on the bagging line, as well his other job duties. The arbitrator also finds it significant that petitioner testified that his job for respondent also running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. Petitioner provided absolutely no information regarding the frequency, duration and manner in which he performed these duties.

Given that petitioner is alleging a manifestation date of 12/4/13 petitioner limited the specific and detailed information concerning his work activities to only 12/3/13 and 12/4/13. He did not describe all the duties he performed for respondent and the frequency, duration and manner in which he performed them. Petitioner alleged that on 12/3/13 he worked a double shift on the bagging line, and on 12/4/13 he worked 10-12 hours on the bagging line performing all jobs by himself, loading 7 pallets with 40-50 bags weighing 50 pounds on each. However, respondent offered evidence to rebut this.

First, Keller testified that it is respondent's policy that no employee works the bagging line alone for an entire day. He also testified that the only time someone might be on the line alone is when his co-worker is moving a pallet once it is full. Keller also testified that petitioner was working with Kent Meagher on 12/4/13. Alternatively, petitioner testified that Kent Meagher was not working with him but saw him working alone on 12/4/13. However, in light of Keller's testimony, the arbitrator finds it significant that petitioner did not call Kent Meagher to corroborate his testimony.

Secondly, the arbitrator finds it significant that petitioner did not include any testimony as to the frequency, duration, and manner in which performed his other job duties that included driving a forklift, shrink wrapping, and moving freight from the production to the storage area. The only frequency, duration and manner petitioner provided was with respect to number of bags he allegedly stacked by himself on 12/4/13. Given that this testimony is rebutted, the arbitrator finds the petitioner should have provided the frequency, duration and manner in which he performed all his job duties for respondent to see if his entire job was in fact repetitive in nature.

In addition to placing into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc., it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar petitioner received treatment from Dr. Kureishy, Dr. Krause, and Dr. Rehman, and underwent a Section 12 examination performed by Dr. Graf.

Dr. Kureishy's understanding of petitioner's activities was presented to him in a hypothetical during his deposition that described petitioner's duties as filling 10 pallets per day with 50 pound stacks five in a row and eight high on each pallet, at a rate faster than in the video. Based on this understanding, Dr. Kureishy was of the opinion that these activities could cause a disc bulge at L4-L5. Dr. Kureishy was also of the opinion that petitioner was doing okay for a period of time and sustained an acute, injury on 12/4/13. He gave no opinion that petitioner sustained an injury due to repetitive work activities. Despite petitioner's claim to the contrary, the arbitrator also finds it significant that Dr. Kureishy admitted on cross examination that petitioner did in fact have chronic back pain prior to his acute injury on 12/4/13, after stating on direct examination that the first time petitioner presented to him with back pain was on 12/5/13. Given that Dr. Kureishy's opinions are based solely on a hypothetical that does not include a detailed and accurate description of all of petitioner's duties, the arbitrator gives less weight to the opinions of Dr. Kureishy. The arbitrator also finds it significant that Dr. Kureishy's opinions are based only on petitioner's alleged work activities on 12/4/13, and does not include any of the work petitioner performed for respondent prior to 12/4/13, including his duties running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, doing repairs, shrink wrapping, and moving freight from the production to the storage area, and his bagging duties prior to 12/3/13. The arbitrator also finds it significant that on 12/9/13 Dr. Kureishy noted that petitioner had chronic back pain, and the mechanism of injury was unknown.

The arbitrator also gives less weight to the opinions of Dr. Kureishy based on his testimony that he did not review any of Dr. Krause's findings or opinions as they relate to petitioner, even though he

referred petitioner to Dr. Krause. Additionally, the arbitrator finds it significant Dr. Kureishy never personally reviewed the 2 MRI's of the lumbar spine and based his opinions solely on petitioner's subjective complaints. Dr. Kureishy also testified that it is his practice to never question a patient's pain, and if they say they are in pain, it is his duty to give them medicine.

Dr. Krause was also one of petitioner's treating physicians. He is an orthopedic surgeon Dr. Kureishy referred petitioner to. Dr. Krause personally reviewed the 2 MRIs of the lumbar spine. Dr. Krause testified did not talk to petitioner about his job duties. Based on this testimony, the arbitrator finds Dr. Krause could not have had an accurate and detailed description of petitioner's duties. The arbitrator further finds it significant that Dr. Krause was of the opinion that petitioner had some degree of complaints about everything, every time he presented to him. Dr. Krause opined that anatomically and structurally there was nothing objectively wrong with petitioner's low back.

Petitioner gave Dr. Graf a history of working for a corncob company which grinds corncobs to be used for products such as Kitty litter, spreading on baseball fields, cleanup, etc. Petitioner stated that he worked in the position of a "bagger" on the assembly-line. He stated that his job required him to place the bags under a spout and then once they were filled, line them up and sew the bag shut, then throw it up onto the pallet. Petitioner reported that this is a three-person job, but since the company was short on manpower he was working alone on 12/3/13 or 12/4/13, and could not keep up with the machine. He stated that he worked a double shift on both days by himself and completed 17 pallets each day, or 14 tons of material. Dr. Graf testified that petitioner did not provide him with the weight of the bags he filled on the bagging line. Petitioner also did not including the frequency, duration, or manner in which he performed these duties on every day other than 12/3/13 or 12/4/13. Petitioner also made no mention of the other duties he performed including running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, doing repairs, shrink wrapping, and moving freight from the production to the storage area.

The arbitrator finds it significant that Dr. Graf noted that despite petitioner's claim that he never had any back problems prior to the injury, his first visit following the injury noted a history of chronic back pain. As a result Dr. Graf considered petitioner's back pain to be pre-existing and unrelated to his work activities. Dr. Graf was of the opinion that petitioner did not demonstrate any hard neurologic findings, but did demonstrate multiple inconsistencies and nonorganic pain signs with overreaction of pain. The arbitrator finds this significant, especially in light of Dr. Krause's opinion that he suspected secondary gain issues.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being as it relates to his low back is causally related to the alleged accident on 12/4/13. The arbitrator bases this opinion on the inconsistencies in the record regarding petitioner's work duties on 12/4/13, and if he worked with anyone on that day; the fact that petitioner did not place into evidence specific and detailed information concerning his work activities other than his work on the bagging line, or the frequency, duration, and manner in which he performed these other duties; the fact that petitioner had been diagnosed with chronic back pain prior to 12/4/13, but denied he had any prior back problems; that Dr. Kureishy opined that petitioner's injury was an acute injury; and the fact that both Dr. Krause and Dr. Graf did not notice any objective evidence that corroborated petitioner's subjective complaints, that Dr. Krause noted that petitioner demonstrated multiple inconsistencies and nonorganic pain signs with overreaction of pain, and Dr. Krause suspected secondary gain issues.

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?
L. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his low back due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 12/4/13, or that his current condition of ill-being is causally related to the alleged injury on 12/4/13, the arbitrator finds these remaining issues 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Erma Thomas,

Petitioner,

vs. NO: 14 WC 09904

Aramark,

16IWCC0113

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, temporary total disability, causal connection, medical, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2015 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: FEB 10 2016

MB/mam
o:2/9/16
43

Mario Basurto

David L. Gore

Stephen Mathis

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

THOMAS, ERMA
Employee/Petitioner

Case# **14WC009904**

16IWCC0113

ARAMARK
Employer/Respondent

On 3/4/2015, 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:

2573 MARTAY LAW OFFICE
STEPHEN R MARTAY
134 N LASALLE ST SUITE 900
CHICAGO, IL 60602

1739 STONE & JOHNSON CHARTERED
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

16IWCC0113

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)

Erma Thomas
Employee/Petitioner
v.

Aramark
Employer/Respondent

Case # **14** WC **9904**

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **February 19, 2015**. 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

On the date of accident, **March 15, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**12,800.32**; the average weekly wage was $**246.16**.

On the date of accident, Petitioner was **31** years of age, ***single*** with **3** dependent children.

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

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

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

ORDER

- *Petitioner failed to establish that she sustained an accident arising out of and in the course of her employment.*
- *Benefits are thereby 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.

David A. Kane
Signature of Arbitrator

March 4, 2015
Date

ICArbDec19(b)

MAR 4 - 2015

Erma Thomas v. Aramark
14 WC 9904

Statement of Facts

On March 15, 2014 Petitioner worked for Aramark at the Field Museum. She had worked there since August 2013. Her duties included stocking wine, beer, and milk which required bending, lifting and moving these items on a cart about 200 feet. She stocked coffee and condiments associated with coffee. She needed to fill, lift, and carry a gallon ice bucket, and dump the ice in a cooler. She also had to sweep and clean tables.

Saturday March 15, 2014 was St. Patrick's Day and they were quite busy. She arrived at noon and went to the catering area. She spoke with an employee from the early shift to learn what was needed. She then took the necessary steps to stock the beer, wine and milk. About 3:00 p.m. she was in the process of cleaning tables. While cleaning the fourth table, she bent down to wipe off a chair. When she straightened up, she felt pain in the middle of her low back. She told her supervisor, Kendrick, and two co-workers about the injury. She asked for pain medication, and a co-worker provided her with pain medication.

She called Thad, another supervisor, on Monday March 17, 2014 and told him that she was in pain. He directed her to Concentra. She could not get in until March 18, 2014. She saw a physician on March 18, 2014 who restricted Petitioner to lifting up to one pound and ordered physical therapy.

Petitioner started physical therapy on March 19, 2014. She returned to the physician at Concentra on March 20 and the restrictions were repeated. She took the restrictions to Aramark, and they were unable to accommodate the restrictions. She followed-up with Concentra on April 3 and April 10, 2014.

Petitioner presented to Dr. Kopsian, a chiropractor. Dr. Kopsian ordered physical therapy and an MRI. Petitioner attended the MRI on April 16, 2014. On April 21, 2014 Petitioner presented to Dr. Neeraj Jain. (Petitioner's testimony on cross-examination was that Dr. Jain had referred her to Dr. Kopsian.) Dr. Jain prohibited Petitioner from working, ordered an epidural steroid injection (ESI), ordered an EMG, and prescribed medications. She underwent the EMG on April 23, 2014. On April 28, 2014 Petitioner returned to Dr. Jain and ordered a brace. The Respondent denied authorization of the brace.

Dr. Jain administered an injection at L4-5, L5-S1 on the left on May 27, 2014. The pain alleviated Petitioner's symptoms for two days, but then the pain returned.

On June 4, 2014 Petitioner presented to Dr. Julie Wehner at the request of the Respondent. Petitioner described the examination as lasting 15 minutes and included Petitioner walking three feet with her shoes off and lifting her leg. (On cross-examination, she agreed that Dr. Wehner asked how she felt and asked how the accident occurred.)

Petitioner returned to Dr. Jain on June 16, 2014, and he recommended a second injection. She returned to Dr. Jain on five occasions through October 20, 2014 and again on February 16, 2015. On each occasion she had the same complaints, and Dr. Jain had the same recommendations.

She has been off work since March 15, 2014. She remains an employee of Aramark and wants to return to work. She currently has low back pain and tingling in the left leg. She has had these symptoms since March 15, 2014. She walks on a treadmill and rides a stationary bike. She also takes Tramadol—a narcotic pain medication. If it were authorized, she would resume medical care.

Dr. Jain testified at a deposition. He is board certified in anesthesia and pain management. Petitioner first presented to him on April 21, 2014. Dr. Jain recorded a history that Petitioner "was bent over whacking the chair off". He was not certain of the typographical error, but it seems likely that Petitioner said she was "wiping a chair off". (PX 1, p. 6, 30, 31.) She had an onset of back pain going to both legs. The pain was immediate and severe. Examination was positive for a markedly antalgic gait with difficulty bearing weight on the left side. Strength and reflexes were diminished on the left. Dr. Jain did not know if he reviewed the April 16, 2014 MRI films but concluded that the MRI was abnormal with disc herniations at L3-4, L4-5, and L5-S1. On cross-examination, Dr. Jain acknowledged that the MRI findings are consistent with the normal findings of a 31 year old. Dr. Jain agreed that the radiologist did not describe herniations in his MRI report. (PX 1, p. 33.) He recommended left sided injections to alleviate symptoms from an inflammatory reaction to the disc herniation. He prohibited

Petitioner from working because she was "basically unable to bear weight" on her left side. He offered an opinion that Petitioner's condition was caused by the March 15, 2014 accident. (PX 1, p. 6-11.) Petitioner's April 23, 2014 EMG showing moderate left lumbar radiculopathy was consistent with a disc herniation and subjective complaints.

On May 27, 2014 Dr. Jain administered an injection, and Petitioner assessed her relief at 70% to 80%. The pain had returned to some extent by the June 16, 2014 office visit. However, the initial 70% to 80% pain relief suggests the location of the injection is the source of Petitioner's pain, and the injections are appropriate treatment for the condition. (PX 1, p. 15, 16.) Before the injection on May 27, 2014, Petitioner assessed her pain at 6/10. When she returned on June 16, 2014, she again assessed her pain at 6/10. (PX 1, p. 35, 36.) He recommended a second injection on June 16, 2014. When Petitioner returned on August 14, 2014, she assessed her pain at 6/10. (PX 1, p.25.) He reviewed Dr. Wehner's June 4, 2014 IME report and did not think it was valid. "She was obviously motivated to deny the care, regardless of what the findings were." (PX 1, p. 21.) Dr. Jain suggests Dr. Wehner was offering an opinion favorable to the Respondent to justify her fee. He testified that he performs 1,200 injections per year but was unable to provide an estimate of his fee for these injections. (PX 1, p. 38.) Dr. Wehner noted Petitioner had marked pain with light palpation. She considered this to be symptom magnification. Dr. Jain could not answer whether he would expect Petitioner to have marked pain with light palpation. (PX 1, p. 37.)

When Petitioner returned on August 14, 2014, she assessed her pain at 6/10. (PX 1, p. 25.)

Dr. Wehner testified at a deposition on December 17, 2014. She is a board certified orthopedic surgeon limiting her practice to treatment of the spine (RX 4, p. 5.) She examined Petitioner at the request of the Respondent on June 4, 2014. This examination lasted approximately 45 minutes. (PX 4, p. 18.) She authored a follow-up report on September 17, 2014 after reviewing the EMG report. (RX 4, p. 14, 15.) Petitioner provided Dr. Wehner a history of an onset of low back pain while helping to move tables and chairs. (RX 4., p. 7.) Her June 4, 2014 examination was positive for Petitioner having marked pain with light palpation and tingling in the left leg with left hip rotation and left leg straight leg raising. Strength testing was noted to be normal. (RX 4, p. 8-11.) Dr. Wehner reviewed the MRI films and thought they were normal. (PX 4, p. 20, 21.) After reviewing the MRI films and records, Dr. Wehner diagnosed low back pain. She disagreed with Dr. Jain's diagnosis of a herniated disc. (RX 4, p. 12, 13.) She thought six to 12 therapy visits were appropriate. (PX 4, p. 13, 14.) Dr. Wehner did not think the EMG results of left sided radiculopathy made any medical sense. It does not fit with the subjective complaints, clinical exam, or MRI findings. (PX 4, p. 15, 16.) Dr. Wehner did not think the EMG was medically necessary. (RX 4, p. 27.) Petitioner was able to return to full duty work on June 4, 2014. (RX 4, p. 29.)

Conclusions of Law

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

Section 1(d) of the Act mandates as follows: "To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment."

The Supreme Court addressed the "arising out of" component in *Greater Peoria Mass Transit District v. Industrial Commission*, 81 Ill. 2d 38 (1980). The Supreme Court stated, "there must be a showing that an injury, to be considered compensable, was due to a cause connected with the employment or incidental to it."

In the case at bar, Petitioner testified to an onset of pain attributable to a specific time and place. Specifically, she was straightening up after bending to wipe off a navel high chair. She testified to her job duties but neither her job duties nor her medical histories support a claim for a repetitive trauma.

Petitioner's activity of straightening from a bent position is an activity of daily living. This activity alone does not create an increased risk. See *Willinda Burns v. Sears Holding Corp.*, 12 WC 8204, 12 I.W.C.C. 1336. Because Petitioner's injury does not arise from a risk incidental to employment, Petitioner failed to establish that she sustained an accident arising out of her employment.

The Arbitrator has reviewed *Young v. IWCC*, 13 N.E.3d 1252 (2014) and concludes that it does not apply to the facts of the instant case. In *Young*, claimant was reaching into a 16x16x33 inch box to retrieve an object weighing between 12 and 20 pounds when his shoulder popped. According to the employer's analysis of the incident, claimant had "over extended reaching limits" when reaching deep into the box. The employer noted that one of the options to prevent the injury from recurring to other employees was to decrease the size of the box. 13 N.E.3d at 1254. The appellate court deemed claimant's injury to arise from a risk distinctly associated with his employment and specified that claimant reached farther than a person would typically reach when he tried to retrieve the object from the box.

In the case at bar, Petitioner straightened up from a slightly bent position when she had the onset of pain. This is an activity of daily living and not associated with a risk incidental to her employment. The Arbitrator concludes Petitioner failed to establish that the accident arose out of her employment. Therefore benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREA DUNN,
Petitioner,

16IWCC0118

vs.

NO: 14 WC 010571

CHESTER MENTAL HEALTH CENTER,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, medical treatment, and temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, and 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 claims to have sustained two accidental injuries arising out of and in the course of her employment. The first is claimed to have occurred on January 29, 2014. The second is claimed to have occurred on May 15, 2014. An Application for Adjustment of Claims was filed with the Commission for the respective accidents with each claim being assigned to Arbitrator Edward Lee. The Commission finds no evidence of the claims being formally consolidated. Each claim, however, was presided over concurrently by Arbitrator Lee in an arbitration hearing on March 24, 2015. Each claim was subsequently addressed in a single Decision of the Arbitrator. In the Decision of the Arbitrator, Arbitrator Lee found Petitioner, for both claims, failed to prove that she experienced accidents that arose out of and in the course of her employment and denied Petitioner benefits. Petitioner filed a Petition for Review for each claim. These petitions were not consolidated and were assigned and a heard by separate Commission panels. This Decision and Opinion on Review addresses the injuries Petitioner claims to have occurred her right arm/elbow and right hand on January 29, 2014, and was assigned case number 14 WC 010571.

As noted above, Arbitrator Lee denied Petitioner compensation for her claimed January 29, 2014, accident. In support of his decision, Arbitrator Lee noted he found Petitioner's

testimony to be suspect and not credible. Specifically, he found the job description Petitioner gave to her treating physicians to have been inaccurate and her claim to the amount of rehabilitation work she performed on her home to be contradicted by her co-worker. The Commission, in reviewing the evidence, arrives at the opposite conclusion with respect to Petitioner's testimony, finding Arbitrator Lee misconstrued Petitioner's testimony concerning her employment activities as well as her testimony and timeline concerning the rehabilitation of Petitioner's home.

In the Decision of the Arbitrator, Arbitrator Lee noted "Petitioner told each doctor that she lifted cassettes 40 times a day." A review of the histories Petitioner provided the medical professionals reveals only once was this recorded and was done so by Gerald Cameron, a physician's assistant at Murphysboro Health Center. The history Petitioner provided to Dr. Clare Fadden, her primary care physician who also works at Murphysboro Health Center, was of lifting cassettes up to forty times a day. To Dr. Matthew Smith of Washington University Physicians, Petitioner stated she lifted cassettes at work repeatedly. The intake form Petitioner completed before seeing Dr. Smith indicated that the problem for which she presented stemmed from lifting 25-pound cassettes for eleven years. Petitioner informed Dr. George Paletta that she handled cassettes up to forty times a day. Dr. Andrew Sudekum, after conducting an independent medical examination pursuant to Section 12, recorded that Petitioner said that she, on average, lifts 25-pound cassettes up to forty pounds a day. The Commission finds the history as recorded by PA Cameron to be an outlier and inconsistent with the histories recorded by the other medical professionals. The Commission incidentally notes further that, before Arbitrator Lee, Petitioner testified to lifting cassettes sometimes up to forty times a day. The Commission finds Petitioner proved to its satisfaction that her employment activities resulted in an injury to her right arm/elbow.

Arbitrator Lee, in the Decision of the Arbitrator, also questioned Petitioner's claim that she did not personally perform the remodeling of her home and referenced the postings Petitioner made on Facebook to support his position. Petitioner testified that she might have supplemented the labor performed by the contractors she hired with her own labor as well as that of two high school students and her ex-boyfriend. The Commission finds Petitioner's use of the pronoun "we" on her Facebook postings concerning her home rehabilitation to indicate the work was performed through the collaborative efforts of Petitioner and others. Nothing posted on Petitioner's Facebook account causes the Commission to conclude Petitioner performed the rehabilitation of her home alone. Assuming *argumendo* Petitioner did perform all the rehabilitation work herself, it is Petitioner's testimony the rehabilitation of her home was performed in the summer of 2013. The Facebook postings corroborate this. Petitioner's claim is that the onset of her right upper extremity symptoms began on January 29, 2014, at least four months after the work was performed on her home. The length of time between when the work was performed on Petitioner's home and the onset of her symptoms, absent any information to the contrary, is too great to reasonably conclude any work Petitioner personally performed on her home resulted in an injury to her right arm/elbow.

For the reasons expressed in the two paragraphs immediately above, the Commission reverses the finding contained in the Decision of the Arbitrator with respect to accident. Petitioner's employment activities resulted in repetitive trauma to her right arm/elbow that manifested itself on January 29, 2014.

16IWCC0118

The Commission, having found accident, addresses those issues deemed moot by Arbitrator Lee as the result of his finding Petitioner failed to prove that she sustained a compensable accident.

Petitioner maintains she provided timely notice of her injury. Entered into evidence were several reporting documents that indicated Petitioner's injury was sustained on January 29, 2014. These documents were subsequently filed with Respondent within two weeks of the claimed accident. Respondent did not contest Petitioner failed to give timely notice of the injury. The Commission, accordingly, finds notice of the injury was within the timeframe set forth in the Act.

Petitioner's Application for Adjustment of Claim alleges she sustained injuries to her right arm/elbow and right hand. After thoroughly reviewing Petitioner's medical records, both her complaints and her physicians' examination findings, the Commission finds no evidence of Petitioner sustaining any injury to her right hand save only a single complaint of pain radiating down the forearm to the wrist. The Commission does find evidence to support there to be a causal connection between Petitioner's right arm/elbow complaints and her employment activities effective January 29, 2014.

PA Cameron, on February 17, 2014, diagnosed Petitioner as having tendonitis in her right elbow but did not attribute it to any particular cause. Dr. Fadden, on March 17, 2014, found the condition of Petitioner's right elbow to be consistent with a repetitive motion injury and likely from repeatedly lifting. Given Petitioner's employment activities, the Commission finds Dr. Fadden's assessment, combined with Petitioner's testimony, reasonably demonstrates there to be a causal connection between Petitioner's employment activities and the condition of her right arm/elbow. The Commission, however, finds this causal connection existed only from January 29, 2014, through April 21, 2014.

Petitioner was repeatedly seen at Murphysboro Health Center from February 17, 2014, through April 21, 2014. On April 21, 2014, Petitioner presented there and was recorded as claiming to be pain-free a majority of the time. The accompanying examination found Petitioner experienced a pulling sensation in the right supinator but no pain nor any pain with palpation or on pronation or supination. Dr. Fadden stated the tendonitis, now identified as epicondylitis, appeared to have resolved. Petitioner was discharged with instructions to continue home exercise regimen and to follow-up if the symptoms should reoccur. The Commission finds Petitioner to be at maximum medical improvement as of April 21, 2014, on account of being relatively pain-free on that day and without a return visit to Dr. Fadden scheduled.

Though the manifestation date of Petitioner's injury is January 29, 2014, Petitioner did not seek medical attention until February 17, 2014. From that date through April 21, 2014, she treated repeatedly at Murphysboro Health Center and underwent physical therapy at Chester Memorial Hospital. She was also seen at Southern Illinois Healthcare on February 17, 2014, for an x-ray of her elbow and by Dr. Smith on March 21, 2014. The Commission finds the treatment Petitioner received from February 17, 2014, through April 21, 2014, to have been reasonable and necessary in addressing Petitioner's injury.

16IWCC0118

Petitioner first sought medical treatment for her symptoms on February 17, 2014, and was seen by PA Cameron. PA. Cameron released Petitioner to work with restrictions effective February 19, 2014. Petitioner credibly testified that Respondent did not accommodate the restrictions imposed upon her by PA Cameron on February 17, 2014, and, as a result, she did not work until being released to work without restrictions on April 22, 2014. The Commission finds Petitioner, as result of this, to be entitled to temporary total disability benefits from February 19, 2014, through April 21, 2014.

The Commission takes notice that Petitioner returned to Dr. Fadden on May 22, 2014, with complaints that included her right elbow. Notice is also taken of Petitioner's second Application for Adjustment of Status, dated July 11, 2014, indicating those complaints are related to a repetitive trauma Petitioner sustained on May 22, 2014. Accordingly, the Commission takes this history as further proof that Petitioner's right arm/elbow injury from January 29, 2014, had resolved as of April 21, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1336.91 per week for a period of 8-2/7 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 for medical expenses incurred between February 17, 2014, and April 21, 2014, under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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: FEB 11 2016
KWL/mav
O: 12/14/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0118

DUNN, ANDREA
Employee/Petitioner

Case# 14WC010571

SOI/CHESTER MENTAL HEALTH CENTER
Employer/Respondent

On 5/20/2015, 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:

4075 FISHER KERHOVER & COFFEY LO
JASON E COFFEY
PO BOX 191
CHESTER, IL 62233

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 FL
CHICAGO, IL 60601-3227

1745 CMS - RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

MAY 20 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0118

Case # **14** WC **010571**

Andrea Dunn
Employee/Petitioner

v.

State of Illinois/Chester Mental Health 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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0118

FINDINGS

On the date of accident, **January 29, 2014 & May 15, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**123,948.00**; the average weekly wage was $**2,383.62.**

On the date of accident, Petitioner was **42** 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 $**IF ANY** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on January 29, 2014 and May 15, 2014, that arose out of and in the course of her employment or that her current condition of ill-being is causally related to said accident. Petitioner's claim for compensation is denied and no benefits are awarded.

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

5/11/15
Date

ICArbDec19(b)

MAY 20 2015

16IWCC0118

Andrea Dunn v. State of Illinois/Chester Mental Health Center, 14 WC 010571 & 14 WC 024947

Petitioner filed two applications for adjustment of claim with the Illinois Workers' Compensation Commission. Petitioner first alleged that she sustained injuries to her right arm/elbow and right hand as a result of repetitive duties while working for Chester Mental Health Center. (AX2) Petitioner has alleged the date of accident as January 29, 2014. (AX2) Petitioner next alleged that she sustained injuries to her right elbow, right shoulder, left elbow, and left shoulder as a result of repetitive duties and stress while working for Chester Mental Health Center. (AX3) Petitioner alleged a date of accident of May 15, 2014. (AX3) This is a repetitive trauma claim and the issues in dispute are accident, notice, causation, medical bills, prospective medical, and temporary total disability. (AX1)

Petitioner was 42 years old on January 29, 2014 and May 15, 2014, which are her alleged manifestation dates for her repetitive trauma claims. Petitioner testified that she has worked as a clinical pharmacist at Chester Mental Health Center for the past twelve years.

On February 17, 2014, Petitioner presented to Gerald Cameron, PA at the Murphysboro Health Center with complaints of pain radiating into her right forearm. (PX1) Petitioner reported that the onset of her pain began three weeks ago and occurred occasionally. Petitioner reported that her pain was aggravated by lifting. On physical examination Mr. Cameron reported that Petitioner's right arm was tender on the lateral radial aspect of the proximal forearm/tendon at the radial collateral ligament. Petitioner was assessed with tendonitis of the elbow or forearm. Petitioner was given naproxen and x-rays of the right elbow were ordered. Petitioner was given work restrictions. Petitioner was restricted from use of the right arm for any lifting, pushing, or pulling activities for two weeks.

On February 17, 2014, Petitioner underwent an x-ray of her right elbow. (PX1) The findings were of normal bone mineralization, no fracture or dislocation, the joint space was maintained, and no focal soft tissue abnormality was seen. Dr. Justin Hodge advised Mr. Cameron to consider an MRI if further evaluation was needed.

On February 25, 2014, Petitioner followed up with Mr. Cameron. (PX1) Petitioner reported that the naproxen was not helping much. Mr. Cameron recommended physical therapy for Petitioner's right forearm. Mr. Cameron continued Petitioner's restrictions for three weeks.

On March 17, 2014, Petitioner presented to Mr. Cameron in follow up. (PX1) Petitioner reported a history of lifting "med boxes", 40 boxes per day weighing 20-25 lbs. each. Petitioner reported her pain had progressively worsened since January 2014. Mr. Cameron noted that Petitioner's pain seemed to be central to the common extensor tendon area of the forearm and was consistent with a repetitive motion injury, likely from a repeated lifting and strain of the tendons. Petitioner was given restrictions, and only permitted to walk, stand, occasionally lift a

maximum of five pounds with the right arm, no repetitive activities with her right arm, and no repetitive gripping with her right hand.

On March 21, 2014, Petitioner presented to Dr. Matthew Smith with complaints of right elbow and shoulder pain. (PX5) Petitioner reported that she thought her pain was related to lifting cassettes at work repetitively. Petitioner reported that her pain radiated down her forearm into her wrist. Petitioner advised that her shoulders had started bothering her more over the last week. Dr. Smith obtained x-rays of Petitioner's right elbow and forearm and her right shoulder. Petitioner's x-rays showed a normal examination of right shoulder, elbow, and forearm. Dr. Smith noted that Petitioner's right shoulder pain was likely related to impingement, and her right elbow pain was consistent with lateral epicondylitis with associated radial tunnel syndrome. Dr. Smith reported that Petitioner would benefit from continued physical therapy and that it would likely take several months for her conditions to completely resolve. Petitioner was advised to follow up in three months if she did not get better with physical therapy. Dr. Smith noted that Petitioner "has been diagnosed with lateral epicondylitis. This diagnosis **could** be due to the repetitive lifting of 25 pound medication cassettes within her position at work". (PX5, emphasis added)

On April 21, 2014, Petitioner presented to Mr. Cameron in follow up. (PX1) Petitioner reported that her pain had lessened since her last appointment. Petitioner reported that she wanted to return to work and see how she did, and that she was pain free the majority of the time. Petitioner reported that she had seen an orthopedic doctor, Dr. Matthew Smith, who gave her the diagnosis of epicondylitis and advised her that it was likely due to lifting. Mr. Cameron assessed Petitioner with epicondylitis which appeared to be resolved. Petitioner was advised to continue home flexibility and strengthening exercises and to follow up if her symptoms recurred. Petitioner was returned to work without restrictions on April 22, 2014.

On May 22, 2014, Petitioner presented to Dr. Clare Fadden at the Murphysboro Health Center. (PX2) Petitioner reported complaints of pain in her elbows and shoulders. Dr. Fadden noted that Petitioner had tendonitis in her elbows and shoulders. Petitioner gave a history of being off work for two months and being pain free, but when she went back to work she had recurrent pain in her shoulders and elbows. Petitioner reported that she had been taking ibuprofen and tramadol because she had been waking up at night with increased pain. Dr. Fadden noted that Petitioner had ulcerative colitis and was on Remicaid and also had some osteopenia so Petitioner had concerns about steroid use. Petitioner was referred for physical therapy and given a restriction for no lifting.

Petitioner underwent a Section 12 examination with Dr. Anthony Sudekum on June 23, 2014, at Respondent's request. (RX6)

On July 7, 2014, Petitioner presented to Dr. Fadden with a history of shoulder pain which began six months prior. (PX2) Petitioner reported that the pain in her shoulder radiated to her

elbow and was burning and dull. Petitioner reported that the pain was aggravated by lifting and pushing. Dr. Fadden planned for Petitioner to continue physical therapy and to watch her weight lifting.

On August 7, 2014, Petitioner reported pain in her bilateral shoulders, which she described as constant but improving. (PX2) Petitioner reported that the pain was aggravated by lifting, movement, and pushing. Petitioner reported that her pain was relieved by physical therapy. Petitioner was advised to continue therapy and weight restrictions at work.

On September 16, 2014, Petitioner presented to Mr. Cameron in follow up. (PX2) Petitioner reported that over all her pain was much better but she still had intermittent pain in both shoulders and elbows, especially the right elbow, when she tried to lift things. Petitioner was to continue light duty restrictions for one month pending physical therapy.

On October 13, 2014, Petitioner presented to Dr. George Paletta . (PX7) Petitioner gave a history of an onset of right elbow pain which began in January, 2014. Petitioner reported that she had to lift and deliver cassettes of medication up to forty times per day and that the cassettes weighed approximately twenty-five pounds. Petitioner reported that the cassettes were on a cart for her to deliver. Dr. Paletta noted that Petitioner's pain was mainly confined to the lateral aspect of the elbow in the extensor wad, but did not go all the way down the forearm or into the dorsum of the hand. Dr. Paletta assessed Petitioner with mild chronic lateral epicondylitis and possible associated radial tunnel syndrome. Dr. Paletta planned for Petitioner to undergo an MRI scan of the elbow, and if the MRI indicated significant lateral epicondylitis with or without a partial tear then Petitioner may be a candidate for an injection. Dr. Paletta further noted that if Petitioner was reluctant to consider an injection because of her osteopenia then her other options might be for a Tenex procedure or for a partial lateral epicondylectomy. Dr. Paletta concluded that based upon the history provided to him by the Petitioner and the correlation of onset or worsening symptoms with work activities that required repetitive lifting, it was his opinion that Petitioner's right elbow condition was causally related to her work activities. Dr. Paletta gave Petitioner restrictions of no lifting more than ten pounds.

Dr. Sudekum testified via evidence deposition on November 13, 2014. (RX8) Dr. Sudekum testified that he reviewed records from Murphysboro Health Center, Dr. Smith, Dr. Donald Bishop, and x-rays as part of his preparation for the exam.

Dr. Sudekum testified that at the time he examined Petitioner she did not have any physical indication of left lateral epicondylitis. Dr. Sudekum testified that since there was no objective evidence of any disease he had to make a differential diagnosis. Dr. Sudekum testified that in Petitioner's case there were some physical exam findings which could potentially be consistent with lateral epicondylitis, but with a differential diagnosis you had to look at the patient as a whole and look at other positive pathologic entities that could be causative of Petitioner's symptoms. Specifically in Petitioner's case, Dr. Sudekum testified that Petitioner

suffered from ulcerative colitis. Dr. Sudekum testified that ulcerative colitis is an inflammatory bowel disease, and that with that disease there were symptoms and pathologic entities outside the intestines, specifically musculoskeletal pain is one of the more common symptoms. Dr. Sudekum testified that most studies indicated that 20 – 40% of patients with that condition will have some significant musculoskeletal complaints. Dr. Sudekum testified that Petitioner takes Remicade for her ulcerative colitis, and could also be a causative factor in her conditions. He further testified that Petitioner had pain in her deltoid muscles, her upper arms, her elbows, and her forearms which is more indicative of a generalized entity rather than simple lateral epicondylitis. With that in mind, Dr. Sudekum testified that generalized myositis, fibromyalgia, or a generalized tendinitis condition of an unknown etiology would also be a differential diagnosis. Additionally, Dr. Sudekum testified that another differential diagnosis could be osteoarthritis because it could also be present with those conditions. Dr. Sudekum testified that in order for him to be able to give a more definitive diagnosis he would have to review an MRI scan of the Petitioner.

Dr. Sudekum testified that Petitioner's age, condition of ulcerative colitis, and use of the medication Remicade could predispose her to the development of the symptoms she presented with and the condition of lateral epicondylitis. Dr. Sudekum testified that he did not believe that Petitioner's work activities caused or aggravated her underlying pathology. Dr. Sudekum testified that Petitioner's job could have provoked symptoms, similar to someone who had hip arthritis that felt pain when walking up the stairs at work, but he did not think the type of work she described would cause a pathologic change. Dr. Sudekum testified carrying grocery bags probably induced the same type of symptoms she had when lifting cassettes at work.

Dr. Sudekum testified that tearing out 2,000 feet of carpet could potentially cause an acute onset of Petitioner's pathology. Dr. Sudekum testified that hand scraping wallpaper off walls could certainly have an effect on the development of pathology for lateral epicondylitis. Dr. Sudekum testified that painting walls in a house could also have a similar effect in the development of the pathology. Dr. Sudekeum testified that "[t]hose types of activities would be much more likely, frankly, to be associated with the development of a condition like lateral epicondylitis than would lifting cassettes." Dr. Sudekum also testified that if Petitioner used a miter saw to cut hardwood flooring on a sustained or repetitive basis over several hours it would be more likely to have caused or contributed to lateral epicondylitis pathology or symptomology.

Petitioner testified at arbitration on March 24, 2015. Petitioner testified that she works as a clinical pharmacist at Chester Mental Health, and has done so for 12 years. Petitioner testified that clinical pharmacists fill cassettes on a daily basis for a 24 hour supply of medication for the patients which they then deliver to each unit every day. Petitioner testified that each cassette weighs 23.6 pounds and is pushed on a cart to deliver medication. Petitioner testified that there are 6 units that the pharmacists deliver to on a daily basis. Petitioner testified that depending on what day of the week it was and how the facility was staffed, she would lift the cassettes

sometimes up to 40 times per day. Petitioner testified that filling and delivering the cassettes is her primary job duty.

On cross-examination Petitioner testified that, including herself, there are three full-time clinical pharmacists. Petitioner testified that there had also been temp pharmacists at some time. Petitioner testified that while there are 6 units to deliver medication to, she would only deliver to 1 – 2 units per day. Petitioner admitted that she personally only filled 6 cassettes per day, but testified that it could be fewer as well. Petitioner also admitted that she lifted her 6 cassettes only 18 times unless it was Thursday or Friday. Petitioner testified that on Thursday and Friday they double filled cassettes since the pharmacists would not be there on the weekend. On those days Petitioner testified that she could lift her cassettes as many as 40 times, but it could be fewer. Petitioner estimated it would only take her 10 seconds to lift a cassette on and off the cart she used to take the medication to the unit.

Petitioner testified that she first saw her primary care physician for medical treatment for her repetitive injury in February, 2014. Petitioner testified that she completed an employee's notice of injury on February 7, 2014. (RX2) Petitioner testified that she filled out the employee's notice of injury on the same day she saw the doctor.

On cross-examination Petitioner advised that her first doctor's appointment was actually February 17, 2014, not February 7, 2014. Petitioner was then asked why she would have completed an employee's notice of injury prior to seeing a doctor. Petitioner testified that it was because she felt that she had tendonitis in her elbow from overuse and repetition. Petitioner testified that she thought it was work related because she did not have any extra-curricular activities. However, Petitioner admitted that she is right hand dominant and used her right hand for everything she does.

Petitioner admitted that she has two dogs, an 80 pound dog and a 60 pound dog. Petitioner testified that she doesn't walk her dogs on a leash because they "don't do well on a leash". Petitioner admitted that by not doing well on a leash, it meant the dogs yank and pull while on a leash.

Petitioner testified that she bought a 2400 square foot house in 2013. Petitioner was asked about Respondent's Exhibits 10(A), 10(B), and 10(C). Petitioner admitted that the pictures were of her Facebook status, of her, and of her home. Petitioner was asked specifically about 10(A), her Facebook status, which read "Thanks everyone! Today was the first 'labor of Love' day. With some great help, we ripped out about 2000 square feet of carpet, pad, and baseboards among some other projects. It's going to be a manual labor kinda week for this girl!" Petitioner was asked if she ripped out 2,000 square feet of flooring. Petitioner testified that she personally did not rip out flooring. Petitioner testified that she "helped where needed" but didn't personally take on any projects herself. Petitioner was then asked about Respondent's Exhibit 10(B) and admitted that it was a picture of her using a saw to cut boards. Petitioner testified that

she helped her contractor "cut a couple of boards" and that she helped to lay "maybe of few boards" of flooring. Petitioner denied ever hand-scraping wallpaper off the walls. Petitioner testified that except for her entryway, she hired someone to do all the painting.

Respondent called Jeffrey Sauzek to testify. Mr. Sauzek testified that he works as a clinical pharmacist at Chester Mental Health Center. Mr. Sauzek testified that he and Petitioner worked the same days and performed the same job duties, and that the only difference between their positions is that he starts the day one hour earlier than Petitioner and she stays one hour later than him.

Mr. Sauzek testified that he was aware that Petitioner remodeled her house because she talked about it at work. Mr. Sauzek testified that Petitioner told him that she personally did the flooring, painted, and maybe stripped wallpaper.

Therefore, the Arbitrator concludes:

1. The Petitioner failed to prove she sustained an accident on January 29, 2014 and May 15, 2014, that arose out of her employment with Respondent. Petitioner failed to prove that her condition of ill-being in her right elbow is causally related to her alleged accidents of January 29, 2014 and May 15, 2014.

   Based upon Petitioner's testimony, it is apparent that her job duties are not repetitive in nature. Additionally, none of Petitioner's treating physicians had an accurate understanding of how often she was performing the task alleged to be repetitive. Petitioner told each doctor that she lifted cassettes 40 times per day. However, when questioned on cross-examination Petitioner testified that three days per week she only lifts the cassettes 18 times. Petitioner testified that two days per week she lifted them up to 40 times, but admitted it could be less. Petitioner testified that it only takes her 10 seconds to lift a cassette on and off the cart used to deliver the medication. Therefore, three days per week Petitioner spends approximately three minutes lifting cassettes and two days per week Petitioner spends approximately six minutes of her day lifting cassettes. It is clear from the medical records that this was not what Petitioner relayed to her treating physicians.

   "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 203, 797 N.E.2d 665, 671 (2003). Preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence offered in opposition of it; it is evidence which as a whole shows that the fact to be proved is more probable than not." *Gonzales v. United Airlines, Inc.*, 03 IL.W.C. 30483, 09 I.W.C.C. 0458 (2009), citing *Jones v. J. Rubin Co*, 98 IL.W.C. 7779, 02 I.I.C. 0142 (2002). "Among the factors to be

considered in determining whether a claimant has sufficiently carried his burden is his credibility." Id. At trial, a "witness' credibility is always in question." *Bish v. Guiseppe's Pizza*, 07 IL.W.C. 27341, 09 I.W.C.C. 0382 (2009). Credibility is the quality of a witness which renders his evidence worthy of belief. *Gonzales*. It is the Arbitrator's duty to evaluate a witness' credibility, as well as, "the witness's demeanor and internal and external inconsistencies in his testimony." *Id.*

A claimant's testimony, "standing alone, may support an award where all of the facts and circumstances do not preponderate in favor of the opposite conclusion." *Sieber v. Indus. Comm'n*, 82 Ill.2d 87, 97, 411 N.E.2d 249 (1980). However, "when the claimant's testimony is virtually the only evidence favoring an award, and that testimony is repeatedly contradicted by the record, then it is this court's duty to disallow the claim." *Caterpillar Tractor Co. v. Indus. Comm'n*, 73 Ill.2d 311, 315, 383 N.E.2d 220, 222 (1978).

Petitioner's testimony that she did not personally perform any of the remodeling on her home is contradicted by her own Facebook page and the testimony of her co-worker. Therefore, the Arbitrator finds her testimony to be suspect and not credible. Respondent's Section 12 examiner testified that those specific activities could cause or aggravate the condition of Petitioner's right elbow.

Therefore, Petitioner's claim for prospective medical treatment for her right upper extremity is denied.

2. Petitioner's claim for compensation is denied. All other issues are moot.

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

Corey Martin,
Petitioner,
vs.
WATCO,
Respondent,

NO: 14WC 11240

16IWCC0121

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permant 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 May 19, 2015, 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.

DATE: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTIN, COREY
Employee/Petitioner

Case# **14WC011240**

16IWCC0121

WATCO
Employer/Respondent

On 5/19/2015, 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
TODD J SCHROADER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

2904 HENNESSY & ROACH PC
MICHAEL J HOLT
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0121

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

Corey Martin
Employee/Petitioner

v.

Watco
Employer/Respondent

Case # 14 WC 11240

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 **March 25, 2015**. 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 _____

16IWCC0121

FINDINGS

On 2/19/2014, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 $41,600.00; the average weekly wage was $800.00.

On the date of accident, Petitioner was 36 years of age, *single* with 4 dependent children.

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

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

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

Respondent is entitled to a credit of $5,139.46 under Section 8(j) of the Act as to medical benefits.

ORDER

The Petitioner failed to prove accident. All benefits 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

5/18/15
Date

MAY 19 2015

FINDINGS OF FACT APPLICABLE TO ALL DISPUTED ISSUES

Corey Martin testified that he works for Respondent as a welder/Car Man. The job involves welding and cutting metal parts off of railroad cars. On February 19, 2014, he was swinging a 10-pound, long-handled sledgehammer and missed. He felt a pop in his left shoulder. It is not disputed that Petitioner treated with Dr. Poos initially, a family doctor, who referred him to Dr. Doerr, an orthopedic surgeon. Petitioner was treated conservatively by Dr. Doerr, including physical therapy and shoulder injections. Petitioner was released back to full duty work in his former capacity, and he currently works for Watco as a Car Man. He is completing his regular job duties but still complains of left shoulder pain.

One of the significant trial issues was the content of the February 20, 2014 medical record of Dr. Poos, whose records were admitted at Petitioner Exhibit 2. The office note dated February 20, 2014 contains the history that Petitioner had left shoulder pain for several weeks; no known injury. This history appears twice in the typewritten office note. On the other hand, Dr. Poos' office note of February 25, 2014 references a history of Petitioner swinging a sledge hammer at work on February 18, 2014 and injuring his left shoulder.

At trial, Petitioner testified that Dr. Poos may not have understood what he told him. Petitioner testified he had experienced problems before with the left shoulder and the sledgehammer incident made it worse. Petitioner did not believe the Dr. Poos office note was accurate. Dr. Poos was not deposed.

The second major issue at trial concerned Watco's "point" system. Petitioner testified to his understanding that a worker is assessed a half on full point for being tardy or absent without excuse. Petitioner agreed that, on the day of his alleged injury, he had accumulated 11.5 points out of a permitted 12 points. If an employee accumulated 12 points in a year, the employee could be terminated. Petitioner agreed that, if he had showed up late for work without excuse on the alleged accident date, he would have received a half point which would put him at the 12 point mark. A worker does not receive any points if their tardiness or absence is because of a work injury.

Respondent called Jorel Grant who is the environmental health and safety manager for Respondent. Mr. Grant explained that the Watco point system is part of the collectively bargained agreement with the union. It is a "no fault" based system. There is a 12-point maximum during a rolling calendar year that can be incurred before termination. If a worker calls in before 6:06 a.m., only a half point is assessed, but a call after this time results in a full point assessment. If the worker is tardy because of a medical appointment arising from a work accident, no points are assessed or a prior point assessed is removed. On February 19, 1014, Petitioner had 11.5 points out of a permitted 12 points. Mr. Grant identified Respondent's Exhibit 3 as a print out of the points Petitioner had accumulated as of February 19, 2014. Petitioner was very close to "pointing out," on the alleged accident date. Per Mr. Grant, Petitioner was frequently late to work and assessed points.

A third major issue at trial concerned Petitioner calling in before his shift to advise Respondent that he injured his shoulder and would be seeing his doctor. Petitioner testified that he called Rick Bauman at work before his shift began and told him that he injured his shoulder at work.

Respondent called Rick Bauman as a witness, who is a supervisor to Petitioner. Mr. Bauman denied that Petitioner told him that he injured his left shoulder at work. Mr. Bauman completed Respondent's Exhibit 5 on February 21, 2014, and it is a handwritten statement indicating that Petitioner did not report when he injured his shoulder or that it was "on the job or off the job."

Petitioner's injury happened in mid-afternoon. Petitioner agreed he did not report the incident to Watco the day it occurred, and this was against the Watco reporting policy that all accidents are to be immediately reported. Mr. Grant and Mr. Bauman both testified that all accident are to be immediately reported, and workers are trained on this protocol. However, the work is physical in nature, and workers do not always report every minor injury that happens.

Petitioner completed an accident report on February 21, 2014. (Px. 8.) It references a left shoulder injury at work while swinging a sledge hammer. Petitioner also called Jeff Allred, a co-worker, who testified to being present when Petitioner missed with the sledgehammer. Mr. Allred completed a written statement about the accident consistent with Petitioner's testimony. (Px. 10.) Mr. Allred has three pending worker's compensation cases himself against Watco, all denied.

Therefore, the Arbitrator finds as follows:

1. The Arbitrator denies Petitioner's claim. First, the Arbitrator finds the most objective piece of evidence to be the contemporaneous office note of Dr. Poos dated February 19, 2014. It clearly reflects Petitioner reporting shoulder pain for a number of weeks with no known injury. Second, suspicion of the legitimacy of the alleged accident exists because Petitioner was very near termination due to having accumulated 11.5 points out of a permitted 12. If Petitioner's absence from work on February 20, 2014 was due to a work injury, Petitioner would not be assessed any points so he could keep his job. If the absence was due to a personal health condition, Petitioner would have "pointed out" due to an unscheduled work absence and he could be terminated. Sufficient doubt exists in the Arbitrator's mind as to whether Petitioner suffered the alleged work injury.

2. All other issues are moot in light of the conclusion above. Benefits are hereby 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Ooms,
Petitioner,
vs.
The Anderson's Inc.,
Respondent,

NO: 14WC 13639

16IWCC0122

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, 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 26, 2015, 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 $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: FEB 11 2016
MJB/bm
o-2/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

OOMS, TIMOTHY
Employee/Petitioner

Case# **14WC013639**

14WC005682

16IWCC0122

THE ANDERSON'S INC
Employer/Respondent

On 5/26/2015, 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:

0333 SHAY & ASSOCIATES
KATHERINE WOOD
260 E WOOD ST
DECATUR, IL 62523

2904 HENNESSY & ROACH PC
PAUL N BERARD
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0122

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIMOTHY OOMS,
Employee/Petitioner

v.

THE ANDERSON'S INC.
Employer/Respondent

Case # **14** WC **13639**

Consolidated cases: **14 WC 5682**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/28/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did 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 **$21,379.10**; the average weekly wage was **$593.86**.

On the date of accident, Petitioner was **49** years of age, *married* 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 **$38.10** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$38.10**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14. Petitioner's 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.

Signature of Arbitrator

5/20/15
Date

ICArbDec19(b)

MAY 26 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 49 year old bagger, alleges he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent that manifested itself on 2/28/14. This case was heard in consolidation with case 14 WC 5682, with an alleged accident date of 12/4/13. A separate decision has been issued with respect to this claim.

On 8/21/12 petitioner underwent a physical at Decatur Memorial Hospital, performed by Dr. Barnes. This was a pre-placement examination for ADM Birkbeck Grain Elevator EA9. Petitioner's examination was normal.

Petitioner worked for respondent through a temporary agency from November 2012 through March 2013. In March 2013 petitioner was hired full-time by respondent and continued to work for respondent until 12/5/13.

Petitioner was a bagger for respondent. His duties included taking a bag off the table, putting it on the spout of the hopper by clamping the bag onto the hopper, then pulling down the lever with his right hand to fill the bag with corncob. When 50 pounds filled the bag, the hopper would automatically stop. Petitioner would then flip the lever off, release the clamps, and the bag would fall on the conveyor. Petitioner would then step on a pedal that would move the conveyor. The bag would move to the sew area, 20 inches away. Petitioner would fold down the top of the bag together, press another pedal and the sewing machine would sew the top of the bag. Petitioner would then cut the string off the sewing machine right at the end of the sewing machine. Once the bag was filled and sewed, petitioner would pick the bag off the conveyor and place it on the pallet. Other duties that petitioner performed included running the pay loader and man lift, sweeping floors, scooping product, blowing off machines, and doing repairs. He testified that he has a lot of duties, but his primary job is bagging.

Petitioner stopped working on 12/5/13 due to an alleged unrelated low back injury. Petitioner did not work from 12/6/13 through 2/6/14.

On 2/6/14 petitioner returned to Dr. Kureishy staggering while walking. He complained of numbness in his right side, glut and hip area radiating down his side. He also complained of numbness in his left little finger. Dr. Kureishy noted a right ulnar nerve entrapment shooting down the outer right forearm. He recommended an EMG/NCV. Petitioner was continued off work. On 2/21/14 petitioner continued to complain of back pain, and hand/arm numbness/tingling. Petitioner stated that his carpal tunnel syndrome was related to repetitive motion at work.

On 2/28/14 petitioner presented to his cardiologist, Dr. Jyothinagaram. He reported that his activity had decreased over the last few months due to a backache. He also stated that he had carpal tunnel syndrome and was scheduled for carpal tunnel surgery and elbow nerve relief surgery. Petitioner noted that he was a smoker from 1983 to 2001, and would smoke one pack a day. After petitioner stop smoking cigarettes he started chewing tobacco, and graduated to chewing snuff. He was instructed to discontinue use of snuff.

On 2/28/14 petitioner also presented to Dr. Robert Krause at Decatur Neurosurgery Associates, for low back pain. His chief complaint was low back pain, and bilateral hand numbness and tingling. Petitioner reported that his lower back pain developed sometime in December. He related a work injury where he was twisting his back and developed symptoms. He complained of pain about his right lower back, that occasionally travels into the leg. He reported that he had been using Norco, Valium, and Neurontin, without any significant relief. Petitioner denied any left leg symptoms. He stated that therapy exacerbated his pain. Petitioner also complained of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the fourth and fifth digits. Dr. Krause saw no obvious weakness in petitioner's hands, but petitioner reported that he had diminished grip strength. Petitioner reported some symptoms in his left hand, but was more worried about the right hand. Petitioner did not report any nocturnal pain. Dr. Krause reviewed the results of petitioner's MRI of the lumbosacral spine dated 1/15/14. He was of the opinion that it showed mild arthritic changes about the low back. No evidence of disc herniation was seen. He also reviewed the EMG nerve testing performed 2/13/14 which revealed bilateral severe carpal, and moderate to severe, right greater than left, cubital tunnel syndrome. Dr. Krause's impression was lumbosacral sprain/strain with mild arthritic changes of the lumbosacral spine; morbid obesity; bilateral carpal tunnel syndrome, right greater than left; cubital tunnel syndrome. Dr. Krause saw no need for spinal surgery. He recommended physical therapy and a referral to the pain clinic. He released petitioner to light duty activities. He also released petitioner on an as needed basis with respect to his low back. He continued treating petitioner for his bilateral carpal and cubital tunnel syndrome.

On 3/7/14 petitioner returned to Dr. Kureishy. His history included acute back lumbar sacral pain, sudden onset one month ago, radiating down the right leg, moderate in severity. Dr. Kureishy's diagnoses included chronic low back pain, chronic sciatica, and chronic carpal tunnel syndrome. Then on 3/20/14 petitioner returned to Dr. Kureishy. He complained of back pain since he received a shot in his back. He complained of right-sided pressure on his butt, and stated that his left side felt like a knife following the injection. Petitioner's low back pain complaints included not only the right side but the left side. He

reported that they were acute and moderate in severity. He reported that the exacerbating factors are activities. Dr. Kureishy's diagnoses were chronic low back pain and chronic sciatica. Dr. Kureishy noted that petitioner's physical therapy was stopped because it was making things worse. It was noted that petitioner was taking Norco and diazepam.

On 3/21/14 petitioner underwent a right median nerve decompression at the wrist, and right ulnar nerve decompression without transposition, performed by Dr. Krause. Petitioner's postoperative diagnoses were right carpal tunnel syndrome, and right cubital tunnel syndrome. Petitioner followed up postoperatively with Dr. Krause.

On 4/1/14 petitioner related improvement of his right fourth and fifth digit numbness. He noted no adverse events after the decompression. He reported discomfort in the right and pain in his left hand along his wrist, and numbness and tingling along his left fourth and fifth digits. Petitioner made no complaints of any back pain. Dr. Krause released petitioner to driving, and continued petitioner's lifting restrictions at 20 pounds.

On 4/23/14 petitioner returned to Dr. Krause with multiple complaints and concerns. He complained of severe lower back pain and severe pain about his left elbow. He also related numbness along his right fifth digit. Dr. Krause ordered a course of occupational therapy. He released petitioner back to work with lifting restrictions of 50 pounds. His prognosis for petitioner was poor. He suspected secondary gain issues.

On 7/23/14 petitioner followed up with Dr. Krause. He reported concerns regarding his lower back. He stated that he had been undergoing various injections but did not think they had been helpful. He stated that he was still on Percocet and Neurontin. He stated that his hand symptoms were improving, but he still had some discomfort about his left wrist. He did not voice significant digit features, and related numbness along the right elbow. Petitioner did not relate any elbow pain. Dr. Krause reviewed the MRIs from 1/15/14 and 7/1/14 and noted that there were minimal arthritic changes of the mid lumbar segments. A generalized disc bulge was noted. His impression was low back pain, and status post right median and ulnar nerve decompression. Although petitioner related limitations of lower back pain, Dr. Krause did not think there was a surgery that would improve his disposition there. He believed that petitioner would be best treated in a pain management program, which he noted petitioner was doing. He also indicated that weight reduction, chiropractic treatments, and nonsteroidals would all be helpful. He did not believe that petitioner would be able to go back to work because of pain limiting symptoms. However, from his standpoint, Dr. Krause did not have any particular restrictions for petitioner. With respect to petitioner's

peripheral nerve entrapment, Dr. Krause believed petitioner was improving. He noted that petitioner did have some pain and numbness about the elbow area, but suspected that it would improve over the next several months. He had no limitations regarding petitioner's peripheral nerve entrapments. He believed petitioner was tolerating his left side quite well, and did not appear to require surgery at that time. Dr. Krause released petitioner on an as needed basis, and noted that he may continue to work with the pain clinic and his family practitioner for chronic pain management programs. On 7/28/14 Dr. Kureishy noted that petitioner should be off for one month.

On 8/11/14 petitioner underwent a Section 12 examination performed by Dr. William Strecker, at the request of the respondent. Petitioner's chief complaint was pain and numbness in the ring and small fingers. Petitioner gave a history of sustaining a back injury on 12/5/13, and approximately 2 weeks later developed numbness and tingling to the ring and small finger of both hands, more so on the right than the left. Petitioner complained of intermittent numbness of the ring and small fingers on the left. He reported that his job duties are as a bagger, and he is required to fill bags with approximately 50 pounds of corncobs. He then flips the bag, sews it shut, cuts the string, and stack the bag on the pallet. He stated that he usually stacks five bags per layer, eight high, on each pallet. Petitioner reported that prior to his back injury he had been working "shutdown" where he would do a double shift and then a 12 hour shift, seven days a week since August. Petitioner reported that he can typically can do 2 bags in a minute, and was doing approximately 7 tons of material per day during this period. Petitioner reported that he had to maintain his elbows in a fixed and flexed position. Following an examination and record review Dr. Strecker was of the opinion that petitioner had bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. He opined that the treatment to date had been reasonable and necessary. With respect to petitioner's right upper extremity, Dr. Strecker recommended a repeat of his nerve conduction study to ascertain why petitioner had persistent parathesias in the fifth finger, hand and forearm. With respect to his left upper extremity, Dr. Strecker felt that petitioner was most likely going to require decompression of his median nerve at the wrist, as well as decompression and possible transposition of the ulnar nerve at the left elbow. Dr. Strecker was of the opinion that petitioner could work limited duty, not greater than 50 pounds on a non-repetitive basis. With respect to causation, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker noted that while petitioner described that his elbows were maintained in a fixed hyper flexed

position, neither his job description or the video confirmed this. He also noted that petitioner had no complaints of parathesias for two months after his last day of work, as well as only having a limited exposure since he began working full time for respondent, and had not worked since December 2013. Based on the limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel.

On 1/15/15 the evidence deposition of Dr. Strecker, an orthopedic surgeon, was taken on behalf of the respondent. Dr. Strecker noted that when he examined petitioner he still had numbness of the small finger, as well as numbness in the ulnar aspect, or the small finger side of his hand, and on the inside portion of his forearm, on the right. He opined that petitioner did not have any complaints on the right side that would be consistent with carpal tunnel syndrome, or complaints on the left side that would be consistent with cubital tunnel syndrome. Dr. Strecker opined that there is no correlation between nerve conduction and EMG findings and the clinical diagnosis of carpal tunnel syndrome. Based on what the petitioner told him, and the job videotape, Dr. Strecker was of the opinion that the videotape did not show that petitioner had to maintain his arms in a hyper flexed position for prolonged periods of time. Although Dr. Strecker agreed that petitioner had to flex and extend his elbows all day, he did not have to maintain them there. Dr. Strecker was of the opinion that petitioner did not meet any of the thresholds that one would expect to see in somebody who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position. Dr. Strecker was also of the opinion that the other reason he did not think petitioner's cubital tunnels were related to his job duties was the fact that there wasn't a temporal relationship between petitioner's onset of his complaints and his job. Dr. Strecker noted that petitioner did not have any complaints of numbness and tingling until two months after he finished his last day of work for respondent. Dr. Strecker was of the opinion that obesity is a risk factor for the development of carpal tunnel, and petitioner weighed 340 pounds. Dr. Strecker was of the opinion that even though petitioner had electrical findings of carpal tunnel syndrome he had no symptoms, nor did he have any physical or provocative findings of carpal tunnel syndrome.

On cross-examination Dr. Strecker was of the opinion that the job duties that were explained by petitioner and shown in the job video could cause bilateral carpal tunnel syndrome, but petitioner had no symptoms related to carpal tunnel syndrome.

On 1/23/15 the evidence deposition of Dr. Krause, a neurosurgeon, was taken on behalf of the petitioner. Dr. Krause testified that he treated petitioner for his back, as well as his bilateral hands and arms. Dr. Krause opined that when he initially saw petitioner his symptoms were caused by cubital

tunnel syndrome and carpal tunnel syndrome, with most of it being associated with cubital tunnel. He testified that the only complaints petitioner had with regard to carpal tunnel syndrome was his subjective complaints of hand weakness. Dr. Krause testified that he did not talk to petitioner about his job duties. He further testified that most of what he evaluated petitioner for was his back, and petitioner complained bitterly of back pain from work. Dr. Krause did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Krause was of the opinion that when you talk about any cubital tunnel activity, flexion of the elbow can cause aggravation. He was further of the opinion that cubital tunnel is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how they carry their arms. Dr. Krause was of the opinion that it was really hard for him to say exactly what was causing petitioner's cubital tunnel troubles. Dr. Krause was of the opinion that when he saw petitioner on 4/23/14 he was not recommending any further surgeries for petitioner. Dr. Krause was of the opinion that if petitioner had undergone injections before he saw him, that would explain why he may not of been having any back pain when he examined him. Dr. Krause noted that petitioner had some degree of complaints about everything on every visit. Dr. Krause opined that any activity can cause pain, but anatomically and structurally there was nothing objectively wrong with petitioner's low back.

On cross-examination Dr. Krause was of the opinion that if petitioner never had any complaints of arm, hand pain, and finger numbness while he was working, and the first time he reported any of the symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms. Dr. Krause was of the opinion that petitioner would've been capable of working full duty on 4/23/14 as it relates to his back. Dr. Krause noted that petitioner's MRI of his lumbar spine only showed mild arthritic changes, and no herniations. Dr. Krause did not believe that petitioner was a candidate for surgery on his back. Dr. Krause opined that he could not find a discrete abnormality that would substantiate petitioner's back pain.

Tom Keller, Plant Operations Manager for respondent, was called as a witness by respondent. Keller has worked for respondent for over two years. He has oversight and review of the entire plant. He knows petitioner, and worked with him since 2013. He testified that he is familiar with petitioner's job duties, and agreed with the bagging process as described by petitioner. Keller learned of petitioner's alleged accident on 12/4/13, on 12/9/13.

Keller testified that petitioner was not working alone on 12/4/13. He testified that petitioner was working with Kent Meagher. He testified that they were doing the same job together that day. Keller also testified that the company policy is for the employees to work together in teams, and rotate through

the different jobs which include bagging, driving a forklift, shrink wrapping, and moving freight from production to storage area. Keller testified that the position he saw petitioner working most often was driving a forklift, shrink wrapping, and moving freight from production to storage area. He stated that there has never been an employee that has worked 10 hours alone. Keller testified that if petitioner had been working alone on 12/4/13 he would have known about it. He testified that he walked throughout the facility regularly and routinely on a daily basis. He testified that it is possible that someone may work alone for a short time while the coworker moves a pallet. With respect to petitioner's alleged injury on 2/28/14, Keller did not find out about that injury until April 2014.

Currently petitioner still has symptoms in his back, and uses a Fentanyl patch every three days. He also takes Percocet and diazepam for his back pain. He testified that the medications affect him and make him feel sluggish. He also attributes his memory loss to the medications. Petitioner complained of numbness from his little finger on his right hand to his elbow. He reported that his wrist hurts all the time. He also stated that he has a trigger finger in his right ring finger. With regards to the left upper extremity petitioner reported that his left hand goes numb on a regular basis, and he has aching in the wrist.

Respondent offered into evidence a video job analysis of the bagger job. The arbitrator notes that there were 2 workers working the bagging line. The operator would take a bag off a table, open it up and put it under a clip on the filler spout. The operator then pulls a lever and the bag is filled. When done the operator pulls the lever again and the bag is released and dropped onto the conveyor belt. The operator controls the speed of the belt with a foot pedal. Most often the operator would press the foot pedal to move the bag on the conveyor over so that he could fill another bag. Once that one is dropped onto the conveyor the operator presses the pedal to make the conveyor move the bag to the sewing machine. He fold the tops of the bag the together and presses a pedal so that the conveyor moves the bag through the sewing machine. The operator puts the string through a cutter right at the end of the string. The operator then places the bag on the pallet. There are 5 to a level and up to 8 levels per pallet. Once full the operator will use a forklift to remove the full pallet from the area. These jobs were performed by 2 operators. The speed at which this process was performed was controlled by the operator. The conveyor moved at the speed the operator determined since he controlled it with a foot pedal.

Respondent also entered into evidence an office note from Dr. Kureishy dated 8/15/13. Petitioner complained of back pain. He reported that he has a hard time at work lifting 50 pound bags. Petitioner was 303 pounds, and his BMI was 41.97. On 9/12/13 petitioner told Dr. Kureishy that his back pain was improved on Skelaxin 800 mg.

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 alleging injuries to his bilateral hands/arms due to repetitive work activities, that arose out of an in the course of his employment by respondent, and manifested itself on 2/28/14.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injuries to his bilateral upper extremities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner is alleging an accident date of 2/28/14. The arbitrator finds this is not the first date petitioner sought medical attention for his bilateral hands/arms, that was on 2/6/14 with Dr. Kureishy. It was not the date the petitioner was first informed by a physician that the condition is work related. It was not the date the petitioner is first unable to work as a result of the condition, since petitioner had not worked for respondent since 12/5/13. It was not the date his symptoms became more acute as work, since

he was working on 2/28/13, and had not done so for almost 3 months. Lastly, it was not the date the petitioner first noticed the symptoms of the condition. That would have been on 2/6/14. The arbitrator does not see 2/28/14 as a manifestation date of petitioner's alleged bilateral hand/arm condition.

Beside proving an accurate manifestation date, in order to prove a repetitive trauma accident, petitioner must place into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. The arbitrator finds the petitioner failed on both counts.

In the case at bar the petitioner outlined the specific duties he performed on the bagging line. Additionally, the respondent offered into evidence a video of the bagging line, and the duties performed. Although petitioner did not agree with the speed the job was performed on the video he did not dispute the activities being performed. However, the frequency, duration and manner of performing these activities was not clearly detailed in the records, especially as it relates to the histories petitioner's treating and examining doctors had. Dr. Krause testified that he did not talk to petitioner about his job duties. He also did not take a good detailed history about what was causing petitioner's hand symptoms. Dr. Strecker testified that the job history petitioner described was not consistent with the job description or video analysis. Additionally, the arbitrator finds discrepancies as to the frequency, duration and manner in which the activities were performed, based on petitioner's testimony versus Keller's testimony.

The arbitrator also finds it very significant that petitioner last worked for respondent on 12/5/13, and no credible evidence was offered to support a finding that petitioner had any problems and/or complaints with respect to his bilateral arms/hands while he worked for respondent, or in 2 months following his last day of work for respondent.

The first credible evidence regarding complaints related to petitioner's bilateral arms/hands was on 2/6/14 when he presented to Dr. Kureishy. At that time petitioner complained of numbness in his left little finger. Dr. Kureishy noted right ulnar nerve entrapment was shooting down the outer right forearm.

Thereafter, petitioner underwent an EMG/NCV of his upper extremities that was performed on 2/13/14. It showed bilateral moderately severe carpal tunnel syndrome, and bilateral moderately severe cubital tunnel syndrome, more on the right side. When petitioner next followed-up with Dr. Kureishy on 2/21/14 he alleged for the first time that his carpal tunnel syndrome was related to his repetitive motion at work.

On 2/28/14 petitioner presented to Dr. Krause, an orthopedic surgeon, complaining of bilateral arm numbness and weakness, with most of the pain about his right elbow, and numbness and tingling in the 4th and 5th digits. Petitioner did not provide Dr. Krause with a detailed and accurate description of his job duties with respondent. Dr. Krause saw no obvious weakness in petitioner's hands. On 4/23/14 Dr. Krause even suspected secondary gains.

On 8/11/14 petitioner was examined by Dr. Strecker, at the request of the respondent. Petitioner gave Dr. Strecker a history of pain and numbness in the ring and small fingers. He gave a history of injuring his low back on 12/4/13 and then 2 weeks later developing numbness and tingling to the ring and small fingers of both hands. The arbitrator finds this onset of bilateral upper extremity complaints unsupported by the credible evidence, which shows the petitioner made no complaints with respect to his bilateral upper extremities until 2/6/14.

Petitioner described his work duties to Dr. Strecker, and told him that he had to maintain his elbows in a fixed and flexed position. Dr. Strecker assessed bilateral cubital tunnel syndrome and an asymptomatic, but electrophysiologically positive, bilateral carpal tunnel syndrome. However, Dr. Strecker was of the opinion that there seemed to be some discrepancies. He opined that while repetition and force have been shown to be a contributing factor for the development of carpal tunnel syndrome, for which the petitioner was asymptomatic, there is no evidence that it is an aggravating or contributing factor to cubital tunnel syndrome, of which petitioner had complaints. Dr. Strecker found petitioner's description that his elbows were in a flexed hyper flexed position, was not confirmed by his job description, or the video of his job that he reviewed. Dr. Strecker also found it significant that petitioner had no complaints of parathesias while he worked for respondent or in the 2 months after his last day of work, as well as only having a limited exposure since he began working full time for respondent. Based on this limited duration and lack of temporal relationship, Dr. Strecker did not feel that petitioner's job duties caused, contributed or aggravated his carpal or cubital tunnel. Dr. Strecker opined that petitioner did not meet any of the thresholds that one would expect to see in someone who has cubital tunnel syndrome, such as chronically compressing the ulnar nerve; using vibratory tools; complaints of inflammatory tendinopathy; or maintaining elbows in a flexed position.

Dr. Kureishy offered no opinions as to whether or not petitioner's bilateral upper extremities are causally related to his work duties.

Dr. Krause opined that carpal tunnel syndrome is not really associated with people doing a lot of flexion activities. He opined that carpal tunnel is highly variable with each person's anatomy and how

they carry their arms, and he did not have a thorough understanding of petitioner's anatomy and how he carried his arms. Additionally, Dr. Krause was of the opinion that it was really hard for him to say exactly what was causing petitioner's cubital tunnel trouble.

Most importantly, Dr. Krause was of the opinion that if petitioner never had any complaints of arm and hand pain, and finger numbness while he was working for respondent, and the first time he reported any symptoms was two months after his last day of work, that his work duties would not be the cause or aggravating condition of his symptoms.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14.

E. WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO 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?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral arms/hands due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 2/28/14, or that his current condition of ill-being is causally related to the alleged injury on 2/28/14, the arbitrator finds these remaining issues moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Colleen Mackey,

Petitioner,

vs.

NO: 14 WC 24305

16IWCC0114

Aramark, Inc.,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)8(a) 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, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 28, 2015 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.

16IWCC0114

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 $2,000.00. 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: FEB 10 2016

MB/mam
o:12/17/15
43

Mario Basurto

David L. Gore

Stephen Mathis

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

MACKEY, COLLEEN
Employee/Petitioner

Case# **14WC024305**

16IWCC0114

ARAMARK INC
Employer/Respondent

On 5/28/2015, 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:

0311 KOSIN LAW OFFICE LTD
DAVID X KOSIN
134 N LASALLE ST SUITE 1340
CHICAGO, IL 60602

1739 STONE & JOHNSON CHTD
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

16IWCC0114

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(A)

Colleen Mackey
Employee/Petitioner

v.

ARAMARK, Inc.
Employer/Respondent

Case # **14** WC **24305**

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Geneva**, on **May 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **June 13, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**29,445.00**; the average weekly wage was $**566.25**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **0** dependent children.

The parties have stipulated and agreed to reserve the issue of medical bills at this time. ARB EX 1.

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

The parties have stipulated and agreed to reserve the issue of any 8(j) credit due respondent at this time.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 377.50/week for 5-3/7 weeks, commencing 06/14/2014 through 07/21/2014, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the medical treatment prescribed by Dr. Chudik including the left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia and its attendant care pursuant to Sections 8 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.

Carolyn Doherty
Signature of Arbitrator

5/27/15
Date

ICArbDec19(b)

MAY 28 2015

FINDINGS OF FACT

Petitioner, a 25 year old left hand dominant food service worker, testified that she worked for Respondent cooking and serving food in a cafeteria line. Petitioner is approximately 5' 1" tall. As part of her serving duties, she is required to stand behind a food preparation board and then reach over a glass partition to place a customer's order for pick up onto the glass partition. Specifically, Petitioner testified there are three rows of food and a preparation board in front of her where she stood. PX 1, RX 3. Petitioner prepared the customer order and then reached over the food and the preparation board to place the order on the glass counter top which was above the prep board and the food. PX 1, RX 3. Petitioner testified that the glass counter was as high as her forehead and thus she was required to stand on her toes while reaching out with her left hand and arm to place the food order on the glass counter. On 6/13/14, Petitioner had worked 4 months for Respondent in this capacity. Petitioner testified that four days prior to 6/13/14, she gave Respondent notice of her intent to leave the job. Her intent was to work for two more weeks after giving her notice. Prior to 6/13/14, Petitioner did not have any problem with her left arm or shoulder.

Petitioner testified that she placed the food order plate onto her open left palm with her palm under the plate while lifting the plate to the counter. Petitioner testified that her left thumb is over the lip of the plate but all four fingers and palm were out flat and under the plate. The plates are Styrofoam and Petitioner described them as "flimsy." RX 4. Petitioner testified that the empty Styrofoam plate weighs very little at approximately 1 ounce. Petitioner testified that the plate holding an omelet weighed little more at approximately 5 ounces. Petitioner testified that her left arm and hand are the only support for the weight of the plate as she stands on her toes lifting and extending her left arm over the counter for plate placement. She lifts the plate to the height of her forehead. At trial, Petitioner demonstrated her plate lifting mechanics using her right arm. Petitioner demonstrated her stance and her full arm extension while reaching over the counter to place the plate.

Petitioner testified that on 6/13/14, she started work at 6 am preparing food and serving breakfast. Petitioner testified that she reached across the counter to place plates approximately 40 to 50 times that morning until 7:45 am. At that time, Petitioner was holding a Styrofoam plate containing an omelet performing the same motion of reaching up and over the place the plate on the glass counter when she heard and felt a pop in her left shoulder. Petitioner noticed immediate pain and was unable to move her left arm away from her body. Petitioner also felt pain in her left neck and numbness in her left hand.

Petitioner testified that she told her supervisor of her injury and he sent her to Concentra on 6/13/14. The Concentra records noted that Petitioner's left shoulder popped while lifting a plate. PX 2. She was diagnosed with shoulder strain, provided a sling for her left arm, prescribed ibuprofen and ice packs and told to remain off of work that day, Friday. PX 2. Petitioner testified that by Sunday, June 15, 2014, her pain had not subsided and she was experiencing swelling in the left side of her neck and into the fingers of her left hand. Petitioner's mother took her to Lutheran General Hospital's emergency room. PX 3. Those records indicate that Petitioner reported left shoulder pain after lifting something "light" with her arms stretched out in front of her at work a few days prior and that she felt a pop in her left shoulder. PX 3.

Petitioner reported complaints of pain, swelling in her fingers and loss of motion. X-rays of her shoulder were negative. She was prescribed Norco and excused from work through June 18, 2014. PX 3. Petitioner was to follow up with an orthopedic doctor. PX 3.

Petitioner returned to Concentra on June 16, 2014. Her complaints included pain in the left shoulder radiating down the left arm and exacerbated by movement of the left arm. PX 2. She also reported intermittent numbness and tingling of the left fingers. The treating physician at Concentra prescribed an MRI of her left shoulder. The workers' compensation carrier denied same. She was released for one handed duty. It is unrebutted that the petitioner notified her supervisor of her restrictions. Petitioner was informed that she would be advised when light duty was available. She was never provided light duty.

Petitioner continued under the care of Concentra on June 16, 20, 27 as well as July 4 and 11. At each visit she voiced the same complaints of pain, lack of motion and swelling. At each visit the physicians at Concentra advised an MRI of her left shoulder. At no time was the MRI approved.

On July 17, 2014 the petitioner was sent to Dr. Lawrence Lieber of M&M Orthopaedics pursuant to Sec. 12 of the Act. RX 1. It is unrebutted that during his examination Dr. Lieber asked the petitioner what she was doing at the time of her injury. He never asked her to recreate or simulate her actual movements. Dr. Lieber reviewed a formal job description from Respondent. On cross exam, Petitioner testified that if Dr. Lieber's records indicate that she estimated the weight of the plate with an omelet at 3 pounds that weight estimate was too high. During his exam Dr. Lieber acknowledged no prior history of left shoulder problems. He noted that currently the petitioner experiences consistent pain in her left shoulder which awakens her at night. She has swelling and popping as well as numbness in her arm along with neck pain. Dr. Lieber's report documented a severely restricted range of motion of petitioner's left shoulder both passively and actively due to pain. She is tender to palpation throughout the shoulder. Dr. Lieber found a positive impingement test, positive O'Brien's test, positive reverse O'Brien's test, positive Speeds test, positive liftoff test and positive apprehension test. He diagnosed the petitioner with shoulder pain and noted that her prognosis is guarded.

Dr. Lieber acknowledged that Petitioner's current complaints appear to be associated with the June 13, 2014 incident. However, Dr. Lieber noted, "... based upon the mechanism of injury, there does not appear to be a significant amount of force having been placed on the left shoulder area to cause Ms. Mackey's current subjective complaints. Based upon the mechanism of injury, this event did not cause the petitioner's current subjective complaints and inability to use the left upper extremity." RX 1. Dr. Lieber concludes that the petitioner requires no further treatment associated with the June 13, 2014 event and that she can return to full duty employment. Lastly, Dr. Lieber found the petitioner to be at maximum medical improvement with regard to the June 13, 2014 event. RX 1. Respondent has denied all benefits under the Act based upon Dr. Lieber's opinions.

Petitioner was seen by Dr. Chudik at her choice on July 18, 2014. Petitioner testified that Dr. Chudik did ask her to demonstrate with her right arm the motions she performed with her left at the time of her injury. Similarly to Dr. Lieber, Dr. Chudik noted no prior problems with petitioner's left shoulder and arm. Dr. Chudik noted tenderness to palpation, painful range of

motion and loss of strength. It was Dr. Chudik's opinion that the petitioner suffered an acute injury at work on June 13, 2014 which required an immediate MRI. PX 5. Petitioner was again seen at Concentra later this same day voicing the same complaints. PX 2.

On July 23, 2014, Petitioner underwent an MRI at Hinsdale Ortho. PX 5. That MRI noted mild supraspinatus and infraspinatus insertional tendinosis with peritendinous fluid near the supraspinatus myotendinous junction without evidence of a rotator cuff tear. On August 4, 2014 Dr. Chudik noted ongoing complaints as well as a positive Neer's and Hawkins impingement tests. Petitioner was diagnosed with adhesive capsulitis. Petitioner's shoulder was aspirated and injected with lidocaine. Petitioner was also prescribed physical therapy. Petitioner testified that the injection provided no long term benefit.

Petitioner remained in physical therapy through January 16, 2015. PX 4. Petitioner testified that the physical therapy also provided no long term benefit. On January 19, 2015, Petitioner returned to Dr. Chudik. Petitioner testified that she was still in constant pain in her neck through her left shoulder joint. She was unable to lift her arm more than a few degrees away from her body. She was unable to straighten her arm to shoulder level or lift it straight up above her shoulder. Dr. Chudik opined that Petitioner had failed conservative management while continuing to have debilitating symptoms. Dr. Chudik diagnosed Petitioner as suffering from adhesive capsulitis. On January 19 and February 27, 2015, Dr. Chudik recommended diagnostic arthroscopic surgery with possible capsular release and manipulation under anesthesia. He further found, based upon a reasonable degree of medical certainty, that Petitioner's condition and need for treatment was causally related to her June 13, 2014 injury. PX 5.

Dr. Chudik completed an addendum to his records in support of his opinions and recommendations. Those opinions and recommendations are reiterated in his report of March 16, 2015. PX 6. Dr. Chudik opined that Petitioner's diagnosis is post-traumatic stiff shoulder refractory to conservative treatment following a work-related injury on June 13, 2014. Further, he opined that Petitioner's left shoulder complaints and current condition of ill-being are a direct result of the June 13, 2014 incident.

Dr. Chudik opined that Dr. Lieber's opinion, that the mechanism of injury did not provide "a significant amount of force having been placed on the left shoulder area to cause Ms. Mackey's current subjective complaints", is flawed. In response Dr. Chudik stated:

> To the common lay person or one not experienced in the field of shoulder biomechanics, Ms. Mackey's mechanism of injury appears to be minor. However, compressive forces across the shoulder joint with the arm in an extended position are approximately 80 percent of a person's body weight and are multiples higher when an object of any weight is held at an arm's length from the body (large moment arm). Minor perturbations with the arm in this susceptible position with significant compressive joint forces commonly result in shoulder injuries like Ms. Mackey's, and often require treatment.

Dr. Chudik then noted that Dr. Lieber had not reviewed the MRI or subsequent treating records before making his opinions in his report of July 17, 2014. PX 6.

Respondent offered into evidence a second report authored by Dr. Lieber dated April 16, 2015. RX 2. In it, Dr. Lieber stated that the report of Dr. Chudik did not change his opinions. Dr. Lieber reviewed the MRI and found no abnormality of an acute nature that could be related to the June 13, 2014 event based on the reported biomechanics of the event. Specifically, he concluded that "... there is no evidence that lifting one's arm from waist to shoulder level holding 1 to 3 pounds could cause enough force across the shoulder area to cause any significant traumatic event to the shoulder that would cause 10/10 pain and inability to relieve the symptoms associated with this event without conservative treatment." RX 2.

Petitioner testified that she returned to work with a different employer on 7/22/14. Petitioner worked a rooftop grill overlooking Wrigley field. She testified that she cooks and bartends without using her left arm. Petitioner also testified that she performed seasonal work in the winter months for the Village of Rosemont. Petitioner also testified that she has played softball in the past with the last time being in September 2013. She testified that she has never hurt her left shoulder playing softball.

At trial, Petitioner testified that she continues to notice shooting pain from the mid left shoulder ball joint up toward the left side of her neck. She experiences swelling in her neck once per week. She does not have pain down the left arm. Petitioner demonstrated that she is only able to lift her left arm with elbow bent to approximately mid sternum height. Petitioner is not able to straighten her left arm to extend the arm outward. Petitioner testified that her condition continues and she wishes to undergo the treatment recommended by Dr. Chudik including a left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

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

The Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of her employment on June 13, 2014. Further, the Arbitrator finds Petitioner to be candid and credible in her testimony. There is no question that Petitioner's injury occurred during the course of her employment as Petitioner was performing her regular job duties of food service at the time of her injury. The Arbitrator finds that at the time of her injury, Petitioner was standing behind the food preparation counter holding a plate of food while extending her dominant left arm to forehead level to lower a plate of food onto the serving counter as depicted in PX1 and RX 3. Petitioner credibly testified that in order to place the plate on the glass countertop she had to stand on her toes while extending out her left arm at forehead level while balancing the plate of food on her upraised fingertips and palm while holding the plate secure with her thumb. During that maneuver Petitioner felt a pop in her shoulder followed by immediate pain in her left

shoulder. Since that time, Petitioner has consistently complained of pain in the left shoulder area, left neck, left arm and intermittent numbness in her left fingers. She has consistently treated for these complaints since June 13, 2014.

In further finding that Petitioner sustained an accident arising out of her employment, the Arbitrator notes that Petitioner was exposed to a risk distinctly associated with her job as a food service worker as the act of standing, balancing a food plate and reaching over the counter to place the food plate squarely comprised Petitioner's job duties. No evidence to the contrary was provided.

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

The Arbitrator finds that Petitioner's current condition of ill-being as diagnosed by Dr. Chudik is causally related to her work accident of June 13, 2014. Dr. Chudik has diagnosed Petitioner as suffering from post-traumatic stiff shoulder refractory to conservative treatment. In finding causal connection, the Arbitrator finds Petitioner to be credible in her testimony that prior to her work injury she had never experienced any pain, soreness, swelling or lack of range of motion to her left arm. All the medical records confirm that immediately after her injury Petitioner first complained of severe pain, stiffness and lack of motion to her left arm. She has documented swelling of the hand and neck on the left side which continue at present.

In finding causal connection for Petitioner's current condition of ill-being, the Arbitrator assigns greater weight to the opinion of Dr. Chudik than to the opinion of Dr. Lieber who opines against causal connection based upon his understanding of the mechanics of Petitioner's injury. Dr. Chudik makes quite clear in his addendum to his records dated February 27, 2015 (Px5), as well as in his narrative dated March 16, 2015 (Px6) that those forces exerted by Petitioner while reaching to place the plate on the counter create substantial forces on the shoulder. Dr. Chudik explains:

> To the common lay person or one not experienced in the field of shoulder biomechanics, Ms. Mackey's mechanism of injury appears to be minor. However, compressive forces across the shoulder joint with the arm in an extended position are approximately 80 percent of a person's body weight and are multiples higher when an object of any weight is held at an arm's length from the body (large moment arm). Minor perturbations with the arm in this susceptible position with significant compressive joint forces commonly result in shoulder injuries like Ms. Mackey's, and often require treatment. PX 6.

In finding causal connection the Arbitrator further notes that both doctors noted the same physical conditions on exam. Multiple exams revealed positive impingement, O'Brien's, reverse O'Brien's, Speed test, liftoff, and apprehension tests. Dr. Lieber noted tenderness throughout the petitioner's shoulder area and strength deficits. He diagnosed Petitioner with shoulder pain and found her prognosis guarded. The Arbitrator notes that without further comment or consideration of the positive findings, Dr. Lieber blankly opines against causal connection citing the mechanics of the injury provided to him on one occasion during a Section 12 exam. The

Arbitrator notes that Petitioner did not demonstrate the mechanics of injury to Dr. Lieber but was only asked for a verbal description. The Arbitrator assigns greater weight to the opinion of Dr. Chudik as his opinion is buttressed by the medical record histories as well as the credible testimony of the Petitioner regarding the biomechanics of her injury as requiring more than "lifting from waist to shoulder" and her lack of prior left shoulder pain or problem. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her work injury of June 13, 2014.

L. What temporary benefits are in dispute?

Based on the findings of accident and causal connection, the Arbitrator further finds that Petitioner is entitled to TTD benefits from June 14, 2014 through July 21, 2014. The records of Concentra note that Petitioner was taken off of work at the time of her initial visit on Friday, June 13, 2014, the date of the accident. Petitioner was seen at Lutheran General Hospital's emergency room on June 15, 2014. (Px3) Those records excuse the petitioner from work through June 18, 2014. By June 16, 2014 Petitioner had returned to Concentra who released petitioner for one handed work. It is unrebutted that the petitioner presented for work within these restrictions and was informed that no suitable light duty was available. Petitioner testified that she returned to one-handed work with a different employer on July 22, 2014.

K. Is Petitioner entitled to any prospective medical care?

Based on the findings of accident and causal connection as stated above, the Arbitrator further finds that Petitioner is entitled to the treatment recommended by Dr. Chudik. The Arbitrator finds that Respondent shall authorize and pay for the treatment prescribed by Dr. Chudik including the left shoulder diagnostic arthroscopy with capsular release and manipulation under anesthesia and its attendant care pursuant to Sections 8 and 8.2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Asa McVicker,
Petitioner,
vs.

16IWCC0127

NO: 15 WC 7164

Continental Tire North Amercia,
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 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 August 28, 2015 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 $9,100.00. 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: FEB 17 2016
KWL/vf
O-2/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0127

Mc VICKER, ASA
Employee/Petitioner

Case# 15WC007164

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 8/28/2015, 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 0.20% 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:

1979 LAW OFFICE OF MICHAEL M WOJTAS
PO BOX 1055
ROSCOE, IL 61073

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0127

Asa McVicker
Employee/Petitioner

v.

Continental Tire North Amercia
Employer/Respondent

Case # 15 WC 07164

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 **Mt. Vernon**, on **7/8/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0127

FINDINGS

On **7/9/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,611.33**; the average weekly wage was $**770.27**.

On the date of accident, Petitioner was **26** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**64.03** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**64.03**.

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

ORDER

Respondent shall pay Petitioner the sum of $**513.51**/week for a further period of **4/7ths** weeks, as provided in Section **8(b)** of the Act, because Petitioner was temporarily and totally disabled from 1/29/15 thru 2/4/15 in which the three day waiting period applies.

Respondent shall pay Petitioner the sum of $462.16 per week for a further period of 19 weeks, as provided is Section 8(e)(9) of the Act because the injury sustained caused 10% loss of use of the right hand. Respondent shall pay Petitioner permanency compensation that has accrued from **3/30/15 (MMI)** through **7/8/15**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent is entitled to credit for amounts paid for TTD and PPD.

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

8/24/15
Date

AUG 28 2015

Before the Illinois Workers' Compensation Commission

Asa McVicker, Petitioner, v. Continental Tire North America, Respondent.	)	**16IWCC0127** Case No.: 15 WC 07164 and 15 WC 20465

FINDINGS OF FACT

Petitioner sustained accidental injuries arising out of and in the course of his employment for bilateral carpal tunnel syndrome. The accident date for the right carpal tunnel condition is July 9, 2014 (15 WC 07164). The accident date for the left carpal tunnel condition is November 1, 2011 (15 WC 20465). The Arbitrator granted Petitioner's oral motion to consolidate the cases on the date of hearing.

Petitioner has worked for Respondent as a Passenger Press Operator since March 2011. The job entails loading tires onto pans in front of a press machine.

On November 1, Petitioner underwent an EMG/NCS that revealed moderate bilateral carpal tunnel syndrome, left worse than right. Respondent referred Petitioner to Dr. David Brown February 15, 2012. Dr. Brown recommended a left carpal tunnel release. Petitioner testified that he did not undergo the surgery because Respondent did not schedule it.

Petitioner returned to Dr. Brown April 2, 2014. On July 19, 2014, Petitioner underwent a right sided EMG/NCS that revealed right carpal tunnel syndrome. Dr. Brown recommended bilateral carpal tunnel releases.

On January 29, 2015, Dr. Brown performed a right carpal tunnel release. Petitioner returned to light duty February 5, 2015. On February 12, 2015, Dr. Brown performed a left carpal tunnel release. Petitioner returned to light duty February 19, 2015.

Dr. Brown released Petitioner to return to work full duty April 6, 2015.

Petitioner last saw Dr. Brown March 30, 2015. Petitioner reported the numbness and tingling in both hands resolved. He reported some soreness and weakness. On exam, he was mildly tender at the scars, which was expected. He had good active range of motion of both wrists and fingers. Grip strength was greater on the right than the left. Dr. Brown recommended continued home exercises and to return as needed.

Petitioner testified that he still experiences tenderness at the scar sites. He has weakness in both hands, particularly when flipping tires at work. Petitioner testified that he cannot do more than five push-ups and he is training to pass a physical to become a police officer. The test is scheduled for December 17, 2015.

Petitioner continues to work for Respondent as a Passenger Press Operator. He makes the same money with the same benefits as before surgery. Respondent has never reprimanded Petitioner for not being able to complete his work activities.

CONCLUSIONS OF LAW
Case No. 15 WC 07164

Disputed Issue K – Temporary total disability

Petitioner missed work for the right carpal tunnel release January 29 through February 4, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $513.51. Respondent is entitled to $64.03 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving right carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job from which he developed the condition and requires regular use of the right hand. Petitioner is right hand dominant. The Arbitrator places more weight on this factor.

8.1(b)(b-3) Petitioner was 26 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified he still experiences pain and weakness in the dominant right hand, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the right wrist and hand. The final physical exam from Dr. Brown supported good range of motion and grip strength. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 10% loss of use of the right hand for 19 weeks at a $462.16 PPD rate. Respondent is entitled to credit for amounts paid.

CONCLUSIONS OF LAW
Case No. 15 WC 20465

Disputed Issue K – Temporary total disability

Petitioner missed work for the left carpal tunnel release February 12 through February 18, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $448.19. Respondent is entitled to $256.10 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving left carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job in which he developed the condition and requires regular use of the left hand. The Arbitrator places some weight on this factor.

8.1(b)(b-3) Petitioner was 23 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified that he still experiences pain and weakness in the left hand and wrist, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the left wrist and hand. The final physical exam from Dr. Brown indicated less grip strength on the left than on the right, but good range of motion. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 7½% loss of use of the left hand for 14.25 weeks at a $403.37 PPD rate. Respondent is entitled to credit for amounts paid.

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

Asa McVicker,
Petitioner,
vs.

16IWCC0126

NO: 15 WC 20465

Continental Tire North Amercia,
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 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 August 28, 2015, 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 $5,800.00. 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:
KWL/vf
O-2/8/16
42

FEB 17 2016

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0126

Mc VICKER, ASA
Employee/Petitioner

Case# 15WC020465

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 8/28/2015, 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 0.20% 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:

1979 LAW OFFICE OF MICHAEL M WOJTAS
PO BOX 1055
ROSCOE, IL 61073

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 16IWCC0126

Asa McVicker
Employee/Petitioner

v.

Continental Tire North Amercia
Employer/Respondent

Case # 15 WC 20465

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 **Mt. Vernon**, on **7/8/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0126

FINDINGS

On 11/1/11, 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 $**34,958.56**; the average weekly wage was $**672.28**.

On the date of accident, Petitioner was **23** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**256.10** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**256.10**.

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

ORDER

Respondent shall pay Petitioner the sum of $**448.19**/week for a further period of **4/7ths** weeks, as provided in Section **8(b)** of the Act, because Petitioner was temporarily and totally disabled from 2/12/15 through 2/18/15 in which the three day waiting period applies.

Respondent shall pay Petitioner the sum of $403.37 per week for a further period of 14.25 weeks, as provided is Section 8(e)(9) of the Act because the injury sustained caused 7½% loss of use of the left hand. Respondent shall pay Petitioner permanency compensation that has accrued from **3/30/15 (MMI)** through **7/8/15**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent is entitled to credit for amounts paid in TTD and PPD.

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

8/24/15
Date

AUG 28 2015

Before the Illinois Workers' Compensation Commission

Asa McVicker, Petitioner, v. Continental Tire North America, Respondent.	)	**16IWCC0126** Case No.: 15 WC 07164 and 15 WC 20465

FINDINGS OF FACT

Petitioner sustained accidental injuries arising out of and in the course of his employment for bilateral carpal tunnel syndrome. The accident date for the right carpal tunnel condition is July 9, 2014 (15 WC 07164). The accident date for the left carpal tunnel condition is November 1, 2011 (15 WC 20465). The Arbitrator granted Petitioner's oral motion to consolidate the cases on the date of hearing.

Petitioner has worked for Respondent as a Passenger Press Operator since March 2011. The job entails loading tires onto pans in front of a press machine.

On November 1, Petitioner underwent an EMG/NCS that revealed moderate bilateral carpal tunnel syndrome, left worse than right. Respondent referred Petitioner to Dr. David Brown February 15, 2012. Dr. Brown recommended a left carpal tunnel release. Petitioner testified that he did not undergo the surgery because Respondent did not schedule it.

Petitioner returned to Dr. Brown April 2, 2014. On July 19, 2014, Petitioner underwent a right sided EMG/NCS that revealed right carpal tunnel syndrome. Dr. Brown recommended bilateral carpal tunnel releases.

On January 29, 2015, Dr. Brown performed a right carpal tunnel release. Petitioner returned to light duty February 5, 2015. On February 12, 2015, Dr. Brown performed a left carpal tunnel release. Petitioner returned to light duty February 19, 2015.

Dr. Brown released Petitioner to return to work full duty April 6, 2015.

Petitioner last saw Dr. Brown March 30, 2015. Petitioner reported the numbness and tingling in both hands resolved. He reported some soreness and weakness. On exam, he was mildly tender at the scars, which was expected. He had good active range of motion of both wrists and fingers. Grip strength was greater on the right than the left. Dr. Brown recommended continued home exercises and to return as needed.

Petitioner testified that he still experiences tenderness at the scar sites. He has weakness in both hands, particularly when flipping tires at work. Petitioner testified that he cannot do more than five push-ups and he is training to pass a physical to become a police officer. The test is scheduled for December 17, 2015.

Petitioner continues to work for Respondent as a Passenger Press Operator. He makes the same money with the same benefits as before surgery. Respondent has never reprimanded Petitioner for not being able to complete his work activities.

CONCLUSIONS OF LAW
Case No. 15 WC 07164

Disputed Issue K – Temporary total disability

Petitioner missed work for the right carpal tunnel release January 29 through February 4, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $513.51. Respondent is entitled to $64.03 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving right carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job from which he developed the condition and requires regular use of the right hand. Petitioner is right hand dominant. The Arbitrator places more weight on this factor.

8.1(b)(b-3) Petitioner was 26 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified he still experiences pain and weakness in the dominant right hand, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the right wrist and hand. The final physical exam from Dr. Brown supported good range of motion and grip strength. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 10% loss of use of the right hand for 19 weeks at a $462.16 PPD rate. Respondent is entitled to credit for amounts paid.

CONCLUSIONS OF LAW
Case No. 15 WC 20465

Disputed Issue K – Temporary total disability

Petitioner missed work for the left carpal tunnel release February 12 through February 18, 2015, or 1 week. The three day waiting period applies and therefore Petitioner is entitled to 4/7ths weeks of TTD benefits at a rate of $448.19. Respondent is entitled to $256.10 in TTD benefits paid.

Disputed Issue L – Nature and extent of the injury

Petitioner suffered an accidental injury involving left carpal tunnel syndrome for which he underwent surgery. While consideration is not given to any single enumerated factor as the sole determinant, the Arbitrator relies on the following five factors pursuant to 820 ILCS 305/8.1(b).

8.1(b)(b-1) Neither party submitted a rating. Therefore, the Arbitrator gives no weight to this factor.

8.1(b)(b-2) Petitioner received a full duty release. He returned to the same job in which he developed the condition and requires regular use of the left hand. The Arbitrator places some weight on this factor.

8.1(b)(b-3) Petitioner was 23 years of age at the time of injury. There was no evidence submitted that Petitioner was at risk for additional injury or problems. He has a number of working years ahead of him. The Arbitrator places more weight on this factor.

8.1(b)(b-4) Petitioner did not provide any evidence that the injury diminished his future earning capacity. The Arbitrator places less weight on this factor.

8.1(b)(b-5) Petitioner testified that he still experiences pain and weakness in the left hand and wrist, particularly when performing push-ups while training to become a police officer. Petitioner did not report any hobbies or activities outside of work impacted by the left wrist and hand. The final physical exam from Dr. Brown indicated less grip strength on the left than on the right, but good range of motion. The Arbitrator gives some weight to this factor.

Based upon the foregoing, the Arbitrator awards 7½% loss of use of the left hand for 14.25 weeks at a $403.37 PPD rate. Respondent is entitled to credit for amounts paid.