WCLA NEWSLETTER
CASE LAW UPDATE AUGUST 2019

I. ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

***Hawkins v. Georgetown-Ridge Farms CUSD #4*, 18 IWCC 0742, 2018 WL 7077792 (IWCC Dec. 6, 2018)**

The Arbitrator found that Petitioner failed to establish that she sustained accidental injuries arising out of and in the course of employment. The Commission affirmed and adopted the decision of the Arbitrator.

Petitioner was employed as a teacher's assistant for Respondent. Petitioner was descending a flight of stairs to enter the building that she worked in, when one of her feet caught and she fell onto her left knee. Petitioner was wearing sandals. Petitioner believed that her right foot became caught. Petitioner traverses the stairs twice a day. There was no foreign substance on the ground. She testified that her sandal became caught on the top of the stairs. Petitioner was carrying her purse and a grocery bag, which was filed with cereal for the students that she tutored. In her recorded statement, Petitioner acknowledged that there were no defects in the stairs. Petitioner testified that she was not required to use a specific entrances. Petitioner picked the entrance that she used for convenience. The area where Petitioner fell was open to the general public.

The principal testified on behalf of Respondent. She testified that Petitioner did not enter the building through entrance closest to where she parked. If Petitioner had used that entrance, she would not have had to descend stairs. She testified that the entrance used by Petitioner was typically used by staff. She stated that visitors typically used the front entrance.

The Arbitrator found that Petitioner failed to establish that she sustained accidental injuries arising out of and in the course of her employment. The Arbitrator found that Petitioner presented no evidence explaining the cause of her fall. Specifically, Petitioner's testimony was that her sandal caught on "something," but she did not know what it caught on. Petitioner offered no testimony that the weather played a role in her fall, that she was in a rush or that the cereal she was carrying contributed to her fall. Further, the medical records did not indicate why she fell.

Petitioner did not establish that she was quantitatively performing an employment related task when she fell. She did not present testimony that she used these stairs more than a member of the general public.

The Arbitrator acknowledged that there may have been concrete, which Petitioner could have tripped over. However, the Arbitrator noted that this was speculation. Petitioner testified that the concrete was nothing drastic and she did not know what caused her to fall. The Arbitrator found that no defect contributed to Petitioner's fall. The Arbitrator held that it was speculative to find that Petitioner's sandal caught on chipped concrete. The Arbitrator stated that Petitioner could not establish a compensable accident through the mere possibility that she tripped over defective concrete as the cause of her fall. Based accident, the Arbitrator found that all other issues were moot.

***Vaughan v. Memorial Medical Center*, 18 IWCC 0689, 2018 WL 6626113 (IWCC Nov. 8, 2018)**

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of her employment. The Commission reversed the decision of the Arbitrator and found that Petitioner failed to establish that she sustained a compensable accident.

Petitioner was employed by Respondent as a Central Processing Technician. Petitioner was assigned to park in Parking Lot 3, but was not assigned a specific parking spot. Petitioner could park in any lot and choose Parking Lot 3 because it was the most convenient lot for her. Respondent suggested, but did not order her, to park in that lot. Petitioner was provided instructions on where to enter and exit the building. Petitioner used an emergency exit to enter and exit the building. The door was not accessible to the general public and required a badge to use. She testified that she choose the entrance that she used based on word of mouth and memos that she had received. Petitioner walked left on the sidewalk after exiting the building.

On the date of accident, Petitioner left work and walked to her car. It was cold and dark outside, but the area was not wet and there was no snow or ice on the ground. There was a different of 1-2 inches between the sidewalk and the area was not even. Petitioner stepped on the slopped area on the blacktop, tripped and fell. As a result of the fall, Petitioner sought medical treatment for her right knee.

Respondent presented the testimony of the workers' compensation coordinator. Respondent did not tell employees where to park. She testified that the area was open to the public and is not different from any other sidewalk on Respondent's campus. The area is not restricted. The sidewalk is maintained by Respondent's employees. The blacktop was angled. She testified that the route Petitioner took was an acceptable route, but not the quickest route.

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of her employment. The Arbitrator found that Petitioner tripped while walking to her car on an acceptable route. It was dark and the ground was uneven. Thus, Petitioner was exposed to a risk greater than that of the general public. The Arbitrator found that Petitioner did not expose herself to an unnecessary risk. Based on the finding of accident, the Arbitrator awarded payment of medical benefits, temporary total disability benefits and found that Petitioner as permanently and partially disabled to the extent of 25% loss of use of the right leg.

The Commission reversed the Arbitrator's decision on accident. The Commission found that the area where Petitioner fell was not hazardous or defective. The Commission relied on the pictures admitted into evidence that the area was not defective. Since the Commission found that the area was not defective, it found that Petitioner failed to establish a compensable accident. The Commission found that Petitioner was stepping off a curb when she sustained an injury and was therefore, not exposed to a risk greater than that of the general public.

***Dixon v. Chicago Transit Authority*, 19 IWCC 0055, 2019 WL 579840 (IWCC Jan. 28, 2019)**

The issues in dispute at hearing were accident, medical causation, payment of medical bills, payment of temporary total disability benefits, nature and extent of the injury and penalties and fees. The Arbitrator found that Petitioner sustained a compensable accident and Petitioner's current mental condition was causally related to the work accident. Based on his finding, the Arbitrator awarded further benefits, but denied penalties and fees. The Commission affirmed and adopted the decision of the Arbitrator.

Petitioner was employed as a bus operator for Respondent. Petitioner was driving her bus and stopped to pick up passengers. As she was allowing passengers to board the bus, a man pointed a gun at her. Petitioner ducked to take cover and the other passengers run towards the back of the bus yelling. Petitioner was scared. The man ran away. Petitioner continued her bus route. Petitioner filed a police report. She continued to have flashbacks.

Respondent admitted videos from various locations on the bus into evidence. The video depicted a man pushing his way onto the bus and Petitioner ducking behind the steering wheel. Another angle of the incident showed the man running onto the bus and a passenger looking at the man as he runs onto the bus. Next, the passenger dives to the ground and other passengers move quickly to the back of the bus. The video does not show the man holding a gun.

Petitioner was diagnosed with adjustment disorder, anxiety and depressive mood disorder. Petitioner was released to return to work for Respondent and did return to work.

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of her employment. The Arbitrator found the testimony of Petitioner to be credible. He noted that although the video did not show the gun, it showed both Petitioner and a passenger reacting to a frightening situation. The Arbitrator found that Petitioner was engaged in her employment at the time of the accident and her employment placed her at a risk greater than that of the general public. Petitioner was required to drive in socially diverse neighborhoods, which exposed her to an increased risk.

The Arbitrator found that Petitioner sought immediate medical treatment. Based on the medical records, he found that Petitioner's current condition of ill-being was causally connected to the work-related accident. Therefore, the Arbitrator awarded payment of medical bills and temporary total disability benefits. He also found that Petitioner was permanently and partially disabled to the extent of 5% loss of use of the person as a whole. The Arbitrator did not assess penalties and fees. The Arbitrator relies on the fact that the video did not show the gun and was inconsistent with the amount of time Petitioner alleged the incident occurred over. Based on the inconsistencies, the Arbitrator declined to assess penalties and fees. The Commission affirmed and adopted the decision of the Arbitrator.

***Ruffino v. State of Illinois*, 19 IWCC 0051, 2018 WL 7288666 (IWCC Jan. 25, 2018)**

Petitioner was working for Respondent as a liquor control agent. Petitioner was performing an inspection at a restaurant. Petitioner was walking downstairs to inspect a basement. Petitioner

was escorted by the CEO of the company he was inspecting. Petitioner turned around to answer a question from the CEO and fell down the stairs. The area was dimly lit and Petitioner was carrying a ticket/citation book. Petitioner sustained an injury to his back and right shoulder.

The CEO testified that he was talking to Petitioner as they were descending the stairs. He did not recall the conversation. He testified that the stairs were standard and were covered in carpet. He did not know what caused Petitioner to fall.

The Arbitrator found that Petitioner was a traveling employee at the time of the accident. Petitioner's job required him to travel to various venues to ensure compliance with the law. The Arbitrator found that Petitioner's histories were consistent. Petitioner was walking down stairs that were dimly lit. The Arbitrator concluded that Petitioner, as a travelling employee, was engaged in a reasonable and foreseeable activity and was exposed to a risk greater than the general public as a result of his employment duties. Based on the finding, the Arbitrator awarded payment of medical bills, prospective medical care and temporary total disability benefits.

The Commission affirmed and adopted the decision of the Arbitrator. There was a special concurring opinion by Commissioner Coppoletti. The Commissioner agreed that Petitioner established that he sustained a compensable accident. However, she did not agree that Petitioner was a travelling employee since Petitioner was neither travelling nor on the street at the time of the accident. She noted that Petitioner was exposed to a neutral risk when walking down the stairs. However, he was exposed to the risk more frequently than the general public. Accordingly, the accident arose out of Petitioner's employment.

***Rundinger v. Village of Northbrook,* 18 IWCC 0767, 2018 WL 7077843 (IWCC Dec. 13, 2018)**

Petitioner was employed as a firefighter/EMT for Respondent. Petitioner was dispatched to a car fire. She grabbed her air pack and helmet and disembarked the firetruck. She was moving fast because it was an emergency. Petitioner placed her left foot on a metal bar, which was 15 inches above the ground. She grabbed a handrail for balance. When she planted her right foot on the ground, she felt a pop in the top of her right foot. Petitioner testified that the ground was uneven.

Petitioner had a prior injury to the right foot. Her previous injuries included a stress fracture. She had incidents of pain in her foot in 2007 and 2010. Petitioner had no incidents of right foot pain between 2010 and the accident in 2014. As a result of the accident, Petitioner underwent surgery for right anterior tarsal syndrome. Petitioner's treating physician stated that the injury was directly related to the work-related accident. At the request of her employer, Petitioner underwent an AMA impairment rating. The doctor diagnosed her with a foot contusion and set forth an impairment rating of 0%.

The evidence depositions of Petitioner's treating physician and the Section 12 physician were completed. Petitioner's treating physician set forth that the current condition of ill-being in connection with the foot differed from the previous condition and was related to the accident. Respondent's Section 12 physician testified there was not work-related accident, but the surgery performed was reasonable.

The Arbitrator found that Petitioner sustained an accidental injury arising out of and in the course of her employment with Respondent. The issue was whether the accident arose out of Petitioner's employment. The Arbitrator found that the act of stepping onto uneven ground was a neutral risk. The Arbitrator found that Petitioner was exposed to a risk greater than that of the general public. The Arbitrator found that the ladder was higher off the ground than normal step or stairs and Petitioner stepped onto uneven ground. Further, Petitioner had to respond to emergencies away from her normal fire station and Petitioner had to carry bunker gear. The Arbitrator found that the activity of stepping off the abnormal height onto uneven ground exposed Petitioner to a risk greater than that of the general public.

The Arbitrator also found that Petitioner's current condition of ill-being was causally connected to the work-related accident. The Arbitrator found the opinions of the treating physician to be more persuasive than the Section 12 physician. The Arbitrator found that the clinical findings correlated with Petitioner's condition and Petitioner's condition became symptomatic following the accident.

Based on the findings of accident and causation, the Arbitrator award payment of medical bills and temporary total disability benefits. The Arbitrator also found that Petitioner was permanently and partially disabled to the extent of 30% loss of use of the right foot. The Arbitrator accorded little weight to the impairment rating.

The Commission affirmed the decision of the Arbitrator. However, the Commission modified the Arbitrator's decision regarding accident. The Commission found that at the time of the accident, Petitioner was a travelling employee. The Commission noted that Petitioner's job required her to respond to emergencies and leave her station. Petitioner sustained an injury while responding to a call. The injury occurred while she was wearing her full firefighter uniform, carrying necessary equipment and stepping down form a higher than average rung while rushing. The Commission held that Petitioner's injury occurred while she was performing acts that she was reasonably expected to perform as part of her job duties. Thus, Petitioner sustained a compensable accident.

***Biedron v. Trafic Services*, 18 IWCC 0748, 2018 WL 7077799 (IWCC Dec. 7, 2018)**

The issues in dispute were accident, notice, medical causation, medical bills, temporary total disability benefits and statute of limitations. The Arbitrator found that Petitioner sustained a repetitive trauma accident arising out of and in the course of his employment and awarded benefits. The Commission reversed the decision of the Arbitrator and found that Petitioner failed to establish a compensable accident. The circuit court remanded the case to the Commission stating that the Commission did not directly address the law and facts relating to a repetitive trauma accident. The Commission addressed the theory of repetitive trauma and found that Petitioner established that he sustained accidental injuries arising out of and in the course of his employment. The instant case set forth the Commission's findings regarding a repetitive trauma accident.

Petitioner was employed as a traffic control technician. Petitioner's job required heavy lifting of barrels, tires and cones. Petitioner would lift 100s of barrels in a day. Petitioner also pulled up signs and painted. Petitioner had sustained a prior injury to his low back. Petitioner began receiving medical treatment for his back in 2012. Petitioner sustained a subsequent work injury

when he was reaching towards the bottom of a bin. Petitioner underwent surgery for his back condition.

Petitioner's treating physician found that Petitioner's current back condition was causally related to lifting at work. Respondent's Section 12 physician stated that the back condition was not related to work since there was no history of work activities in the medical records. On cross-examination, the Section 12 physician set forth that heavy lifting could have caused the condition and the subsequent accident could have aggravated the pre-existing condition.

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment. The Arbitrator found that although Petitioner had a pre-existing back condition, he was working without restrictions until the date of the accident, when he was placed on restrictions. The Arbitrator found that the only explanation for Petitioner's current complaints was the heavy work duties and subsequent aggravation of the back condition. The Arbitrator further noted that the Section 12 physician could not rule out the heavy work as a cause of the back condition. Accordingly, the Arbitrator found that Petitioner sustained a compensable accident. The Arbitrator also found that Petitioner provided timely notice of the accident. The Arbitrator awarded payment of medical bills and temporary total disability benefits.

The Commission found that Petitioner was engaged in a "plethora of heavy, repetitive lifting activities." The medical records contained no mention of Petitioner's work activities, but they did include Petitioner's occupation. The Commission relied on the medical testimony to establish that Petitioner's back condition was related to heavy lifting. The Commission found the manifestation date to be the date when Petitioner's pain increased to a point when he was not able to continue working. The Commission noted that it was plainly apparent that Petitioner's lumbar condition was caused by his repetitive lifting activities.

II. MEDICAL CAUSATION

***Islas v. Mid-American Growers*, 18 IWCC 0752, 2018 WL 7077803 (IWCC Dec. 10, 2018)**

The issues at hearing were medical causation, payment of medical bills, prospective medical care and temporary total disability benefits. The Arbitrator found that Petitioner's current condition of ill-being in connection with Petitioner's low back was causally connected to the work-related accident. She awarded payment of medical bills, payment of temporary total disability benefits and payment for prospective medical care.

The case was previously tried on November 24, 2014. Following that hearing, the Arbitrator found that Petitioner's lumbar spine condition was causally connected to the work-related accident and awarded payment for medication and injections. At the instant hearing, Petitioner requested payment for temporary total disability benefits, medical bills and a denervation procedure.

Following the hearing of November 24, 2014, Petitioner continued under the care of her treating physician. Petitioner underwent therapy, injections and medication. Following the injections, Petitioner continued to experience increased pain. Her treating physician recommended a denervation procedure. Petitioner was last examined by her physician a year prior to the hearing.

She was not aware that her doctor recommended that she follow up with him three months after the last appointment.

Petitioner was examined pursuant to Section 12. The Section 12 physician found Petitioner's current condition of ill-being was not causally connected to her work-related accident. He noted that the annual tear that she sustained was not correlated to the back pain. He did not recommend further medical treatment and set forth that Petitioner had reached maximum medical improvement.

The Arbitrator found that Petitioner's current condition of ill-being in connection with her back was causally connected to the work-related accident. The Arbitrator noted that the Section 12 physician's rationale had not changed over his many examinations. The physician's rational remained the same following the examinations prior to the November 24, 2014 hearing. The Arbitrator relied on the law of the case doctrine in finding that Petitioner's current condition of ill-being was causally connected to the work-related accident. Based on the Arbitrator's finding regarding causation, the Arbitrator awarded payment of medical bills, temporary total disability benefits and prospective medical care.

The Commission modified the decision of the Arbitrator. The Commission affirmed the decision of the Arbitrator regarding medical causation. However, the Commission relied on the testimony of Petitioner's treating physician to deny awarding ongoing medical treatment and finding that Petitioner's back condition was causally related to the work-related accident through September 18, 2015. The treating physician testified that if the injections only provided 30 minutes of relief, then he would not recommend the denervation procedure. Since Petitioner testified that she only received 30 minutes of relief from the injections, there was no basis for awarding prospective medical treatment. Thus, the Commission found that Petitioner reached maximum medical improvement on September 18, 2015. The Commission terminated payment of medical bills after September 18, 2015. The Commission terminated temporary total disability benefits as of September 18, 2015 based on the finding of medical causation. The Commission denied maintenance benefits since Petitioner was not engaged in a job search after September 18, 2015.

III. PERMANENCY BENEFITS

Zaleski v. D&M Architectural Metals, Inc., 19 IWCC 0070, 2019 WL 1145038 (IWCC Feb. 5, 2019)

The Arbitrator found that Petitioner was entitled to wage differential benefits pursuant to Section 8(d)1. The Commission modified the decision of the Arbitrator and found that Petitioner failed to establish an entitlement to a wage differential award. The Commission found that Petitioner was permanently and partially disabled to the extent of 30% loss of use of the person as a whole.

Petitioner was employed as an ironworker for Respondent. He sustained a work-related injury to his low back. Petitioner was placed on permanent work restrictions by his treating physician. The Section 12 physician agreed with the permanent restrictions. Petitioner returned to work for Respondent with restrictions. At the time of the hearing, Petitioner was working as an ironworker with restrictions.

The business agent for Architectural Ironworkers Local 63 testified. He testified that light duty is not an option for ironworkers. He testified that there are no non-working foreman positions. Further, light duty positions were few and far between and there was not stable labor market for light duty positions.

A vocational rehabilitation counselor testified that Petitioner had returned to work for Respondent. His restrictions were being accommodated. He testified that if Petitioner was not working for Respondent, then he would not be qualified to work as an ironworker. The vocational counselor stated that Petitioner could return to work in other occupations. He set forth that Petitioner could earn between $8.91 and $21.14 per hour in suitable employment.

Respondent obtained a labor market survey. The first labor market survey targeted jobs such as machine operator, damage restoration technician and maintenance workers. A second labor market survey targeted construction positions. The counselor set forth that Petitioner could earn $11 and $31.08 per hour.

The owner of Respondent testified. He testified that Petitioner did not sustain a diminishment of earnings based on his work restrictions. He testified that Petitioner could find similar work if he left his employment with Respondent. The president of Respondent also testified. He testified that there as a lot of work that Petitioner could perform within the union. Surveillance videos showed Petitioner working with difficulty and receiving assistance from a co-worker.

The Arbitrator found that Petitioner was entitled to a wage differential award. The Arbitrator cited the holding in *Jackson Park Hospital v. Illinois Workers' Compensation Commission*. The Arbitrator found that Petitioner was partially incapacitated from performing his pre-injury job and sustained an impairment of earnings. The work restrictions were not disputed and the surveillance showed Petitioner struggling to perform his job duties as an ironworker. Further, Petitioner sustained an impairment of earnings based on the vocational reports of both counselors.

The Commission modified the decision of the Arbitrator and found that Petitioner did not establish an entitlement to a wage differential benefit. The Commission found that Petitioner continued to work for Respondent. Petitioner was able to return to work as a foreman. He was not receiving an inflated wage for light duty work. The Commission specifically found that Petitioner modified his job duties to allow him to perform his job. The Commission further found that Petitioner could pursue his work as an ironworker.

The Commission found that Petitioner did not sustain an impairment of earnings. The Commission found that Petitioner was working in his pre-injury employment. Accordingly, the vocational opinions were not relevant. Further, the reports are flawed since Petitioner was performing his pre-injury employment and earning his pre-injury wages. The vocational counselors did not consider that Petitioner could return to work as a foreman. The Commission distinguished the case from *Jackson Park* since Petitioner was not offered a job so that Respondent could avoid liability for a wage different case. Since Petitioner was not entitled to a wage differential benefit, the Commission found that Petitioner was permanently and partially disabled to the extent of 30% loss of use of the person as a whole.

***Droege v. Dybergy Midewest Generation*, 18 IWCC 0764, 2018 WL 7077834 (IWCC Dec. 12, 2018)**

The issues at hearing were accident, causation, medical bills and nature and extent of the injury. The Arbitrator found that Petitioner sustained a compensable accident and that her current condition of ill-being was causally connected to the accident. The Arbitrator awarded payment of medical bills and found that Petitioner was permanently and partially disabled to the extent of 12.5% loss of use of the person as a whole. The Commissioner modified the decision and found that Petitioner was permanently and partially disabled to the extent of 7.5% loss of use of the person as a whole.

Petitioner was employed by Respondent as a lab technician. Petitioner sustained accidental injuries when she was on her hands and knees and reached with her left arm between two white supports to operate a valve. In the awkward position, Petitioner had to pull the valve twice because the valve was not easy to pull. Petitioner felt pain in her left shoulder.

Petitioner sought medical treatment for her left shoulder condition. Petitioner underwent surgery to her left shoulder. The post-operative diagnosis was subacromial bursitis, impingement, biceps tendonitis and a full thickness tear of the rotator cuff. Petitioner was released to return to work without restrictions. When she returned to work, she had minimal symptoms and took over the counter medication.

The Section 12 physician set forth that the current shoulder condition was not casually related to the work-related accident. His opinion was based on the mechanism of accident and that the MRI did not show evidence of a tear. The Section 12 physician found that post-operatively, Petitioner had minimal loss of range of motion and mild subjective complaints.

The Arbitrator found that Petitioner sustained a compensable accident. The Arbitrator found that Petitioner was working in awkward positions and reaching as far as she could tell with minimal room to move. Accordingly, Petitioner sustained accidental injuries arising out of and in the course of her employment since she was subjective to an increased risk. The Arbitrator found that the current condition of ill-being was causally connected to the work-related accident. The Arbitrator relied on the opinions of Petitioner's treating physician, which was based on the MRI. Petitioner had no complaints prior to the accident and had symptoms following the accident.

The Arbitrator found that Petitioner was permanently and partially disabled to the extent of 12.5% loss of use of the person as a whole. The parties did not submit an AMA impairment rating. Petitioner worked as a lab technician and was able to return to work without restrictions. Petitioner was 53 and no evidence was submitted to show how this impacted disability. No evidence was submitted regarding Petitioner's future earning capabilities. The Arbitrator found that Petitioner experienced a decrease in her level of exertion at work. Accordingly, the Arbitrator found that Petitioner was permanently and partially disabled to the extent of 12.5% loss of use of the person as a whole.

The Commission modified the decision of the Arbitrator and reweighed the five factors. The Commission found that the Section 12 physician found minimal loss of range of motion and very mild subjective complaint. The Commission found the Section 12 physicians clinical examination to be more persuasive than the treating physician. Further, Petitioner obtained a pay increase since the accident and worked for Respondent following her release from medical treatment. Accordingly, the Commission found that Petitioner was permanently and partially disabled to the extent of 7.5% loss of use of the person as a whole.

***Roeing v. Mannheim School District #83*, 18 IWCC 0762, 2018 WL 7077815 (IWCC Dec. 12, 2018)**

The issues in dispute at hearing were medical causation, medical bills and nature and extent of the injury. The Arbitrator found that Petitioner's back condition was causally connected to the work-related accident and awarded payment of medical bills. The Arbitrator found that Petitioner was permanently and partially disabled to the extent of 4% loss of use of the person as a whole. The Commission affirmed the decision of the Arbitrator, but provided a more detailed application of the five factors to the facts of the case.

Petitioner was employed by Respondent as a teacher. She was 28 years old at the time of the accident. Petitioner sustained an undisputed injury to her low back. She sought medical treatment. An MRI revealed a central protrusion at L5-S1 with a bulging disc at L4-L5. Petitioner received chiropractic care. She also received pain management. Petitioner underwent facet joint injections. Following the injections, her condition improved.

Petitioner was examined pursuant to Section 12. The Section 12 physician stated that the medical records documented no history of a work accident, so it was speculative that the back condition was caused by a work accident. The physician also provided an AMA rating of 0%. Petitioner's treating physician stated that the current condition of ill-being was causally connected to the work-related accident.

The Arbitrator found that the low back condition was causally related to the work-related accident. The Arbitrator noted that Petitioner had no back problems prior to the work-related accident. Further, the Arbitrator found that Petitioner sneezing in the shower did not constitute an intervening accident since Petitioner had not reached maximum medical improvement at the time of the sneeze. Based on the finding of medical causation, the Arbitrator awarded payment of the medical bills.

The Arbitrator found that Petitioner was permanently and partially disabled to the extent of 4% loss of use of the person as a whole. The Arbitrator gave the impairment rating "appropriate" weight and noted that impairment is not disability. The Arbitrator gave Petitioner's young age great weight. The Arbitrator gave no weight to Petitioner's future earning capacity since there was no evidence presented on this factor. The Arbitrator found that Petitioner experienced flare ups and pain in her lower back.

The Commission affirmed the decision of the Arbitrator, but set forth further explanation of the five factors. The Commission found that the impairment rating of 0% weighed in favor of a

decrease in permanency. The Commission found that Petitioner's young age meant that she had many work years ahead of her and would deal with her injury for longer. Therefore, Petitioner's age weighed in favor of an increase in permanency. The Commission noted that there was no evidence presented that Petitioner's wages were affected by her injury. The Commission found that that factor weighed in favor of a decrease in permanency. The Commission found that Petitioner's periodic flare ups weighed in favor of an increase in permanency. Accordingly, the Commission found that Petitioner was permanently and partially disabled to the extent of 4% loss of use of the person as a whole.

IV. PENALTIES AND FEES

***Mares v. The Salvation Army*, 19 IWCC 0053, 2019 WL 579857 (IWCC Jan28, 2019)**

The issues in dispute at hearing were accident, notice, medical causation, temporary total disability/maintenance benefits and penalties and fees. The Arbitrator found that Petitioner sustained a compensable accident, provided timely notice to Respondent and that Petitioner's current condition of ill-being was causally connected to the work-related accident. The Arbitrator awarded payment of temporary total disability benefits and assessed penalties and fees against Respondent. The Commission reversed the decision regarding penalties and fees, but otherwise affirmed and adopted the decision of the Arbitrator.

Petitioner sustained an injury to his back when he was lifting a bag of compressed clothing. Petitioner reported the accident to Respondent and sought medical treatment. He denied receiving prior treatment for his back. The medical record document that Petitioner sustained an injury while lifting at work. Petitioner underwent injections for his back condition. The treating physician set forth that Petitioner's back condition was causally connected to the work-related accident. Petitioner underwent the surgery, including a two level fusion. Petitioner was discharged from physical therapy since he did not participate in it.

Petitioner was examined by a Section 12 physician. The Section 12 physician found that Petitioner's treatment was reasonable and necessary and he had a less than ideal recovery. He stated that Petitioner had reached maximum medical improvement. The physician recommended an FCE. Respondent submitted lab results indicating inconsistencies with Petitioner's use of opioids.

Petitioner underwent an FCE, which showed significant issues with consistency. Petitioner's treating physician set forth that Petitioner had reached maximum medical improvement. He provide Petitioner with permanent restrictions. Petitioner underwent another FCE, which was valid. Petitioner was performing at a sedentary physical demand level. Surveillance showed Petitioner walking short distances with a cane. Respondent's Section 12 physician set forth that Petitioner would return to work without restrictions despite the FCE.

A vocational counselor opined that Petitioner would not be able return to his pre-injury employment. He set forth that Petitioner had barriers to employment. However, Petitioner may be able to return to work in other capacities. The counselor noted that Petitioner did not have a social security number provided by the government.

The Arbitrator found that Petitioner sustained a compensable accident. No evidence was submitted to rebut Petitioner's testimony regarding the mechanism of accident. Further, the medical records documented a consistent history of the accident. The Arbitrator relied on Petitioner's testimony to find that timely notice was provided to Respondent. The Arbitrator also found that the current condition of ill-being was causally connected to the work-related accident. The Arbitrator relied on the chain of events analysis and Petitioner's treating physician. She found that Petitioner had permanent restrictions based on the treating physician's testimony. The Arbitrator awarded temporary total disability benefits through 2014 when Petitioner's treating physician set forth that he had reached maximum medical improvement. The Arbitrator denied maintenance benefits since Petitioner did not look for work within his restrictions. The Arbitrator awarded medical bills.

The Arbitrator assessed penalties and fees since Respondent did not pay temporary total disability benefits until a year after the accident. Although Respondent disputed accident and notice, it submitted no evidence disputing accident. Further, Respondent did not obtain a Section 12 examination in that time period where benefits were not being paid. The Arbitrator found that Respondent acted in an unreasonable manner in not paying benefits.

The Commission did not find penalties and fees to be appropriate. The Commission stated that no witnesses confirmed the accident, no co-workers testified at hearing, no accident report was completed and Petitioner could not identify the date of accident. Petitioner hired two different attorneys and related two separate dates of accident. Further, Petitioner's credibility was at issue since he was using a different social security number. Therefore, the Commission found that Respondent had valid reasons to dispute the accident.

Q-Dex On-Line
www.qdex.com

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

Marla Hawkins,
Petitioner,

vs.

NO: 12 WC 35797

18IWCC0742

Georgetown-Ridge Farms
Cusd #4,
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, medical, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 14, 2016 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: DEC 6 - 2018

o112718
CJD/rlc
049

Charles J. DeVriendt

Joshua D. Luskin

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

Q-Dex On-Line
www.qdex.com

HAWKINS, MARLA
Employee/Petitioner

Case# **12WC035797**

GEORGETOWN RIDGE FARM CUSD #4
Employer/Respondent

18IWCC0742

On 12/14/2016, 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 0.64% 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:

1551 STOKES LAW OFFICES
JACOB R JACKSON
200 N GILBERT
DANVILLE, IL 61832

2674 BRADY CONNOLLY & MASUDA PC
NOAH P HAMANN
211 LANDMARK DR SUITE C2
NORMAL, IL 61761

Q-Dex On-Line
www.qdex.com

18IWCC0742

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

- ☐ 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

Marla Hawkins
Employee/Petitioner

v.

Georgetown Ridge Farm CUSD #4
Employer/Respondent

Case # 12 WC 35797

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 **McCarthy**, Arbitrator of the Commission, in the city of **Urbana**, on **11-17-16**. 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 _____

Q-Dex On-Line
www.qdex.com

FINDINGS

On **9-11-12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being N/A causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,515.58**; the average weekly wage was **$612.89**.

On the date of accident, Petitioner was **59** 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 **$N/A** for TTD, **$N/A** for TPD, **$N/A** for maintenance, and **$N/A** for other benefits, for a total credit of **$N/A**.

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

ORDER

PETITIONER HAS FILED TO PROVE AN ACCIDENT ARISING OUT OF HER EMPLOYMENT. ALL BENEFITS 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.

D. Dyas McCarty

Signature of Arbitrator

12-12-2016
Date

DEC 14 2016

Q-Dex On-Line
www.qdex.com

FINDINGS OF FACT

Petitioner worked as a teacher's assistant for Georgetown Ridge Farm CUSD #4. (Tr. 12). She worked at the district's middle school. (Id.). On September 11, 2012, she testified that her husband dropped her off at the south parking lot of the middle school, which was where he normally dropped her off. (Tr. 13). She entered the eastern door of the south parking lot, which the Arbitrator notes is depicted on the right side of respondent's exhibit 4 and a close up photo of the entrance is noted in respondent's exhibit 6. (Tr. 14-15).

The petitioner testified that while descending a flight of stairs to enter the building, she caught one of her feet and fell onto her left knee. (Tr. 18-19). She was wearing sandals. (Tr. 16). The petitioner is not sure which one of her feet became caught, but she suspects it was her right foot given that she landed on her left knee. (Tr. 19). The petitioner testified that she believes she landed in a way that her left knee and left leg above the knee hit the steps. (Id.).

Petitioner testified that she was able to get herself into the building, where she was given assistance by co workers. (Tr. 21). She was eventually transported to a local emergency room for medical care. (Tr. 22). It is undisputed that the petitioner fell.

Direct Exam of Petitioner

On direct examination petitioner testified that she traversed the steps where she fell twice per day. (Tr. 17). The weather conditions on the date she fell were pleasant. (Id.). There was no moisture on the ground. (Id.). At trial she denied any history of dizziness or balance issues. (Id.).

She testified that there were no foreign substances on the ground when she fell. (Tr. 18). She testified that the toe of her sandal became caught in the sidewalk "somewhere, at some place...at the top of the steps," causing her to fall. (Id.).

She testified that before the date of the fall, she noticed "some problems" with the sidewalk next to the stairs, "but nothing drastic." (Tr. 15).

Q-Dex On-Line
www.qdex.com

Petitioner testified that on the date of accident she was carrying her purse and a grocery bag. (Tr. 16). Inside of the grocery bag was cereal that she gave to students she tutored in the mornings. (Id.). She testified that she was not required to provide the cereal to the students. (Tr. 17). The cereal did not obstruct her view of the sidewalk or the stairs on the morning of the fall. (Id.).

On September 18, 2012 the petitioner gave a recorded statement to Brad Sandner, who works for the workers' compensation insurance carrier. (Tr. 18). A written transcript of that recorded statement was offered into evidence as respondent's exhibit 8. Audio of the recorded statement was offered into evidence as respondent's exhibit 7. Petitioner does not refute the transcript or the audio. (Tr. 49).

When the petitioner presented to the emergency room she saw the school superintendent, Mrs. Neal. (Tr. 23). Mrs. Neal was at the hospital for an unrelated injury to a student. (Id.). According to the petitioner, Mrs. Neal advised the petitioner to bill her treatment to workers' compensation insurance. (Tr. 24). The petitioner testified that none of her medical bills have been paid by workers' compensation insurance. (Id.).

The petitioner denied any history of left knee or left leg problems before September 11, 2012. (Tr. 25).

The petitioner testified that she did not improve with physical therapy, surgery or pain management treatments, which consisted of injections and medications. (Tr. 25-28). Petitioner testified that after taking medications such as Cymbalta, she developed side effects including high blood pressure and listlessness. (Tr. 28). She does not like taking medication. (Tr. 29).

The petitioner testified that she intended to keep working, but she retired early. (Tr. 30). She was 59 years old on the date of accident. (Arb. Ex. 1). She testified that retirement has negatively impacted her finances. (Tr. 30).

Q-Dex On-Line
www.qdex.com

She testified that since the accident she is less active. (Tr. 31). She tries to perform activities for enjoyment such as cooking, working in her yard and volunteering. (Id.). She can still perform most tasks, but not as much as she could prior to the date of accident. (Id.).

She testified that her home is two stories. (Tr. 32). She moved her bedroom downstairs following the accident due to difficulty with stairs. (Id.). She now sleeps on a couch so she can elevate her left leg. (Tr. 33). She testified that her daily pain is rated six or seven out of ten when she is active. (Tr. 34). At rest, is approximately four out of ten. (Id.). She testified that when it rains or when it is cold her left leg gets stiff. (Id.).

Cross Exam of Petitioner

On cross-examination the petitioner testified that she's not sure which part of her body she landed on when she fell. (Tr. 37).

The petitioner testified that she initially treated with Dr. Paul Plattner, but that she changed care to Dr. Robert Gurtler, in part, at the advice of her attorney. (Tr. 40).

The petitioner testified that she reviewed the respondent's exhibits. She agreed that photos of the school and the accident site, marked as exhibits one through six, are accurate. (Tr. 40-41).

She testified that there are three parking lots at the school, one to the east, one to the west and one to the south. (Id.). Photos of the parking lots are marked as respondent's exhibits one through four. The petitioner testified that each of the parking lots is open to employees and members of the general public who would visit the school. (Tr. 41). She was not required to park in any specific parking lot. (Tr. 42). She chose to park in the south parking lot because it was the closest to her classroom. (Tr. 43). She parked there for her convenience. (Id.).

Each parking lot has at least one entrance into the building. (Id). The petitioner testified that she was not required to use any specific entrance into the building. (Id.).

Q-Dex On-Line
www.qdex.com

The petitioner testified that the east parking lot has a few stairs and a handicap ramp for entrance into the building. (Tr. 44). The stairs and the ramp off of the east lot rise into the building. (Rx3).

The petitioner testified that the west entrance has no steps to enter the building. (Tr. 44).

The south parking lot has two entrances into the building. (Tr. 44). The petitioner testified that a photo of the two entrances to the building from the south parking lot is accurately depicted in respondent's exhibit 4. The entrance to the left in respondent's exhibit 4 was not used by the petitioner on the date of accident. (Id.). The petitioner testified that the entrance on the left of respondent's exhibit 4, is shown close up as respondent's exhibit 5. That entrance, which the petitioner did not use, has no steps into the building. (Tr. 45-46). It does have a small concrete landing. (Id.). The petitioner did not use that entrance because it required her to walk a little farther to her classroom than the other south entrance. (Tr. 46).

The petitioner did use the entrance that is shown on the right side of respondent's exhibit 4, which is off of the south parking lot. (Tr. 46). A close up of the entrance used by the petitioner on the date of accident is depicted in respondent's exhibit 6. (Id.). The petitioner testified that the entrance she used on the date accident was not locked as a matter of practice. (Tr. 47). The entrance she used led into the school kitchen. (Tr. 15). The petitioner testified that, in part, she used that entrance because she would start her day by getting a cup of coffee from the kitchen. (Tr. 57). She used this entrance for her convenience. (Tr. 43).

The entrance where the petitioner fell is open to members of the general public such as delivery people, volunteers who worked in the kitchen or parents who would access the school gymnasium. (Tr. 47-48).

The petitioner testified during cross examination that she does not know how she fell. (Tr. 49-51). She testified that she caught her foot on something, but she does not know what. (Id.).

Q-Dex On-Line
www.qdex.com

She indicated that it is possible she simply caught her shoe on the concrete and not a defect. (Tr. 52). The petitioner testified that carrying the box of cereal likely did not cause her to fall. (Tr. 54).

The petitioner testified that she was never given any work restrictions by a doctor that led her to retire. (Tr. 54-55). She made the decision to retire on her own. (Tr. 55-56). She testified that when she tendered her resignation, her supervisor, Lisa Gocken, tried to keep the petitioner as an employee and that the petitioner was offered other positions. (Tr. 56). The petitioner declined. (Id.).

Re-direct Examination of the Petitioner

On redirect examination the petitioner testified that there was crumbling sidewalk next to the step. (Tr. 57). She testified that crumbling sidewalk is something she could have caught her foot on. (Tr. 57-58).

Re-cross Examination of the Petitioner

During re-cross examination the petitioner testified that she does not know what she caught her toe on. (Tr. 59).

Direct Examination of Respondent's witness Lisa Gocken

Lisa Gocken testified on behalf of the respondent. (Tr. 60). She worked as the principal at the petitioner's school. (Tr. 61). She was the petitioner's direct supervisor on the date of accident. (Tr. 62).

She testified that employees are not told where to park or which entrance to use to enter the building. (Tr. 62-63).

Ms. Gocken testified about the two entrances off of the south parking lot that are depicted in respondent's exhibits four, five and six. (Tr. 63). According to Ms. Gocken the entrance shown on the left side of respondent's exhibit 4, and in the close up picture marked as

respondent's exhibit 5, is the entrance the petitioner did not use on the date of accident. (Id.). That entrance does not have any steps into the building. (Tr. 45-46). Ms. Gocken testified that if the petitioner had entered the school through that entrance she would have walked down a small hallway to a main hallway where the petitioner's classroom was located. (Tr. 63-64). That entrance did not require the petitioner to ascend or descend any stairs into the building or once inside of the school. (Id.).

Ms. Goeken testified about the entrance the petitioner did use on the date of accident, which is shown on the right side of respondent's exhibit 4 and in a close up marked as respondent's exhibit 6. (Tr. 64). To enter the building through that entrance, the petitioner had to descend stairs. (Id). Once inside of the building the petitioner would have entered through the school kitchen/cafeteria. (Id.). After getting her cup of coffee, the petitioner would then walk up a flight of stairs. (Id.). Once at the top of the stairs, the petitioner's classroom was approximately the second door. (Id.).

Cross Examination of Lisa Gocken

Ms. Gocken testified that she took the photos marked as respondent's exhibits one through six. (Tr. 65). She testified that she took the photos between three and six weeks prior to trial. (Id).

Ms. Gocken was asked about the west entrance, which is depicted in respondent's exhibit two. She testified that said entrance is locked during school hours. (Tr. 66). The same is true of the east entrance, which is marked as respondent's exhibit 3. (Tr. 67). She testified that the entrance used by the petitioner on the date of accident, marked as respondent's exhibit 6, typically was not locked. (Id.).

Ms. Gocken testified that the south entrance, which was used by the petitioner, is normally used by teachers and staff. (Tr. 67). Ms. Gocken testified that most visitors use the front door of the school, which is not off of the south entrance. (Tr. 68).

Ms. Gocken testified that the condition of the sidewalk depicted in the respondent's exhibits does not depict to the condition of the sidewalk on the date of accident. (Tr. 68-69). She testified that the concrete which supported the railing for the steps shown in respondent's exhibit 6 does show some chipped concrete. (Tr. 69). Ms. Gocken then testified that she was sure that there was some chipped concrete in different places on the sidewalk leading up to the stairs on the date of accident. (Id).

Re-Direct Examination of Ms. Gocken

During redirect examination Ms. Gocken testified that while visitors should use the front door, if they were lost and looking for a parking lot, they could park in the south lot. (Tr. 71). She testified that anybody who attempted to enter through the entrance used by the petitioner would be able to enter the building. (Id.). Ms. Gocken testified that delivery people used to the entrance the petitioner used. (Id). Ms. Gocken also testified that volunteers for activities or individuals who knew the building well would also use the entrance used by the petitioner.

Recorded Statement

The petitioner gave a recorded statement on September 8, 2012, to Bradley Sandner of the Sandner Group, which is the workers' compensation carrier involved in this matter. The petitioner testified that the recorded statement is accurate. (Tr. 18). In the recorded statement the petitioner was asked if there were any defects to the stairs where she fell and the petitioner stated "not to my knowledge. I go down them everyday. I've never had a problem, so." (Rx7, pg. 5)

Medical Treatment

On the date of accident the petitioner presented to the emergency room at Provena United Samaritans Medical Center. (Px1). She complained of left knee pain. She was noted to have an abrasion to her left knee. No complaints were made concerning the petitioner's left quadriceps muscle. The record reflects that the petitioner tripped over her sandal.

Q-Dex On-Line
www.qdex.com

An x-ray was taken of her left knee that showed effusion and a possible fracture of the proximal lateral tibia and distal lateral femur. (Px2). She was referred to Dr. Paul Plattner. (Px1).

Petitioner was first seen by orthopedic surgeon, Dr. Paul Plattner, on September 13, 2012. (Px4). That record states that the petitioner fell at work after catching her toe on a step, falling onto her left knee. She reported that her knee took the brunt of her injury. There is no mention of the petitioner falling onto her quadriceps or thigh area. Dr. Plattner recommended crutches and an MRI.

On October 2, 2012, the petitioner underwent an MRI of the left knee at Carle Clinic. (Px5). That study showed a complex fracture of the proximal tibia and large knee joint effusion.

When the petitioner returned to Dr. Plattner on October 5, 2012, he diagnosed her with a fracture of the proximal tibia. (Px4). He opined that the fracture would heal on its own. He recommended she treat with rest, ice and compression. He prescribed restrictions of no bending. The record indicates that the patient wanted a second opinion advice of her attorney and specifically that the patient wanted to be seen by Dr. Gurtler. (Px4). The petitioner testified at the 40).

treating with x6). This record does not go into nces or the itioner's fall. Dr. er reviewed the petitioner's MRI and opined that the pe as going to de osarthritis even knee replacem physic performed at Carle Clinic.

Pet al therapy. When she returned to Dr. C is noted to have a palpable defect to the distal and

Q-Dex On Line
www.q-dex.com

quadriceps tendon. (Px6). She had difficulty extending her knee. Dr. Gurtler suspected that she had a quadriceps tendon rupture of the left knee. Surgery was recommended.

On November 16, 2012 the petitioner underwent a left quadriceps repair surgery for the diagnosis of a left quad rupture. (Px10). Post operatively the petitioner participated in physical therapy at Carle. (Px11).

Post operatively the petitioner did not make strong gains. She continued complaining of pain along the medial and lateral aspect of her knee according to the January 24, 2013 follow up visit with Dr. Gurtler's office. (Px6). She also complained of weakness to her left quadriceps muscle and an inability to perform flexion or aggressive knee extension.

After attempting continued physical therapy and conservative care, on June 10, 2013 the petitioner underwent a left leg nerve conduction study with Dr. Rong Chen. (Px13, 14). The study was normal.

Over time, an updated MRI of the petitioner's left knee was performed on April 17, 2013. (Px5). That study showed no evidence for meniscal or collateral ligament tears. On June 18, 2013 an MRI of the lumbar spine showed L5-S1 spondylolisthesis, no central spinal canal stenosis and mild lower lumbar loevoscoliosis. (Id.).

On February 3, 2014, Dr. Gurtler authored a report to petitioner's attorney. (Px16). In the report he causally connected the petitioner's condition of ill being to the work accident. He indicated that the petitioner would need crutches for the rest of her life and that she would likely need to work sitting jobs. He also indicated that she likely would need a total knee replacement at some point in the future.

The petitioner was last seen by Dr. Gurtler on April 24, 2014. (Px6). At that time, the record states that the petitioner's quad was still not working and that she had been evaluated by

Q-Dex On-Line
www.qdex.com

neurology with no explanation. He suspected possible RSD, but indicated he did not treat that condition. He recommended pain management.

The petitioner has been treated by pain management physician Dr. Shaberra Rauther since January 8, 2015 for complaints of left thigh pain and left knee pain. (Px17). Dr. Rauther assessed the petitioner with possible CRPS. On February 25, 2015 she performed a left sided lumbar sympathetic nerve block, which was followed up with a repeat injection on March 18, 2015. The injections provided no long term relief. Since then Dr. Rauther has treated the petitioner with Cymbalta and Lidoderm patches. The petitioner was last seen by Dr. Rauther in September 2016.

The petitioner also continues to follow up with her primary care provider Dr. Jatin Rana for some pain management. (Px19). She most recently saw Dr. Rana on July 28, 2016 for refills of Norco and Lidoderm.

Causation Opinions

Respondent obtained records review reports from orthopedic surgeon, Dr. David Fetter, dated July 29, 2013 and November 27, 2013. (Rx9, 10). Dr. Fetter opined that the petitioner's only injury as a result of the fall was a lateral tibial plateau fracture of the left knee. He did not find that the petitioner's quadriceps rupture was causally related to the work accident nor does he feel that the petitioner's surgery was related to the work accident. He is of the opinion that the petitioner only required immobilization, six to twelve weeks of non or minimal weight bearing followed by a rehab program of 12 weeks. Dr. Fetter's deposition was taken on May 21, 2014.

Dr. Fetter's opinions are contrasted by the opinions of Dr. Gurtler. He opines that the petitioner fractured her lateral tibial plateau and that she also ruptured her left quadriceps muscle as a result of the fall. He authored a narrative report dated February 3, 2014. His deposition was taken on April 24, 2014. (Px30).

CONCLUSIONS OF LAW

Q-Dex On-Line
www.qdex.com

A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of the employment. 820 ILCS 305/2 (West 2002). Both elements must be present in order to justify compensation. Illinois Bell Telephone Co. v. Industrial Comm'n, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 137 Ill. Dec. 658 (1989).

Arising out of the employment pertains to the origin or cause of a claimant's injury. William G. Ceas & Co. v. Industrial Comm'n, 261 Ill. App. 3d 630, 636, 633 N.E.2d 994, 199 Ill. Dec. 198 (1994). An injury "arises out of" employment when "the injury has its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." Id. As a general rule, "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts she was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incidental to her assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling her duties." Caterpillar Tractor Co. V. Industrial Comm'n, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667, 133 Ill. Dec. 454 (1989).

In order to determine whether a claimant's injury arose out of her employment, we must first categorize the risk to which she was exposed. The risks to which an employee may be exposed are categorized into three groups: (1) risks distinctly associated with employment; (2) risks personal to the employee, and (3) neutral risks that have no particular employment or personal characteristics. Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill. App. 3d 347, 352, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000).

Falling while traversing stairs is a neutral risk and the injuries resulting therefrom generally do not arise out of employment. Illinois Consolidated Telephone Company, 314 Ill. App. at 353. An injury resulting from a neutral risk does not arise out of the

O-Dex On-Line
www.oldex.com

employment. Caterpillar Tractor Co., 129 Ill. 2d at 59. However, an exception to noncompensability under the Act exists where the requirements of the claimant's employment create a risk to which the general public is not exposed. Id. "The increased risk may be qualitative or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public." When analyzing a neutral risk, the increased degree of risk to the claimant may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (*i.e.*, when the employee is exposed to the risk more frequently than members of the general public by virtue of the employment. Adcock v. Illinois Workers' Compensation Comm'n, 2015 IL App (2d) 130884WC, 395 Ill. Dec. 401, 38 N.E.3d 587.

Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work related task which contributes to the risk of falling. Nabisco Brands, Inc. v. Industrial Comm'n, 266 Ill. App. 3d 1103, 1107, 641 N.E.2d 578, 204 Ill. Dec. 354 (1994).

In this case, the claimant did not present any evidence explaining the cause of her fall. She testified that she does not know why she fell. Specifically, trial testimony was as follows:

> Q. Is it fair to say that you don't know how you fell?
> A. Well, no, not really.
> Q. Okay.
> A. **I caught my foot *on something***. I know that that happened. I don't just get to the top of the stairs and decide you're going to fall down and something happened that caused me to fall. I've never fallen, you know, in my life. I know that I'm older, and I realize that people, you know, fall down when they get older, but that isn't what happened. I mean, I absolutely did something to make myself, you know, to cause the fall.
> Q. But do you know what got caught?
> A. My -- the toe of my shoe was caught. It was an accident. The toe of my shoe was caught, and I went forward.

Q. In reading your transcript, you were asked specifically: Did your shoe get caught on any defect? And I think you responded that either you weren't sure or that it didn't. Is that still a fair statement?
A. **Well, something caused me to fall and, you know, that's pretty much about all I can tell you.** I just didn't stand there and fall down. **I wish I could be more clear** without -- but at the time that I spoke with him, I was on some medication. That may have had something to do with my thinking, and I'll be real honest with you, my whole -- during this whole thing, I was worried death about the school. That's why I didn't want to do workmen's comp. I didn't want to do insurance. That's why I knew how much that would cost, and it was -- I was very concerned that they were going to have to pay a lot of money, and I knew what kind of financial place they were in at that time, and that's the truth. I don't know what else to tell you other than something caused me to fall -- catch my toe and -- of my shoe, not really my toe, of my shoe and made me fall.
Q. Again, if I'm putting words in your mouth, stop me.
A. I will tell you, yes.
Q. **If you tripped over, say, a chunk of concrete that was missing or, you know, a branch that was in your way, you would remember that, correct?**
A. After I thought about it, **I think I probably would remember** it because I --
Q. Sorry.
A. Continue.
Q. **And you don't recall anything like that, correct?**
A. **I recall catching my toe on *something*** involved.
Q. **I guess my question is: What is the something you caught your toe on?**
A. **I don't -- *something on the sidewalk.*** At first I thought it was just a crack on the sidewalk. At first I wasn't a hundred percent sure if it were like a deep pocket in the sidewalk or it was just a crack. I mean, you're walking down the sidewalk and caught your toe in the crack of the sidewalk. I didn't know that, but I know that I caught my toe on something on the toe of my shoe. I just didn't stand there and fall. ***Something happened that could have caused it. I'm not sure what the default was or if it was just a crack or if it was just my shoe catch on the concrete, but something made me fall down the stairs.***
Q. *So it is possible that your shoe just caught on the concrete, correct?*
A. *I don't know. I mean, yes.* (Tr. 49-52)***[emphasis added]***

While the petitioner clearly caught the toe of her sandal on something and fell, there is no clear testimony or evidence indicating on what she caught her sandal.

Additionally, she testified that weather did not play a role in the fall. She offered no testimony that she was in a rush. She testified that while she was carrying cereal in her hands, she was not required to bring cereal to the school by her employer and importantly, carrying the cereal did not cause her to fall.

O-Dex On-Line

Importantly, the medical records also illustrate the fact that the petitioner did not know how she fell. The initial medical record from the emergency room on the date of accident reflects that the petitioner tripped on her own sandal. (Px1). The next medical record in her history is from Dr. Plattner on September 13, 2012. (Px4).

The petitioner did not show that qualitatively she was performing an employment related task when she was injured. She was not performing any task for her employer. She was walking like any member of the general public. Likewise, qualitatively she presented no evidence she used the stairs in question more than a member of the general public. The entrance she used was open to the general public. The door she entered through was the only door at the school that was unlocked all day. The petitioner has the burden of proving that her injury arose out of her employment. See *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 847, 663 N.E.2d 1046, 215 Ill. Dec. 532 (1996). She has not met her burden.

The Arbitrator recognizes the petitioner suspects she tripped over concrete, but for the Arbitrator to agree with the petitioner, he must speculate concerning the cause of the fall. There is some evidence that there was crumbling concrete near where the petitioner fell. However, the issue is whether that constituted a defect or hazard. The Petitioner initially said in her direct testimony that while there were some problems with the sidewalk next to the stairs, it was "nothing drastic." When she gave her recorded statement just one week after her fall, she said that she was unaware of any defects in the condition of the stairs. She clearly had an opportunity at that time to tell the insurance representative about the crumbling walk but did not. (RX 8) While Mrs. Goeken did testify on cross examination that she was sure that the sidewalk had a chip in different places, the Arbitrator is mindful of the context in which that testimony was given. She was first shown a picture of the stairs and asked about chips in the concrete standards supporting the railing. The chipping noted on the standards had nothing to do with the

Q-Dex On-Line
www.qdex.com

petitioner's fall. She was then asked about chipping on the walk. She was not asked to indicate on the photograph where the chipping was nor how extensive it was. She only said it was chipped through wear and tear.

The petitioner is asking the Arbitrator to decide, through circumstantial evidence, that she fell because the toe of her sandal caught on some chipped concrete on the sidewalk next to the steps and that said sidewalk's condition at the time constituted a risk or hazard not present on normal sidewalks used by the general public. Circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. Mann v. Producer's Chemical Co., 356 Ill. App. 3d 967, 974, 827 N.E.2d 883, 293 Ill. Dec. 2 (2005). Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn. Carter v. Azaran, 332 Ill. App. 3d 948, 961, 774 N.E.2d 400, 266 Ill. Dec. 294 (2002).

In her proposed decision, the petitioner cites a number of cases to support her position. The common factor in all of those cases, however, is the proven existence of a defect or hazard which was causally linked to the petitioner's accident. In Bommarito v.The Industrial Commission, 82 Il. 2d. 191 (1980), the petitioner fell because he stepped in a hole. In Litchfield Healthcare v. The IWCC, 349 Il. App. 3d 486 (5th. 2004), photographs showing a height discrepancy of an inch and a quarter where the fall occurred were offered and conceded to by the respondent. The two other cases were Rule 23 decisions, but in both there was clear evidence of a defect or hazard. As noted above, in the instant case, the existence of a defect has not been sufficiently proven.

Based on the evidence in the record, the claimant cannot show more than a mere possibility that she tripped over defective concrete as the cause of her fall, and, thus, there is no

Q-Dex On-Line
www.qdex.com

reasonable certainty that the claimant's injury stemmed from a risk associated with her employment.

Because the petitioner did not present any evidence establishing the cause of her fall, she has failed to prove that her injury arose out of her employment.

The claim is denied and all other issues become moot.

Q-Dex On-Line
www.qdex.com

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS)
)
)
COUNTY OF SANGAMON)

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

Lois M. Vaughan,
Petitioner,

vs. NO: 16 WC 17341

18IWCC0690

Memorial Medical Center,
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 issues including accident, causal connection, temporary total disability, and nature and extent of permanent partial disability, and being advised of the facts and law, hereby reverses the February 23, 2017 decision of Arbitrator McCarthy as described below. The Arbitrator's decision is attached hereto and made a part hereof.

The Arbitrator found that Petitioner's right knee injury arose out of and in the course of employment with Respondent. He awarded temporary total disability benefits under §8(b), medical expenses under §8(a), and permanent partial disability compensation representing 25% loss of use of the right leg under §8(e)12. The Commission, after reviewing the entire record, disagrees with the Arbitrator's finding of compensable accident. Particularly, the Commission finds that Petitioner's injury – incurred in a fall while stepping off a sidewalk curb onto a parking lot – did not "arise out of" her employment. Accordingly, the Commission reverses the Arbitrator's decision and vacates all awards of benefits.

I. BACKGROUND

Petitioner, 60 years old at the time of accident, was hired in June 2015 by Memorial Medical Center as a technician in its "Central Processing" department, where her duties included cleaning and sterilizing surgical instruments, assembling trays of instruments needed for surgeries, carting the trays to the operating room in preparation for the following day's surgeries, etc. She worked from 10:30 p.m. to 7 a.m. (Tr. 11-14).

18IWCC0690
Q-Dex On-Line
www.qdex.com

On the morning of October 29, 2015, after completing her shift and exiting the building, Petitioner fell while headed for the parking lot. The parking lot's surface was made of black asphalt, and alongside its edge ran a light-colored (concrete and cement) sidewalk. Petitioner was alighting the sidewalk when she stumbled and fell. She landed on the blacktop on her right knee, sustaining a communited fracture of the patella. (Tr. 36; PX 1). There was no snow, ice or any precipitation on the ground. (Tr. 26). Nor were there any holes, debris, obstructions, or the like that caused her to trip. (Tr. 60). Quite simply, she had just taken a misstep with her left foot and stumbled over the curb, which was about 1½ to 2 inches higher than the blacktop surface. (Tr. 32-33).

Both parties submitted photographs into evidence depicting various views of the parking lot and curbed sidewalk, including the particular spot where Petitioner stumbled. (PX 4; RX 4; RX 5). The photographs show that at the end of the sidewalk was a wheelchair access ramp. The height difference between the sidewalk and blacktop diminished and their surfaces became level with each other at the point of this access ramp. Petitioner attempted to alight the sidewalk before the point where the surfaces became level. Although the boundary between the light-colored, curbed sidewalk and the blacktop is distinct, Petitioner stated it looked to her that the sidewalk's surface was even with the blacktop – that is, she did not notice the difference in height between the sidewalk and the blacktop -- because it was 7 a.m. and dark. (Tr. 32-33; 66-67). She also stated that only one of the two lights by the door of a nearby building was on at the time, and only "partially" illuminated the area where she ultimately fell. (Tr. 29-30).

Petitioner acknowledged that these sidewalks are open to the public. (Tr. 55). She also testified that, while performing duties for Respondent in the preceding months, she had traversed this same general area multiple times and was familiar with these sidewalks and surroundings. (Tr. 55-57). In fact, she had stepped off that curbed sidewalk to the parking lot before, but "in different places." (Tr. 68).

II. DISCUSSION

A. The Arbitrator's finding of a hazard or defect is erroneous.

The Arbitrator's decision is based on finding of a hazard or defect. He wrote:

> "It is clear from the evidence that the uneven surface between the sidewalk and the asphalt parking lot where the Petitioner fell was a hazard or defect. This is especially true when you add in the fact that the asphalt lot was not flat and instead sloped away from where Petitioner placed her left foot."

(Arbitrator's decision at 9). He cited Litchfield Healthcare Center v. Industrial Comm'n, 349 Ill.App.3d 486 (2004), wherein the claimant "tripped while walking across a sidewalk at work which had uneven slabs of concrete to the extent of 1¼ inches." (Arbitrator's decision at 9). The claimant in that case identified an exhibit which showed one slab of concrete higher than the adjoining slab. The Litchfield court determined that the sidewalk was "uneven and defective." Litchfield at 491. The Litchfield court further found that the condition created a risk that was neutral, but one to which the claimant was exposed to a greater degree than the general public by virtue of her regular use of the parking lot to

Q-Dex On-Line
www.qdex.com

18IWCC0690

which she was headed. Id. In the instant case, the Arbitrator found that the uneven ground, combined with the darkness that Petitioner allegedly encountered at 7 a.m., warranted the determination that she was exposed to a risk of tripping greater than that met by the general public. (Arbitrator's decision at 9).

The Arbitrator's citation to Litchfield is misplaced. Here, the height differential (diminishing towards the access ramp at the end of the sidewalk) between the curb and the blacktop was by design and not a defect. As Respondent points out, "common sense dictates that sidewalk slabs should be even or the same height; whereas curbs are, by nature, raised boundaries. Thus, demonstrating height differences between slabs within the same sidewalk evidences defectiveness; where demonstrating height differences between a curb and the area it borders does not." (Respondent's Statement of Exceptions at 9-10). The multiple photographs submitted by both parties -- of views of the parking lot, sidewalk, and the exact site of Petitioner's fall – show that the premises were neither defective nor hazardous. (PX 4; RX 4; RX 5).

B. Petitioner's injury did not "arise out of" employment.

As there was no defect, special hazard or risk on Respondent's premises, the Commission finds that Petitioner has failed to prove that her injury "arose out of" her employment. For an injury to "arise out of' the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989). Petitioner's case in fact bears a remarkable similarity to the circumstances of Caterpillar, where the claimant was injured when he stepped off a curb (featuring a "slight slope between the curb and the driveway") in front of his place of employment. The Supreme Court found that the claimant provided nothing in the record to indicate that the curb was either defective or hazardous.[1] Thus, the condition of the premises in Caterpillar was not a contributing cause of his injury. The Supreme Court further found that the fact that the claimant took an accepted route does not satisfy the "arising out of" element. As the Court noted:

> "We recognize that in prior cases this court held that injuries sustained on the employer's premises by an employee going to or from his actual employment by a customary or permitted way, within a reasonable time before or after work, were incurred in the course of and arose out of the employment. [citations omitted]. While the broad language of these cases might appear to imply that any accidental injury sustained on the employer's

[1] The circumstances in Caterpillar were described as follows: "On July 7, 1979, after completing his shift, [claimant] Price left the building through the door normally used by the employees, intending to go to his car, which was parked in the employee parking lot. Immediately in front of the building was a sidewalk with a curb running along its edge. Price walked along the sidewalk for about 30 feet and then stepped off the curb onto the blacktop driveway. There was a slight cement slope, apparently for drainage, between the curb and the blacktop driveway. As Price stepped off the curb, his right foot landed half on the cement incline and half on the blacktop driveway and he twisted his ankle. The driveway was part of the company premises and was used both by employees and by the general public to pick up employees. There is no evidence of holes, rocks or obstructions on the pavement." Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 56-57.

18IWCC0690

Q-Dex On-Line
www.qdex.com

> premises is compensable, that is not the law in this State. An examination of the cases indicates this court's continued adherence to the maxim that an injury is not compensable unless it is causally connected to the employment. Where liability has been imposed, the injury occurred either as a direct result of a hazardous condition on the employer's premises [citations omitted] or arose from some risk connected with, or incidental to, the employment [citations omitted]."

Caterpillar, 129 Ill. 2d at 61-62. The Court concluded that the claimant did not establish that he was exposed to a risk not common to the general public to a greater degree. "Curbs, and the risks inherent in traversing them, confront all members of the public." Recovery to the claimant was denied. Id.

Similarly, the Commission finds that Petitioner is not entitled to recovery. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed February 23, 2017, is hereby reversed as discussed above. Benefits denied.

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

DATED: NOV 8 - 2018

Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

o-09/12/18
jdl/ac
68

Q-Dex On-Line
www.qdex.com

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VAUGHAN, LOIS M
Employee/Petitioner

Case# **16WC017341**

MEMORIAL MEDICAL CENTER
Employer/Respondent

18IWCC0690

On 2/23/2017, 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 0.67% 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
KATHY A OLIVERO
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0490 SORLING NORTHUP
DAVID ROLF
1 N OLD STATE CAPITAL PLZ #200
SPRINGFIELD, IL 62701

Q-Dex On-Line
www.qdex.com

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

18IWCC0690

☐ 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

Lois M. Vaughan
Employee/Petitioner

Case # 16 WC 17341

v.

Consolidated cases: _____

Memorial Medical 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 Douglas McCarthy, Arbitrator of the Commission, in the city of Springfield, on January 18, 2017. 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

Q-Dex On-Line
www.qdex.com

18IWCC0690

FINDINGS

On **October 29, 2015**, 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 **20** weeks preceding the injury, Petitioner earned **$12,430.95**; the average weekly wage was **$621.55**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of **$9,652.32** under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of **$414.37**/week for **9 4/7** weeks from **10/30/15** through **1/4/16**, as provided in Section 8(b) of the Act.
- Respondent shall pay Petitioner the sum of **$372.93**/week for a further period of 53.75 weeks, as provided in Section 8(e)(12) of the Act, because the injuries sustained caused **25% loss of use of the right leg**.
- Respondent shall pay Petitioner compensation that has accrued from **10/29/15** through **1/18/17**, and shall pay the remainder of the award, if any, in weekly payments.
- Respondent shall pay the further sum of **$5,108.07** for necessary medical services, pursuant to the medical fee schedule, as provided in Section 8(a) and 8.2 of the Act, and shall be given a credit for payments made by the group medical plan, and shall hold Petitioner harmless from any and all claims by any provider of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

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

D. Glenn McCarty 2/13/17

Signature of Arbitrator Date

FEB 22 2017

The Arbitrator hereby makes the following Findings of Facts on all issues:

Petitioner became employed by Respondent in June of 2015 as a Central Processing Technician and held that position on 10/29/15, but had worked as a traveler for Respondent since January or February of 2015. The duties of a Central Processing Technician involve processing all surgical instruments and other equipment for the operating rooms including cleaning, decontaminating, and sterilizing the surgical instruments and equipment, assembling trays with the instruments and equipment, obtaining the trays for the following day, loading the trays onto carts, pushing the carts to the operating rooms, and emptying the carts, laundry, and trash from the operating rooms. Petitioner estimated orthopedic surgical trays weighed approximately 25 pounds, non-orthopedic surgical trays weighed 10-15 pounds, carts with trays weighed up to 300 pounds, and full laundry bags weighed 20 pounds. As a Central Processing Technician, Petitioner was required to be on her feet all day. Petitioner worked the third shift as a Central Processing Technician with her hours from 10:30 p.m. to 7:00 a.m. On 10/29/15, Petitioner's direct supervisor was Brenda Sturdy.

As an employee of Respondent, Petitioner stated she was assigned to Parking Lot 3 and received a parking sticker but was not assigned a particular spot in that lot. Petitioner acknowledged as an employee of Respondent she was able to park in any of the employee parking lots but the closest lot for Petitioner was Parking Lot 3, and Respondent had only suggested but did not instruct Petitioner to park in Parking Lot 3. The parking sticker Petitioner received did not restrict Petitioner to parking in Parking Lot 3, but allowed Petitioner to park in any of the employee parking lots. Parking Lot 3 is north of the emergency room of Respondent and Petitioner identified Parking Lot 3 on PX 4, an older version of Respondent's campus map.

Petitioner was given instructions on where to enter and exit Respondent's facility as an employee of Respondent by Ms. Sturdy, and was initially instructed to enter through the emergency room or the front of the Medical Arts building where the garden center is located. Petitioner circled two areas on PX 4 where she had been instructed to enter and exit Respondent's facility when she was initially hired. Petitioner acknowledged she was not limited to use only those doors, only that Respondent had suggested these doors to enter and exit Respondent's facility, as these doors were convenient to where Petitioner was going to perform her duties as a Central Processing Technician.

Petitioner used the emergency room to enter and exit as an employee of Respondent for several months, and was then given further directions on where to enter and exit Respondent's facility by memos and word of mouth, which included a door behind Human Resources that goes to Central Sterilization. Petitioner marked an X on PX 4 for the door that went to Central Sterilization. The door to Central Sterilization is not a door that can be entered or exited by members of the public as a badge is needed to open the door either way. After entering the door to Central Sterilization, the time clock Petitioner uses as an employee of Respondent is located down some steps and through another door. As an employee of Respondent, Petitioner is required to clock in and out.

Petitioner indicated when leaving through the door to Central Sterilization, an employee can go either left or right, but she always went to the left and walked on the west sidewalk there. Petitioner acknowledged there is a sidewalk on the eastside of the Medical Arts building and it was her choice which direction she went when coming out the door to Central Sterilization. Petitioner also acknowledged the west and east sidewalks by the door to Central Sterilization are open to the public. Petitioner further acknowledged she had traversed this same general area as a traveler at Respondent and was familiar with the sidewalks, doors, and buildings.

18IWCC0690

The west sidewalk Petitioner encountered upon leaving the door to Central Sterilization intersected with another sidewalk in front of the security office which Petitioner identified in PX 5, p. 4 and leads to a parking lot. Petitioner identified the building to the left of the sidewalk in PX 5, p. 4 as the Human Resources building and thought the building to the right was laundry. Petitioner described the sidewalks were concrete and the parking lot was blacktop and there is a visual difference between them.

Before 10/29/15, Petitioner did not have any medical condition that caused her to trip, stumble or fall. On 10/29/15, Petitioner had worked the third shift, clocked out, and was leaving work at approximately 7:00 a.m. to go to her car in Parking Lot 3. Petitioner indicated it was cold and dark outside as the sun had not come up, but there was no precipitation occurring when she left, and there was no ice, water, or snow on the ground from prior precipitation. Petitioner walked out of the door to Central Sterilization with a co-worker, Tracy Gomez, on 10/29/15, but then Petitioner had walked in front of Ms. Gomez on the sidewalk shown in PX 5, p. 4. Petitioner did not encounter any members of the public as she left work on 10/29/15 and stated she had never encountered any members of the public on that sidewalk when she went into work or left work.

Petitioner noted PX 5, p. 4 showed two lights by the door in that photograph, but explained only one of those lights was on at the time Petitioner left work on 10/29/15 at approximately 7:00 a.m. and it only partially illuminated the area where Petitioner ultimately fell. Petitioner also noted PX 5, p. 4 and RX 5 showed a light on the building to the right, but explained the lights present on that building on 10/29/15 were lower on the building and behind the rose bushes. Petitioner further explained on 10/29/15, there was a security vehicle parked in the area for security personnel that caused the lights behind the rose bushes to make the area where Petitioner fell not as illuminated.

On 10/29/15, as Petitioner was walking on the sidewalk shown in PX 5, p. 4, it appeared the sidewalk was even with the blacktop, when there was actually a difference of 1 ½ - 2 inches, and as Petitioner stepped off the sidewalk onto the blacktop, she tripped, stumbled, and fell landing on her right knee. Petitioner marked the spot on the blacktop area where she tripped with an X on PX 5, p. 7 and described the blacktop area as slanting or sloping down. Petitioner also indicated she was completely off the curb when she stepped onto the sloped blacktop area. Petitioner stepped with her left foot which did not land like it was supposed to and Petitioner tripped. Petitioner stated the darkness made the blacktop area look even or level with the sidewalk at that area and marked the spot where she actually landed with a check mark on PX 5, p. 7. On 10/29/15, there were no guardrails, barricades, signs, colored paint, or markings of any kind where Petitioner stepped off the sidewalk onto the sloped blacktop area.

Petitioner confirmed RX 6, p. 2 showed the sidewalk area where she fell and at one point, the sidewalk is level with the sloped blacktop area and then the blacktop area tapers down to the curb and that is how the area existed on 10/29/15. Petitioner further explained at a certain point when a person steps off the sidewalk in that area, they will be level with the blacktop area but the blacktop area where she stepped off the sidewalk on 10/29/15 had a 1 ½-2 inch difference between the sidewalk and the sloped blacktop area. Petitioner did not know why the blacktop area tapered in that area and said the reason she fell was because she did not see the difference in height between the sidewalk and blacktop area as it looked even to her since it was dark. Petitioner acknowledged she had stepped off the curb to the parking lot in that area in different places before 10/29/15.

Q-Dex On-Line
www.qdex.com

18IWCC0690

Petitioner identified RX 4 as a series of photographs that showed the approximate area where Petitioner stepped off the curb to the parking lot and Petitioner would have been walking toward the top of the 2nd photograph that showed the sidewalk continued and then made a right angle down an accessibility ramp into the parking lot. Petitioner acknowledged she was cutting across the area rather than going further on the sidewalk and turning down the ramp. Petitioner also acknowledged RX 4 was an accurate portrayal of the condition of the sidewalk and parking lot at the location where Petitioner fell and there were no chunks, defects, or holes nor any rocks or debris where Petitioner tripped.

After Petitioner fell, she noticed she was unable to move her right leg and started screaming and her co-worker and security personnel came to her aid and the security personnel then went to obtain ER staff. Petitioner estimated she was on the ground for approximately 10 minutes before she was brought into the ER in a wheelchair. While in the ER, Petitioner initially saw a nurse, an ER physician, and radiologist, and told them she had tripped and fallen on the blacktop area not the curb. Petitioner also indicated her supervisor, Ms. Sturdy, came to the ER and Petitioner told Ms. Sturdy what had happened in that she had tripped, fallen, and landed on the concrete lip.

The records of Memorial Medical Center reported Petitioner was seen in the emergency room on 10/29/15 at 7:12 a.m., initially by an ER nurse, with the history Petitioner tripped and fell in parking lot and complained of right knee pain and did not hit head (PX 1, p. 6, 7). It was also reported by the ER physician Petitioner was walking in the parking lot and tripped on a curb and landed directly on her right knee and complained of pain to the anterior knee (PX 1, p. 8). On physical examination, Petitioner had a superficial abrasion over the anterior right knee, was able to flex and bend the knee without difficulty, and there was normal sensation and motor function to the distal extremity (PX 1, p. 9). Petitioner was sent for an X-ray of the right knee and the radiologist reported Petitioner tripped and fell in parking lot this morning, with right knee pain, more on the medial aspect (PX 1, p. 9). The X-rays showed a comminuted fracture along the inferior aspect of the patella, the superior patellar pole was somewhat high-riding in the inferior portion which was inferiorly displaced, and there was a large adjacent soft tissue swelling (PX 1, p. 9-10). Petitioner was diagnosed with a comminuted fracture of the patella, placed in a knee immobilizer and referred to Dr. Razavi, an orthopedic surgeon, for worsening/continued problems (PX 1, p. 10).

The records of the Orthopedic Center of Illinois reported Petitioner was seen by Dr. Razavi on 11/2/15, for evaluation of a knee problem that occurred 4 days ago from a fall while walking in a parking lot at work on 10/29/15 (PX 2, p. 3). Petitioner presented in a wheelchair with a knee immobilizer on the right knee and Dr. Razavi found significant ecchymosis and edema about the knee joint, and diagnosed Petitioner with a closed fracture of the right patella and offered Petitioner surgical repair of the right knee patella fracture and extensor mechanism (PX 2, p. 4). Petitioner underwent a history and physical examination for this surgery with her family physician, Dr. Lee, on 11/6/15 (PX 2, p. 11-13). On 11/11/15, Dr. Razavi performed a repair of the infrapatellar tendon on the right side and noted the fracture in the inferior pole of the patella was significantly comminuted which precluded stable fixation of it (PX 2, p. 21-22).

Petitioner was seen by Dr. Razavi on 12/11/15, and reported excessive pain but there was no calf swelling, no leg pain, and no shortness of breath (PX 2, p. 25-27). Petitioner was instructed to be weight-bearing as tolerated, to keep the knee immobilizer on at all times to keep the knee getting complete extension, and allowed Petitioner to return to work with standing as tolerable and limited use of the right

Q-Dex On-Line
www.qdex.com

18IWCC0690

leg based on pain and strength tolerance (PX 2, p. 28). Petitioner returned to work as a Central Processing Technician in a restricted capacity on 1/5/16. Petitioner saw Dr. Razavi again on 1/8/16, and reported her symptoms were moderate in severity and improving, and Dr. Razavi prescribed intensive physical therapy for range of motion and knee strengthening (PX 2, p. 29-31).

The records of Memorial Medical Center reported Petitioner received physical therapy services from 1/20/16 through 4/22/16 (PX 1, p. 37-101). At the initial evaluation of 1/20/16, the therapist reported Petitioner's pain had been present since 10/29/15 after she fell directly onto the right knee onto concrete when leaving work and Petitioner had significant swelling in her right knee and lower leg into the ankle with increased WB (weight bearing) positions or prolonged sitting (PX 1, p. 44-47). On physical examination, Petitioner had an antalgic gait, decreased WB RLE, decreased heel toe contact, right knee in slight flexion, flexion of 65 degrees, extension of -11 degrees, and 3+ strength iliopsoas (PX 1, p. 45-46). While receiving physical therapy, Petitioner reported stiffness, deep ache, tightness, soreness, tiredness, and a feeling the knee was going to give out (PX 1, p.52-53, 57-58, 61-62, 75-76, 84-85, 97-98, 99-101). The physical examination of Petitioner on 4/22/16 showed flexion of 132 degrees and extension within normal limits (PX 1, p. 100).

Petitioner returned to Dr. Razavi on 2/22/16, and reported joint swelling, but no calf swelling, no leg pain, no shortness of breath, and partial weight bearing status (PX 2, p. 44-46). On physical examination, Dr. Razavi found knee tenderness, ROM as expected given post-op status, strength as expected given post-op status, stiffness, and active range of motion 5-95 degrees (PX 2, p. 44). Dr. Razavi instructed Petitioner to continue with physical therapy and return in 3 months, and released Petitioner to light duty with 15 minute breaks every 2 hours (PX 2, p. 47-48). Petitioner saw Dr. Razavi again on 5/31/16, with some complaints of knee pain and swelling (PX 2, p. 50-52). On physical examination, Dr. Razavi found no drainage or erythema around the incision, active range of motion from 0-115 degrees, released Petitioner from his care and instructed Petitioner to return to work without restrictions (PX 2, p. 53). Petitioner has not returned to see Dr. Razavi since 5/31/16.

Petitioner returned to work in a full duty capacity as a Central Processing Technician after 5/31/16 but noticed it was difficult for her to stand on her right leg for hours and perform her duties with the trays and carts. Sometime in November of 2016, Petitioner discussed with her supervisor's manager, Becky Douglas, a change in position. At the time of this discussion, Petitioner earned the sum of $16.17 per hour as a Central Processing Technician. As a result of the discussion with Ms. Douglas, Petitioner accepted an alternative position as a Central Processing Aide at the rate of $14.00 per hour. The duties of a Central Processing Aide include making linen packs for sterilization, making basins and trays for labor and delivery and the ER that weigh 5 pounds at most.

Petitioner returned to her family physician, Dr. Lee, on 12/22/16 for right knee pain, and reported right anterior knee pain for one year, the pain was a constant dull pain, worse with standing and walking, and associated symptoms include stiffness, decreased range of motion, difficulty bearing weight, and difficulty ambulating (PX 3, p. 64-65). On physical examination, Dr. Lee found diffuse tenderness in the anterior knee, limited ROM in all planes, and painful in all planes, and prescribed Norco for Petitioner and instructed her to return in 3 months for pain management (PX 3, p. 65).

At the time of the accident, Petitioner was 60 years of age, and earned the sum of $15.70 per hour as a Central Processing Technician. Petitioner anticipates working until she is 66 years of age and notices her

right knee swells all the time and hurts under the kneecap down toward the shin. Petitioner has been using a cane suggested by her husband for approximately 5-6 months mainly when she is out walking as her knee buckles and Petitioner takes the cane to work. Petitioner confirmed no physician had prescribed the cane she uses. Petitioner also notices the right knee is swollen and frequently pops.

Petitioner identified several recreational activities she is limited in performing because of pain in her right knee and ankle, including hiking, walking on uneven ground, riding her bicycle, and playing with her dogs. Petitioner performs the exercises she learned in physical therapy all the time including walking one step at a time. Petitioner explained she was from Virginia and when she traveled, she would go sightseeing and hike around. Petitioner further explained she used to ride her bicycle every day after she got off work or in the mornings and especially on the weekends but acknowledged she did not do this to the same frequency given the weather in Illinois. Petitioner also explained she did not pedal any stationary bicycle in physical therapy because she was unable to put her foot on the pedal and bring the pedal back up but pushed pedals while sitting down.

Petitioner stated none of the photographs in PX5 showed the darkness in the area where Petitioner fell as it existed on 10/29/15. Petitioner also stated none of the photographs in RX 4, RX 5, and RX 6 showed the lighting conditions in the area where Petitioner fell on 10/29/15.

PX 6 contained medical bills incurred by Petitioner at Memorial Medical Center, Orthopedic Center of Illinois, Dispatch Medical Treatment, Clinical Radiologists, Midwest Emergency Physicians, Associated Anesthesiologists, Prairie Cardiovascular, Memorial Home Services, and Memorial Physician Services, as well as prescription medications. PX 6 showed payments by group health insurance totaled the sum of $9,652.32, payments by Petitioner totaled the sum of $267.70, and unpaid bills totaled the sum of $4,840.37.

Rachel Moore has been employed by Respondent since 2008, initially as an Employee Specialist, and then since March 2015 as the Worker's Compensation (WC) Coordinator. As an Employee Specialist, Ms. Moore's duties included recruiting employees, offering jobs, performing compliance and background checks, handling agency contracts, ensuring bonuses were received, performing audits, and providing instructions to new employees. As the WC Coordinator, Ms. Moore's duties included reviewing injuries that come in, following up with employees and their managers, seeing if a department was able to accommodate restrictions an employee may have, and paying benefits that may be due. Ms. Moore has a BS in Business Administration and Management and an MBA but does not have a law degree.

Ms. Moore explained employees of Respondent are not told where to park, and there was no requirement an employee park anywhere, but employees were told where they could park as shown on various campus maps and included any employee parking lot. Ms. Moore explained Respondent used to have red hanging tags for parking lots but moved to red parking stickers which allow an employee to park in any of the employee parking lots.

Ms. Moore reviewed the incident report for the accident Petitioner sustained which is utilized in the course of her duties as the WC Coordinator and noted that report stated "while walking out of work Petitioner tripped on the curb, falling on right knee". Ms. Moore assumed the incident report was completed by Brenda Sturdy because if an employee completed the incident report, the appropriate pronoun would have been used, and acknowledged the incident report does not document the person

Q-Dex On-Line
www.qdex.com

18IWCC0690

who completed it, as the incident report can be completed online with an employee ID number. The incident report noted the accident occurred at 7:11 a.m. but Ms. Moore did not know when Petitioner was seen in the ER as she did not have Petitioner's medical records and did not know when the incident report was completed. Ms. Moore never spoke directly with Petitioner but noted Petitioner spoke with the prior WC Coordinator, Christina Reed, as Ms. Moore was not the WC Coordinator on 10/29/15. While Ms. Moore had access to the notes of Ms. Reed, she did not bring those notes to the hearing.

Ms. Moore was aware of where the fall took place and is able to see the area where Petitioner fell from her office as the WC Coordinator in the Medical Arts building. Security services, Human Resources services, Patient Financial Services, some IS services, and the library are located in the Medical Arts building. The sidewalk Petitioner was walking on at the time she fell is open to the public, there is nothing that indicates it is not a public sidewalk, and the sidewalk is no different than any of the other sidewalks throughout the campus of Respondent. The sidewalk does not require anyone to have an employee badge to enter that area or be on the sidewalk and the sidewalk is not in a restricted area. While the public can go and walk on the sidewalks throughout the campus of Respondent, the sidewalks are not maintained by the City of Springfield but are maintained by employees of Respondent.

Ms. Moore noted the sidewalk on the east side of the Medical Arts building is also open to the public and leads to Dodge Street across the street from Parking Lot 3 and then to the hospital proper. Ms. Moore is able to see people traverse the east sidewalk as she has a window in her office and has seen members of the general public utilize the east sidewalk. Ms. Moore identified RX 5 as two photographs which showed the parking lot behind and next to the Medical Arts building as well as Security services. Ms. Moore is familiar with that area at approximately 7:00 a.m., and with the lighting in that area as she had been in that area at that time.

Ms. Moore looked at the two photographs in RX 6 and described the area as the back entrance to the Medical Arts building and noted there is a wheelchair ramp there and if a person continued on the sidewalk you get to the front of the Medical Arts building and then to Dodge Street and then to various parking lots. Ms. Moore noted the parking lot in the photographs of RX 5 is open to the public and these photographs showed the location of Petitioner's fall. Ms. Moore noted a person walking south on the sidewalk shown in these photographs can get to several areas of Respondent's facility.

Ms. Moore confirmed the sidewalk shown in RX 4 had a curb similar to the curb in the area where Petitioner fell, but explained the sidewalk shown in RX 4 is for people to pull up and park, whereas the sidewalk where Petitioner fell is an area where a person cannot drive through. Ms. Moore confirmed to the west of where Petitioner fell, there are parking spaces for security vehicles and attending physicians and where Petitioner fell, there are no parking spaces for members of the public and the curb in the area where Petitioner fell was not painted yellow as was the curb in front of the Medical Arts building.

Ms. Moore was present when the photographs in RX 4 were taken and the last photograph in that exhibit showed a foot off the curb in the blacktop area and there was about a 2 inch difference between the blacktop and curb at that point. Ms. Moore described the blacktop area as being angled from south to north and then east to west and the blacktop is level at one point with the sidewalk and then tapers down to the normal curb height. Ms. Moore did not know why the blacktop area was that way but it had been that way since she started working for Respondent and noted just beyond the blacktop area that tapers down there is an actual ramp.

Q-Dex On-Line
www.qdex.com

18IWCC0690

Ms. Moore confirmed the route Petitioner was on at the time she fell on 10/29/15, was an accepted route for Petitioner to take but not necessarily the quickest route as she thought the sidewalk on the east side of the Medical Arts building would be the quickest route. Ms. Moore noted she may not see a total of 10 people on the sidewalk Petitioner was on when she fell on a daily basis. Ms. Moore agreed the last photograph in RX 4 showed a foot touching the curb but not on the curb itself. Ms. Moore never asked anyone, including Brenda Sturdy or Chris Reed, what their understanding was of the involvement of the curb with reference to the accident Petitioner sustained. Ms. Moore understood the last photograph in RX 4 was in proximity to where Petitioner fell.

Therefore, the Arbitrator concludes as follows:

1. Petitioner sustained an accident arising out of and in the course of her employment on 10/29/15. The "in the course of" element refers to the time, place, and circumstances under which the accident occurred. Injuries that occur on an employer's premises within a reasonable time before and after work are generally compensable. In this case, Petitioner had clocked out from work, had exited through a properly designated door, and was walking to her car parked in one of the employee parking lots when she fell and injured herself while on an accepted route. Petitioner's injuries were incurred within a reasonable time after leaving work and were incurred on Respondent's premises. Thus, Petitioner's injuries were sustained in the course of her employment. Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275 (5th Dist. 1999).

   For an injury to "arise out of" the employment its origin must be in some risk connected with, or incidental to, the employment, so as to create a causal connection between the employment and the accidental injury. As has been done in numerous Illinois cases analyzing this issue, the Arbitrator first must characterize the type of risk to which the Petitioner was exposed. It is clear from the evidence that the uneven surface between the sidewalk and the asphalt parking lot where the Petitioner fell was a hazard or defect. This is especially true when you add in the fact that the asphalt lot was not flat and instead sloped away from where the Petitioner placed her left foot. The Appellate Court in the case of Litchfield Healthcare v. The Industrial Commission, 349 Ill. App. 3d 486 (2004) involved a very similar fact pattern. The petitioner tripped while walking across a sidewalk at work which had uneven slabs of concrete to the extent of 1 ¼ inches. The Court determined that the condition created a risk which was neutral, but one to which the petitioner was exposed to a greater degree because she encountered it frequently, as it was on her regular route to work.

   In the instant case, Ms. Vaughn tripped while walking on her normal, accepted route between the door she exited at work and her parking lot. Not only was the spot where she tripped on uneven ground, but it was also encountered in darkness when she left her work shift at 7:00 A.M. Those facts together exposed the Petitioner to a risk of tripping greater than that encountered by the general public.

   Respondent argues that the Petitioner's accident did not arise out of her employment because she route that she took to her parking lot was of her own choice. It argues that she could have gone around her building using a sidewalk on the other side and presumably avoided

Q-Dex On-Line
www.qdex.com

encountering any defects. The Arbitrator is not persuaded by this argument. Ms. Moore, the Respondent's Workers Compensation Coordinator, testified that the route the Petitioner took, while not the quickest route was an accepted route. At least one other employee, Tracy Gomez, apparently felt the same way. This was clearly not a situation where the Petitioner was unnecessarily exposing herself to danger in taking the route that she took to her car.

Based upon the above, the Arbitrator finds the Petitioner's accident arose out of her employment.

2. The medical services provided to Petitioner were reasonable and necessary. Medical bills incurred by Petitioner in treatment of her right leg condition of ill-being were submitted in PX 6 and Respondent had no objection to this exhibit, including liability or reasonableness and necessity of the services. In addition, the medical records support the reasonableness and necessity of the services Petitioner received to her right leg (PX 1-3).

3. Petitioner was temporarily totally disabled for the period of 10/30/15 through 1/4/16, or 9 4/7 weeks. Respondent disputed only its liability for TTD benefits, not the period claimed. The undisputed evidence showed Petitioner was off work following the accident on 10/29/15, until she returned to work in a restricted capacity by Dr. Razavi on 1/5/16.

4. Pursuant to Section 8.1b of the Act for accidental injuries that occur on or after 9/1/11, in determining the level of permanent partial disability, the Commission shall base its determination on several factors, including (i) the reported level of impairment pursuant to subsection (a), (ii) the occupation of the injured employee, (iii) the age of the employee at the time of injury, (iv) the employee's future earning capacity, and (v) the evidence of disability corroborated by the treating medical records, and further provides that no single enumerated factor shall be the sole determinant of disability.

With regard to Section 8.1(b)(i) of the Act, the parties stipulated this requirement was waived, so no weight is given to this factor. With regard to Section 8.1(b)(ii), Petitioner was a Central Processing Technician at the time of the accident, which is a job that required Petitioner to be on her feet all day and lift trays, laundry bags, and trash weighing 10-25 pounds, and push and pull carts weighing up to 300 pounds. She testified that she had symptoms with her knee after returning to her job such that she transferred to one les demanding. The Arbitrator finds this factor favors the Petitioner's claim. . With regard to Section 8.1(b)(iii), Petitioner was 60 years of age at the time of the accident, which means Petitioner does not have the work life expectancy of a younger worker. This factor weighs for the Respondent. With regard to Section 8.1(b)(iv), Petitioner's future earning capacity has not been impacted by the injury herein. While she did switch to a lower paying job, the switch was of her own volition. Her treating doctor released her without restrictions on May 31, 2016. (PX 2) With regard to Section 8.1(b)(v), Petitioner's condition of ill-being was diagnosed as a comminuted fracture along the inferior pole of the patella, the superior patellar pole was somewhat high-riding in the inferior portion which was inferiorly displaced, and there was a large adjacent soft tissue swelling. On 11/11/15, Petitioner underwent a repair of the infrapatellar tendon on the right side, but the fracture in the inferior pole of the patella was significantly comminuted which precluded stable fixation. Following surgery, Petitioner received extensive physical therapy to

Q-Dex On-Line
www.qdex.com

her right knee, and reported to the therapist complaints of stiffness, deep ache, tightness, soreness, tiredness, and a feeling the knee was going to give out. The undisputed evidence showed following Petitioner's return to work as a Central Processing Technician, she experienced difficulties performing her duties due to the injury she sustained and eventually began using a cane at the suggestion of her husband. When Petitioner was last seen by a medical provider for her right knee on 12/22/16, it was reported Petitioner had anterior knee pain, worse with standing and walking, and associated symptoms included stiffness, decreased range of motion, difficulty bearing weight, and difficulty ambulating. On physical examination of Petitioner's right knee, findings included tenderness in the anterior knee, limited range of motion in all planes along with pain, and Petitioner was prescribed Norco. (PX 3) Petitioner credibly testified to limitations she has in performing certain recreational as well as daily activities.

Based upon the above, the Arbitrator finds the Petitioner disabled to the extent of 25 % of the right leg.

Q-Dex On-Line
www.qdex.com

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Travis Ruffino,
Petitioner,

vs. NO. 17 WC 22376

19IWCC0051

State of Illinois,
Liquor Control Commission.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical treatment, 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 February 5, 2018, is hereby affirmed and adopted.

Q-Dex On-Line
www.qdex.com

19IWCC0051

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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case

DATED: JAN 25 2019

Joshua D. Luskin

Charles J. DeVriendt

o-11/28/18
jdl-wj
68

SPECIAL CONCURRING OPINION

I concur with the result reached by the majority. I write separately as I utilize a different legal analysis in arriving at my decision. The majority in adopting the decision of the arbitrator finds Petitioner's injury arose out of and in the course of his employment based upon a traveling employee theory of recovery specifically the street risk doctrine. As Petitioner was neither traveling nor on the street when his injury occurred, I find such analysis inapplicable.

"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. [citations omitted]. 'In the course of employment' refers to the time, place and circumstances surrounding the injury." *Sisbro Inc. v. Industrial Commission*, 207 Ill. 2d 193, 203, 797 N.E.2d 665 (2003). "Arising out of" speaks to risk- is the risk encountered by the employee a risk incidental to the employment as not all injures suffered while at work are compensable. See *e.g. Brady v. Louis Ruffolo & Sons Construction Company*, 143 Ill. 2d 542, 552, 578 N.E.2d 921 (1991) ("This court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the Act"). "To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro* at 203.

Q-Dex On-Line
www.qdex.com

19IWCC0051

Petitioner is employed by Respondent as a liquor control special agent. T. 11. His work duties require him to travel to different locations in order to conduct inspections for compliance with the Liquor Control Act. T. 12-13. As part of the inspection process, Petitioner is required to search the premises which includes attics, basements, or any area where an alleged violation might occur. T. 13. Further, Petitioner is required to climb stairs every day as part of his job duties. *Id.* While performing an inspection, Petitioner slipped on stairs injuring his shoulder. T.16.

"An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto. [Citation omitted]." *Scheffler Greenhouses, Inc. v. Industrial Commission*, 66 Ill. 2d 361, 367, 362 N.E.2d 325 (1977). Petitioner was in the course of his employment when his injury occurred as he was at a place he was expected to be and performing his duties.

"There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. [citations omitted]." *Adcock v. Illinois Workers' Compensation Commission*, 2015 IL App (2d) 130884WC, ¶ 31. Further, an injury which results from a neutral risk requires the employee to show he was exposed to the risk to a greater degree than the general public. *Springfield Urban League v. Illinois Workers' Compensation Commission*, 2013 IL App (4th) 120219WC, ¶ 27. Such showing of an increased risk may be proved by "either qualitative (i.e., when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than the members of the general public by virtue of his employment). [citation omitted]." *Adcock*, 2015 IL App (2d) 130884WC, ¶ 32.

"By itself, the act of walking up a staircase does not expose an employee to a risk greater than that faced by the general public. [Citations omitted]." *Baldwin v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151 (2011). Petitioner was exposed to a neutral risk when walking on the stairs, but he was exposed to such risk more frequently than the general public. Petitioner's job duties required him to enter unfamiliar buildings and perform inspections which required him to traverse stairs on a more frequent basis than the general public. As, such Petitioner's injury arose out of his employment.

For the reasons set for above, I concur with the decision reached by the majority.

Elizabeth Coppoletti

Q-Dex On-line
www.qdex.com

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

RUFFINO, TRAVIS
Employee/Petitioner

Case# 17WC022376

ST OF IL/LIQUOR CONTROL COMM
Employer/Respondent

19IWCC0051

On 2/5/2018, 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 1.62% 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 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
SHANNON D RIECKENBERG
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

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

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

FEB 5 - 2018

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

Q-Dex On-Line
www.qdex.com

19IWCC0051

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

- ☐ 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)

TRAVIS RUFFINO
Employee/Petitioner

v.

STATE OF ILLINOIS / LIQUOR CONTROL COMM.
Employer/Respondent

Case # 17 WC 22376

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **September 7, 2017**. 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 30, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$64,632.00**; the average weekly wage was **$1,242.92**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **2** dependent children.

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

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

Respondent is entitled to a credit for any awarded medical expenses paid by Respondent pursuant to Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$828.61 per week** for **9-6/7 weeks**, commencing **July 1, 2017 through September 7, 2017**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary causally related medical expenses contained in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.

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

The Arbitrator declines to award prospective medical treatment based on the fact that the Petitioner's medical records in evidence do not reflect any current specific treatment recommendations.

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 APPEAL: 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.

Ruffino v. SOI / Liquor Control Comm., 17 WC 22376

19IWCC0051

Signature of Arbitrator

January 31, 2018
Date

FEB 5 - 2018

STATEMENT OF FACTS

The Petitioner worked for Respondent as a Liquor Control Special Agent 1. On 6/30/17, he was performing a compliance field inspection at The Cellar, which involved searching for Liquor Control Act violations, such as bootlegging, gambling, unsanitary alcohol and beer taps, fabricated invoices, etc. This inspection can involve looking anywhere on the premises, attic to basement, and this includes climbing stairs on a daily basis.

The Petitioner had been escorted to an upper level by the CEO of the tasting room, Mr. Wells. On the way back down the stairs, Mr. Wells was behind him, and after a few stairs the Petitioner testified he turned around to answer a question from Mr. Wells and fell down the remaining 7 to 8 stairs. He testified that their discussion at that time involved where books and records needed to be kept.

Petitioner testified the stairway was dimly lit, the stairs were carpeted with no tread or track-type materials, and that he was carrying his ticket/citation book with him at the time. To his recall, there was no hand rail.

The accident report submitted into evidence by Respondent is detailed and consistent with Petitioner's testimony. (Rx1). A witness report of Mr. Wells states that the Petitioner was about 3 stairs ahead of him going down when Petitioner "took a misstep & fell, when he fell he landed on his right elbow first then slid on his back down the last 4 or 5 steps." (Rx3).

The Petitioner was taken by ambulance to Carbondale Memorial Hospital. The ambulance report indicates the Petitioner had fallen down approximately 7 stairs and landed on his right shoulder, with complaints of low back and head pain as well. There was deformity and swelling in the right shoulder. The Petitioner did not believe he lost consciousness. (Px3).

At the hospital, Petitioner reported right shoulder pain and pain to the middle lower back with numbness, as well as head and neck injuries. Petitioner reported a prior lumbar surgery. Right shoulder x-ray showed no acute fractures or dislocation. CT scans of the head and chest indicated no acute traumatic abnormalities. A lumbar CT scan noted post-operative disc replacements at L4/5 and L5/S1 and no acute fractures. Cervical CT showed no acute fracture or listhesis, but a prior cervical fusion was noted between C3 and C6 along with multi-level degeneration. There was no evidence of fusion hardware complication. The diagnoses made by the ER doctor were non-specific, and medication was prescribed. (Px4).

Petitioner next sought treatment with his family physician on 7/5/17, and saw Dr. Reyes' assistant, Angie Eubanks. He reported posterior right shoulder pain that started with the fall down the stairs, as well as low back pain that radiated to the right leg and foot. He was diagnosed with shoulder and low back pain. Noting the Petitioner wanted to see Dr. Gornet in lieu of Dr. Davis in Herrin, IL, that's where he was referred. (Px5).

Petitioner initially saw Petitioner Dr. Gornet's associate, Dr. Mall, on 7/10/17 for his right shoulder. The report states: "The owner of the facility began calling him to ask him a question, and he slipped and fell down about seven stairs", landing on his right arm and lower back. Dr. Mall noted he had previously operated on the Petitioner's left shoulder for a rotator cuff tear, and the Petitioner reported his right shoulder pain was similar to what he'd felt previously with the left shoulder. Physical examination of the lumbar spine was positive for pain to palpation, and Petitioner's right shoulder demonstrated significant weakness with rotator cuff strength testing. Petitioner also had pain to palpation over the AC joint and biceps tendon of his right shoulder, and pain with cross-body adduction and range of motion. Right shoulder x-rays showed no significant pathology. Dr. Mall diagnosed a possible right rotator cuff tear and/or SLAP tear, which he causally related to the 6/30/17 fall. He noted that Petitioner could not recall if he fell onto his shoulder or elbow first, and that: "Obviously, this would have some importance based on the pathology seen on the MRI. However, with his inability to accurately describe which of these two body parts landed first, it may be difficult to make this determination." He recommended an MRI arthrogram of the right shoulder along with restricted work duties, and referred Petitioner to Dr. Gornet for the low back. (Px6).

A "New Patient Questionnaire" Petitioner completed for Dr. Mall noted he was "walking down the stairs and slipped and fell on about the third stair, falling down about seven stairs. I landed on my right arm initially and tumbled down the remaining stairs." The Petitioner noted prior left shoulder, neck and back surgeries with Dr. Mall and Dr. Gornet. (Rx5; Px6).

Petitioner saw Dr. Gornet on 7/10/17 as well, reporting increasing neck, shoulder, and low back pain following the fall. Dr. Gornet noted that the imaging studies showed increasing structural changes at L2/3 and L3/4, above his previous disc replacements, and MRIs of the neck and low back were recommended. Dr. Gornet noted that there may be artifact issues with the films due to the prior neck and low back surgeries, but he wanted to do the least invasive test before attempting a possible CT myelogram. (Px7).

The 7/13/17 right shoulder MRI arthrogram reportedly showed: 1) focal high grade partial thickness bursal surface tear involving the anterior third of the distal supraspinatus tendon insertion in a back ground of tendinopathy; 2) a shallow partial thickness bursal surface tear in the posterior supraspinatus; 3) infraspinatus insertional tendinopathy without tendon tear; and, 4) no discrete labral tear. There was no contrast leakage that would indicate evidence of a full thickness rotator cuff tear. (Px8).

Lumbar MRI was also completed on 7/13/17, and the report indicated hardware artifact from the prior surgery, making evaluation of L4/5 and L5/S1 difficult. Above those levels, degenerative disc changes were noted from L1 to L4 with disc bulging and foraminal stenosis at each level, most prominent at L3/4. There was no evidence of central canal stenosis. (Px8).

Petitioner returned to both Dr. Mall and Dr. Gornet on 7/13/17. On exam, Dr. Mall noted continued significant weakness with rotator cuff testing and tenderness over the AC joint and biceps tendon within the bicipital groove. His review of the MRI showed no evidence of a full-thickness rotator cuff tear, or even a high-grade partial-thickness tear, but there was some intrasubstance degeneration of the rotator cuff tendon. He saw no SLAP tear. Dr. Mall recommended injections into the AC joint and subacromial space followed by physical therapy. While he felt the Petitioner would need time for pain to resolve before being released, the shoulder looked good structurally. Petitioner remained on work restrictions. (Px6).

With Dr. Gornet on 7/13/17, Petitioner reported increasing low back pain and bilateral symptoms into the buttocks and legs. The prior history of anterior decompression and disc replacements at L4/5 and L5/S1, and cervical disc

replacements at C3/4 and C6/7 was noted. In comparing the 7/13/17 lumbar MRI to a pre-accident, post-surgical lumbar MRI from July 2010, Dr. Gornet noted no change in the disc replacements at L4/5 or L5/S1, but opined that there was an increasing disc pathology at L2/3 in particular, including central herniations and subtle annular tears. In the cervical spine, however, he compared films from July 2010, 11/12/15 and 7/13/17 [Arbitrator's Note: the report from a 7/13/17 cervical MRI was not located in the medical evidence in the record], noting an "obvious impaction of the disc replacement up into C3 and this correlates with his increasing trapezial pain." Though there was no dislodgement of the C6/7 disc, there was an indication that he had subsided at that level compared to previous films. Dr. Gornet prescribed Meloxicam and Cyclobenzaprine, placed Petitioner off work through 9/14/17, and stated: "The disc replacement used at C3/4 is fairly robust and this may improve over time, but my general suspicion is the pain in his right trapezius is consistent with both a shoulder process as well as his subsidence." He recommended treated the low back conservatively, and opined that Petitioner's current symptom levels, need to be off work, medications and treatment are causally related to the recent work injury. (Px7).

Petitioner returned to Dr. Mall on 8/10/17 with no improvement in his right shoulder symptoms, noting therapy had not been approved by workers' compensation. Dr. Mall diagnosed a partial thickness rotator cuff tear, biceps tendonitis, and AC joint sprain, opining that proper treatment should include injection and therapy. Work restrictions were issued, and Petitioner planned to pursue treatment for the time being via his general health insurance. (Px6). On 8/17/17, Dr. Mall performed a right biceps tendon injection. (Px9). At the last visit with Dr. Mall prior to hearing on 8/30/17, the Petitioner reported significant anterior relief with the shoulder injection, but that this only lasted for two weeks, and that it provided no relief of his posterolateral shoulder complaints. Dr. Mall noted that Petitioner's physical examination continued to show rotator cuff weakness and pain to palpation over the biceps tendon. He recommended and administered a second injection into Petitioner's right shoulder subacromial space. (Px6). Petitioner testified that he and Dr. Mall discussed surgery if the second injection failed, though this is not indicated in Dr. Mall's report.

The Petitioner testified that he developed severe pain to the right shoulder, neck and low back areas due to the accident, but that the shoulder is his main problem. He agreed he has had prior workers' compensation claims, but none involved the right shoulder. He reviewed the accident report he completed for Respondent, agreeing it is accurate and that he tried to be truthful and honest. The Petitioner testified that he hasn't received any temporary total disability benefits to date.

On cross examination, the Petitioner reiterated that he was in a conversation with Mr. Wells, who was behind him, when he fell. He estimated that the stairs were two to two and a half feet wide, and that the carpet was "slick", though he did not notice any defects. He testified he had not used the stairs at The Cellar before 6/30/17. He went one time up the stairs that day, and he got hurt on the way back down. He was carrying a boxed clipboard that he regularly carried with him.

The Petitioner acknowledged that he previously worked for the Illinois Department of Corrections for a year or so between stints with the Respondent. He testified he has had prior workers' compensation claims, including for the neck and back treated by Dr. Gornet, but not for the right shoulder. He agreed he did not indicate neck pain in the intake form completed for Dr. Mall, and forgot to indicate he had prior right carpal tunnel surgery. He agreed that the form accurately states what he indicated, and testified that he informed Dr. Mall of exactly how he fell, including the turning around to talk, holding the clipboard, etc. He reiterated the reason he fell was because he was distracted answering Mr. Wells' question while on the stairs.

Mr. Wells testified that he met with the Petitioner on 6/30/17 at his establishment. After they did their business reviewing invoices in the upstairs office, the Petitioner walked ahead of him as they went back down the steps. He testified that

they were having casual conversation, but did not recall exactly what was being discussed. He testified that the stairs are "pretty standard", with carpet in the center and approximately 3" of wood on each side. He testified there is an overhead chandelier type light. He knew of no defects on the stairs such as tears or rips. He saw Petitioner fall, but testified that he didn't know the cause of the fall. He agreed that they only went up and down the stairs once that day. Mr. Wells agreed he completed a witness statement regarding the fall, and testified he had no reason to dispute what he wrote in his witness statement. On cross examination, Mr. Wells testified it was fair to say that the Petitioner turned around to speak to him. There is no tread trim on the stairs, just the carpet.

The Respondent submitted a prior decision of the Commission regarding a workers' compensation claim of the Petitioner while employed at the Pinckneyville Correctional Center on 4/19/10. (Rx6).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment on 6/30/17.

In the Arbitrator's view, it's clear that the Petitioner was a travelling employee at the time he fell down the stairs on 6/30/17. His job involves travelling to various venues that serve alcohol to ensure compliance with the Illinois Liquor Control Act. The test for determining whether an injury to a traveling employee arose out of and in the course of his employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer. *Cox v. Illinois Workers' Comp. Comm'n*, 406 Ill. App. 3d 541, 941 N.E.2d 961 (2010). Under such an analysis, a traveling employee may be compensated for an injury as long as the injury was sustained while he was engaged in an activity which was both reasonable and foreseeable.

Petitioner's history of the injury is credible, consistently documented throughout the record, and corroborated by the testimony of Mr. Wells. He was participating in an inspection in the course of his job when he slipped and fell down stairs. Petitioner testified that he regularly climbed stairs in the course of his inspections in order to properly search premises. Petitioner was clearly engaged in a reasonable and foreseeable activity at the time he slipped and fell on the steps. This supports the Arbitrator's finding that the Petitioner was in the course of his employment when he fell. The next question is whether the injury arose out of the employment.

In this case, the Petitioner testified that the lighting above the stairs was dim. He testified that he was holding his clipboard in his hands when he fell, and that there were no hand rails. He testified that he was looking back and talking to Mr. Wells in response to a question when he fell. While Mr. Wells testified that there was a chandelier-type lighting above the stairs, he did not testify as to the level of light it produced. He also did not testify as to whether or not there is a handrail available when using the stairs. While he testified that he did not recall what he and the Petitioner were talking about at the time, he acknowledged that they were talking while on the stairs. Taking all this evidence together, the Arbitrator finds that the greater weight of the evidence indicates the Petitioner was exposed to an increased risk of injury due to his employment when he fell down the stairs on 6/30/17.

In support of this Decision, the Arbitrator cites the following case law: *Potenzo v. Illinois Workers' Comp. Comm'n*, 378 Ill.App.3d 113, 317 Ill.Dec. 355, 881 N.E.2d 523 (2007); *Nee v. Illinois Workers' Comp. Comm'n*, 28 N.E.3d 961, 390 Ill.Dec.308 (2015).

Based upon the noted findings, the Arbitrator concludes that Petitioner, as a traveling employee, was engaged in a reasonable and foreseeable activity at the time of his injury, and was exposed to a greater risk of injury as a result of his employment and employment duties. He therefore has met his burden in establishing that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on 6/30/17.

The Arbitrator acknowledges that the Petitioner's credibility was called into question to some degree in his prior case, 10 WC 016511 (Rx6). The Respondent notes that the Petitioner's account of his fall differs in Respondent's Exhibits 1, 2, and 5, along with his own medical records and exhibits. The Arbitrator believes that the initial accident report (Rx1) and the intake form and initial report of Dr. Mall (Px6) provide contemporaneous support for the Petitioner's testimony regarding what occurred on 6/30/17 and how he fell.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Respondent indicated on the record that if the issue of accident were found in the Petitioner's favor, there was no dispute that the Petitioner's claimed injuries are causally related to that accident. As such, the Arbitrator finds that the Petitioner's condition of ill-being is causally related to the 6/30/17 accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The parties have stipulated that the Respondent is entitled to credit for any awarded medical expenses that were paid by Respondent prior to hearing, and that any outstanding awarded medical expenses may be paid by Respondent directly to the providers.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

While the Petitioner testified that Dr. Mall indicated a surgical recommendation, this is not indicated in the medical records that were submitted into evidence. As noted, the Arbitrator finds the Petitioner's condition to be causally related to the 6/30/17 accident. However, the last report of Dr. Mall in evidence notes that an injection was provided, and there was no other specific treatment recommendation indicated. Based on this, the Arbitrator cannot award any specific prospective medical treatment.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner claims entitlement to TTD from 7/1/17 through the 9/7/17 date of hearing. This is consistent with the Arbitrator's findings with regard to accident and causation, as well as the records of Dr. Mall and Dr. Gornet. The Arbitrator finds that the Petitioner was temporarily and totally disabled from 7/1/17 through 9/7/17.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stacy Kundinger,

Petitioner,

vs.

NO: 14 WC 39038

Village of Northbrook,

18IWCC0767

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Arbitrator's conclusions relating to the disputed issues of accident, causal connection, medical expenses, temporary total disability, and nature and extent. However, while the Arbitrator correctly concluded that Petitioner suffered an accident arising out of her employment, the Commission disagrees with the Arbitrator's legal analysis. After carefully reviewing the facts and relevant law, the Commission finds Petitioner was a traveling employee at the time of her work accident; thus, a general risk analysis is inappropriate.

Petitioner is a firefighter and paramedic. Her job duties include responding to emergency calls, transporting injured people to the hospital, running Advanced Life Support rigs, and responding to fires. On the date of accident, Petitioner's fire engine responded to a vehicle fire on an expressway. She injured her right foot as she stepped off the fire engine and onto uneven pavement on the expressway. Petitioner was rushing to respond to the fire and was carrying and wearing her required gear.

The Arbitrator analyzed the facts surrounding Petitioner's work accident using a neutral risk analysis. Although the Arbitrator arrived at the correct conclusion that Petitioner's injury is the result of an accident arising out of and in the course of her employment, the Commission notes that Petitioner is a traveling employee and a neutral risk analysis is inappropriate. A traveling employee is an employee whose duties require them to travel away from their employer's

18IWCC0767

premises. *Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728, ¶ 17. Illinois courts have found that injuries sustained by a traveling employee arising from the following three categories of acts are compensable: 1) acts the employer instructs the employee to perform; 2) acts which the employee has a common law or statutory duty to perform while performing duties for the employer; and 3) acts which the employee might be reasonably expected to perform incident to his assigned duties. *Id.* at ¶ 18. Generally, if the employee is engaged in conduct that is reasonable and foreseeable, any resulting injury arises out of and occurs in the course of employment.

Petitioner's position as a firefighter and EMT requires her to leave her assigned station and respond to emergencies. Petitioner injured her foot during one such call. The injury occurred while she was wearing her full firefighting uniform, carrying the necessary equipment including her helmet and air pack, stepping down from the higher than average rung on the engine ladder, and rushing to contain an active car fire. After analyzing the pertinent facts, it is unquestionable that Petitioner's injury occurred while she performed acts that she would reasonably be expected to perform as part of her job duties as a firefighter. Thus, Petitioner sustained a compensable injury to her right foot on the date of accident.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 25, 2016, is modified as stated herein.

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

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

DATED: DEC 13 2018

o: 10/23/18
TJT/jds
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KUNDINGER, STACY
Employee/Petitioner

Case# 14WC039038

VILLAGE OF NORTHBROOK
Employer/Respondent

18IWCC0767

On 4/25/2016, 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 0.35% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4788 HETHERINGTON KARPEL BOBBER
ALAN KARPEL
120 N LASALLE ST SUITE 2810
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
EDWARD JORDAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

18IWCC0767

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

STACY KUNDINGER
Employee/Petitioner

v.

VILLAGE OF NORTHBROOK
Employer/Respondent

Case # 14 WC 39038

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 **Maria Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **February 17, 2016**. 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 _____

18IWCC0767

FINDINGS

On 09/16/2014, 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 $92,401.40; the average weekly wage was $1,776.95.

On the date of accident, Petitioner was 42 years of age, *single* with 1 dependent child.

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

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

Respondent shall be given a credit 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 $18,669.26 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,184.63/week for 14-4/7th weeks, commencing 10/24/2014 through 10/29/2014 and 10/31/2014 through 02/03/2015, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $34,436.29, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $18,669.26 for medical benefits that have been paid by its group carrier and Respondent shall hold Petitioner harmless from any claims by its group carrier and by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall be given a credit of $1,019.43 for medical benefits that have been paid by its workers' compensation insurance carrier and Respondent shall hold Petitioner harmless from any claims by its group carrier and by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay Petitioner permanent partial disability benefits of $735.37/week for 50.1 weeks, because the injuries sustained caused the 30% loss of the right foot as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

4-21-2016
Date

APR 25 2016

FINDINGS OF FACT

Stacy Kundinger ("Petitioner") testified she is a 42-year-old firefighter and EMS technician and has been so employed in that capacity for the Village of Northbrook ("Respondent") since 2001.

On September 16, 2014 Petitioner worked for Respondent and was dispatched to a car fire on the expressway. She put on her "bunker" gear (fire pants and jacket) and rode the fire engine to the location of the car fire. The car was on the inside shoulder of the expressway. The fire engine was positioned at an angle between the shoulder of the expressway and the adjacent traffic lane to protect the firefighters from vehicular traffic. Petitioner grabbed her air pack and helmet and began to disembark from the fire engine. She testified that she was moving fast because she was responding to an emergency. She placed her left foot on a metal bar that was about 15 inches above the ground and grabbed a handrail for balance as she descended from the fire engine. When she planted her right foot on the ground, she heard "a pop or a crack" and experienced immediate pain on the top of her right foot. She believes the ground was uneven, explaining that her right foot was between the road pavement and the shoulder of the expressway and the pavement was about an inch or two higher than the shoulder. She said she felt a pop or crack.

Petitioner admitted to prior injuries and problems to the right foot. She first injured it on September 20, 2004 when she was descending from a fire engine with heavy equipment and her right foot gave out. She reported hearing it crack. She was diagnosed with a stress fracture and spent two months in a boot. She returned to normal work and recreational activities afterward, but noticed that she had a little bone or knot on the top of her foot. If she stepped wrong or "tweaked it" she would experience pain that could last a couple days. Petitioner completed an Incident Investigation Report for this. Rx9. A Supervisor's Report of Accident was also completed. Rx10. On cross, she said the crack she heard in 2004 was very different than the sound she heard when she injured her foot on September 16, 2014.

Respondent also admitted into evidence an Incident Report noting that on August 2, 2007, Petitioner twisted her right ankle while exercising. No injury to the foot is documented.

The next incident occurred on February 14, 2010. Petitioner slipped on an icy curb while responding to a fire alarm. She reported feeling a painful "snap" on the top of her right foot. She received a cortisone injection which resolved her symptoms. She did not lose time from work. She was able to resume her normal activities. Petitioner completed an Employee's Statement of Incident and an Illinois Form 45. Rx8, Rx11.

On September 6, 2012, Petitioner saw Dr. Webber of Aurora Health Care for the right foot. Px2:23. She reported pain over the area the prior stress fracture. On exam, she has tenderness over the TMT joint and pain with motion at the TMT joint. The area was injected with Depo- Medrol, Marcaine and Lidocaine. Petitioner was referred to foot and ankle specialist, Dr. Malicky. The doctor noted Petitioner's work and that she was on her feet most of the day. Exam showed mass at the dorsum of the right mid-foot at the base of the first and second metatarsal cuneiform joints. Radiographs showed ossicle at the dorsum of the mid-foot at the level of the first metatarsal medial cuneiform joint in the junction just between the first and second metatarsals. Dr. Malicky diagnosed an exostosis right dorsal mid-foot at the junction of the first and second metatarsal at the level of the first metatarsal medial cuneiform joint. He recommended right dorsal exostectomy. Px2:31. He advised her that the condition would be a long term problem unless she had the exostosis surgically removed. She declined because her symptoms had resolved with the cortisone injection.

Petitioner testified that she did not have a recurrence of symptoms until her accident on September 16, 2014. During this two year period she performed the strenuous duties required by her job as a firefighter/paramedic

including responding to emergencies, carrying heavy equipment, getting in and out of the fire engine, transporting patients, and fighting fires. She also maintained her physical conditioning program at work which involved running, biking and using the Stair Master as well as weight training. Outside of work she engaged in recreational activities including playing in a basketball league with ex-college players, playing in a flag football league, running and playing sports with her son. Shortly before her accident, Petitioner registered to run in a marathon in Los Angeles which was going to take place in the Spring of 2015.

Petitioner testified that she reported the September 16, 2014 accident by filling out a "Page One" after she returned to the fire house on the day of the accident. An employee statement of incident report was also completed for the date of injury. Rx5. It was noted that petitioner injured her right foot stepping on uneven pavement while responding to a car fire. She reported pain on the right foot on the top of the foot. When asked what she was doing at the time of the injury, the response written noted that she was grabbing gear and heading to the car fire, she stepped and planted foot, twisting wrong. Petitioner admitted to a prior injury to the same foot in the same location.

On September 16, 2014, Petitioner called Dr. Malicky's office noting that she felt she may have re-injured her foot. Px2:37. She explained she stepped wrong on a graveled area and requested and appointment. She was told that the earliest available appointment was not until October 16, 2014. She explained that she could not wait that long and would attempt to see a work doctor. On September 17, 2014, Petitioner again contacted Dr. Malicky's office stating that she was having trouble with her job because of her foot pain and that she felt she had re-aggravated her foot. She felt it was the same issue as when she last saw the doctor. She was interested in surgery. She was waitlisted.

On October 2, 2014, Petitioner saw Dr. Malicky. Px2:41. She said she injured her foot when she planted her foot on uneven ground. *Id.* The doctor noted that she had complaints of a "new onset of pain" in the foot related to a work injury. He wrote she was walking around on uneven ground while fighting a car fire when she "twisted her right foot and experienced exquisite pain and hypersensitivity to the dorsum of the right mid-foot." *Id.* at 43. Exam revealed a palpable exostosis of the dorsum of the right mid-foot reproducing chief complaint of pain along with positive Tinel's with percussion along the deep peroneal nerve in the right mid-foot. Petitioner also had pain with manipulation of the first and second metatarsal cuneiform joint of the right foot. Radiographs of the right foot showed osteophyte/exostosis dorsum of the right metatarsal joints at the junction of the first and second metatarsal, which the doctor felt correlated directly to the radiodense marker placed on the skin. Assessment was right dorsal mid-foot exostosis with impingement of the deep peroneal nerve contributing to the anterior tarsal tunnel syndrome and left ankle instability and peroneal tendon subluxation with dorsal talar neck exostosis. The plan was for excising of the right dorsal mid-foot exostosis with exploration of the deep peroneal nerve and anterior tarsal tunnel release. Regarding the left foot the plan was for open repair of the peroneal tendon subluxation, open at cystectomy to law and back and stress of the left ankle and suspected repair of the ankle ligaments.

Petitioner went to OMEGA on October 2, 2014. Px3. She described the accident and her persistent pain. The doctor at OMEGA noted that she was going to see her own physician. The mechanism noted was that Petitioner stepped out of the fire truck onto uneven pavement and that her right foot slightly everted. She developed pain in the anterior mid-foot which had persisted. Assessment was right foot strain versus stress fracture versus ligamentous injury.

Dr. Malicky performed surgery on Petitioner's right foot on November 4, 2014. Px2:8-10. Pre and post operative diagnosis was right anterior tarsal tunnel syndrome with dorsal mid foot exostosis. A right dorsal mid foot exostectomy and right anterior tarsal tunnel release was performed. Intraoperatively, he found an obvious

area of incarceration of the deep peroneal nerve along the anterior tarsal canal which correlated directly with Petitioner's pain. He surgically released the nerve at the area of impingement. A well circumscribed, firm, mobile, exostosis was found to be directly compressing along the deep peroneal nerve.

On November 25, 2014 Petitioner returned to see Dr. Malicky. She was having difficulty with weight bearing. The plan was for physical therapy, hydrotherapy, wean from crutches and off work. She was instructed to avoid lowering her foot for more than 20 to 30 minutes at a time.

On January 6, 2015, Dr. Malicky noted Petitioner was still experiencing pain, swelling and she felt unsteady with vigorous activity. Dr. Malicky recommended therapy and a transition to full duty work. Petitioner was excused from her marathon.

On January 21, 2015, petitioner was evaluated by Dr. Vora of Illinois Bone and Joint Institute. Rx3. The doctor summarized medical records from Dr. Malicky dating back to October 2014, Omega Health records, an operative report and follow-up care. He noted that Petitioner related that she was responding to a call and that her foot was planted on a crack, she rolled her right foot and felt a pop with pain and discomfort in the right foot. The doctor noted that in the initial radiographs there was evidence of an unchanged injury to the dorsum of the mid-foot from the x-ray report he had received from Aurora Medical Center. He did not review the actual images but stated that the report clearly stated that there was evidence of an old injury of the dorsum of the mid-foot. The doctor felt that although the surgical procedure was reasonable it would have no work-related basis. Explaining that the diagnosis of the right foot as it relates to September 16, 2014 injury was difficult to say since the claimant had already undergone surgery but it would be most likely a foot sprain. The doctor noted that in comparing radiographs from 2012 to 2014, there was no interval change and thus there was clearly a pre-existing condition with regard to the dorsal exostosis of the mid-foot. Regarding the diagnosis of anterior tarsal tunnel release, Dr. Vora felt that this was not an anatomic area of the tarsal tunnel. He noted that deep peroneal neuritis could occur along that region as it relates to the dorsal osteophyte and would have no relationship to a work-related condition. Dr. Vora opined that it would be considered pre-existing, related to the anatomic body deformity exostosis, which was present and pre-existing. The doctor felt that surgery was appropriate although he found no relationship between the surgery and the mechanism of injury. The doctor stated that there would be no restrictions as it related to light-duty or full duty related to work-related injury as there was no indication for surgery was work-related.

On February 26, 2015, Petitioner followed up with Dr. Malicky. Px2:3. She told him that her attorney was requesting an explanation of his opinion that her right foot condition was "directly related" to the accident. In his progress note he laid out the history leading up to the surgery and stated he felt the acute injury likely displaced or fractured the exostosis, which was pre-existing. He thought the acute event caused dislodging of the dorsal exostosis (from the twisting injury mis-stepping on the uneven ground) which also caused compression on the adjacent deep peroneal nerve (along the anterior tarsal canal).

On May 18, 2015, petitioner returned to Dr. Vora for an AMA impairment rating. Rx4. Petitioner reported that she was still having pain in her foot, worse when getting up from a seated position and worse with strenuous activity. She said she could not run normally. Regarding the AMA impairment rating, the doctor diagnosed a right foot contusion and said that it would have been anticipated to resolve without sequelae and that there would have been no radiographic abnormalities associated with this as directly related to the contusion. Thus, he concluded a likely 0% lower extremity impairment rating. He found her foot was normal, functional, without objective pathology and with subjective neuritis complaints. He noted she was able to run but with some symptoms afterwards. The doctor also used the diagnosis of superficial peroneal nerve as a potential applicable diagnostic criteria key factor. Using the net formula key adjustment factor, the doctor concluded it would result

in severity great of a resulting in a 1% lower extremity impairment rating. That translated to 1% whole body impairment rating.

Dr. Malicky testified on November 11, 2015 in an evidence deposition. He is a board certified orthopedic surgeon who limits his practice to treatment of the foot and ankle. Dr. Malicky acknowledged he diagnosed a right dorsal mid-foot exostosis. He offered surgical treatment but Petitioner declined because she had responded to a cortisone injection previously administered by Dr. Weber. He next saw Petitioner on October 2, 2014. She provided a history of the accident including her sensation of a "pop" followed by exquisite pain and hypersensitivity to the dorsum of her right foot. He examined her foot and noted differences from his exam in 2012. Unlike her exam in 2012, she now had exquisite pain and hypersensitivity and could not tolerate any pressure on the dorsum of her right foot. She also now had a positive Tinel's which suggested that her deep peroneal nerve was bothering her. In 2012 her Tinel's was negative. He diagnosed a right dorsal mid-foot exostosis with impingement of the deep peroneal nerve contributing to anterior tarsal tunnel syndrome. He recommended surgery to excise the exostosis and explore the deep peroneal nerve in the anterior tarsal tunnel. Dr. Malicky concluded that Petitioner's problem was directly related to her accident. He explained that Petitioner had not sought treatment for her right foot for two years before the accident. She felt a "pop" at the time of the accident which he opined represented a change in the bone on the top of her foot, whether the nerve was then compressed against the bone, or if the bone, through the twisting of her foot, moved into the nerve, but some change occurred at the top of her foot from the work injury. He opined that the accident was a competent cause of the change in the exostosis based on her walking on uneven ground and twisting her right foot. Dr. Malicky disagreed with Dr. Vora's statement that the deep peroneal nerve is not in the anterior tarsal tunnel. He thought that Dr. Vora was describing the posterior tarsal canal which is located on the inner aspect of the ankle. The anterior tarsal tunnel, according to Dr. Malicky, is located on the top of the foot where he had operated.

Dr. Vora's evidence deposition was taken on November 23, 2015. Rx2. Dr. Vora is also a board certified orthopedic surgeon who limits his practice to treatment of the foot and ankle. Dr. Vora testified that there is no work related injury but agreed the surgery performed by Dr. Malicky was reasonable. He testified consistent with his two reports on direct examination. Regarding his statement that the deep peroneal nerve is not in the anterior tarsal tunnel he responded that the tarsal tunnel is on the medial aspect of the ankle but also agreed that anterior tarsal tunnel syndrome most commonly presents in part with pain upon palpation of the deep peroneal nerve in the entrapped area and a vague burning sensation in the distribution of the deep peroneal nerve. Dr. Vora also agreed that trauma can aggravate or exacerbate an underlying condition. He also agreed that trauma can change the course of the condition, and necessitate treatment that was previously unnecessary.

Petitioner testified that she has a four inch long and half centimeter wide scar on the top of her right foot at the site of the surgical incision. It is bright pink and purple, raised and sensitive. She also still has a black stitch in the area of the incision. The scar and the surrounding area are numb. She experiences the numbness daily, particularly when she touches it. The top of her right foot is tender to touch. She has pain in the area where the exostosis was removed if she moves her foot in certain directions, such as when she plants her foot and pushes off. The pain is activity dependent, but she notices it on a daily basis. She gave examples such as when she carries something on a call or when she picks up her six year old son. She no longer plays basketball or football because it hurts when she plants her right foot, and she does not want to risk a re-injury. She cannot run like she did before the accident. Before the accident she had registered to run in a marathon. Now she can no longer train. Although she is working full duty for Respondent, she has to be "very careful and extra cautious" to avoid re-injury. She is conscious of her foot while working. She mentioned climbing the "tower ladder" as an example. She is careful of how she places her right foot on the ladder rungs. At trial, Petitioner submitted various bills she claimed were unpaid. Px5, Px6.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner was the only person to testify at the hearing. The Arbitrator finds her testimony to be candid, forthright and otherwise credible.

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

The Arbitrator incorporates the findings of fact as though fully set forth herein. The Arbitrator finds that Petitioner suffered an accidental injury arising out of and in the course of her employment with Respondent on September 16, 2014. Here, there is no doubt Petitioner's injuries were sustained in the course of her employment. The dispute between the parties is essentially over whether Petitioner's injuries arose out of her employment.

Arising out of the employment refers to the origin or cause of the claimant's injury. For an injury to "arise out of" the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he 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. 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. *Litchfield Healthcare Ctr. v. Indus. Comm'n*, 349 Ill. App. 3d 486, 812 N.E.2d 401 (5th Dist. 2004). There are three categories of risk to which an employee may be exposed; namely: (1) risks distinctly associated with her employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics.

In this case, Petitioner testified she was stepping down from the fire engine steps/stairs and did so onto uneven ground, causing her to twist her foot. This history is repeated in her medical records. The risk of such an event is not distinctly associated with her employment, nor is it personal to her. The risk of stepping on uneven ground is a neutral one. As such, the Arbitrator considers whether the risk of stepping down onto uneven ground is one to which Petitioner was exposed to a greater extent than that to which the general public was exposed.

Evidence established that Petitioner's duties included responding to emergency calls, riding in a firetruck, using various equipment and loading and unloading equipment while responding to emergencies. Petitioner described the fire truck ladder as higher off of the ground than a normal steps or stairs. She said the last step or stair is twice the height of a normal step or stair. Petitioner testified that when she stepped with the right foot she stepped onto uneven ground. She explained the level between the shoulder of the highway and the actual highway was not even. Petitioner's statement that the ground was uneven is reiterated in her medical record. She also testified that because of the uneven ground, she twisted her foot. This too is corroborated by her medical record. While the act of stepping onto the ground is an everyday activity to which it may be said the general public is exposed, the Arbitrator notes Petitioner described a higher than normal distance between the fire engine's last step and ground level, described an uneven surface between the curb and the highway, stated her job duties required her to respond to emergencies away from her normal fire station or location, to carry her bunker gear and to step off fire engines with that gear. She was engaged in these activities when she stepped off the fire engine stairs/steps and onto the uneven ground. The Arbitrator finds Petitioner's activity of stepping off the abnormal height of the stair and onto the uneven ground exposed her to a risk greater than that to which the

general public is exposed. *Blackburn v. Waste Mgmt. of Ill.*, 11 IWCC 1123 (claimant was exposed to the defective street and the risk of stepping thereon more frequently than the general public).

The evidence also supports a conclusion that Petitioner's act of stepping down a ladder and onto uneven ground were acts she might reasonably be expected to perform incident to her assigned duties as a firefighter responding to an emergency call. Here, the evidence showed that Petitioner would have been reasonably be expected to disembark the fire engine down the stairs and onto the uneven pavement in order to carry out her duties of attending to the emergency described. Such actions would thus be incidental to those duties. *Kram v. SOI/Vienna Correctional Ctr.*, 15 IWCC 0286 (Apr. 23, 2015) (stepping down to take corrective action was incidental); *Young v. IWCC*, 2014 IL App (4th) 130392WC (act of reaching was distinctly associated with his employment duties). Based on the foregoing, the Arbitrator concludes Petitioner's accident arose out of and in the course of her employment with Respondent.

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

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein.

At trial, Respondent disputed that Petitioner's right foot condition was causally related to her work injury. Ax1. In support thereof, evidence was introduced showing that Petitioner had injured her right ankle on prior occasions and was previously diagnosed with exostosis for which a prior surgical recommendation was made. Therefore, Respondent argues, the condition is not causally related. Respondent's doctor, Dr. Vora opined both in his medical opinion report at during his deposition that the exostosis was pre-existing and bore no relationship to the work accident. He compared x-ray reports and felt they demonstrated no interval change. The doctor also believed that the anterior tarsal tunnel, for which Dr. Malicky performed a nerve decompression, was not an anatomical location but that deep peroneal neuritis could develop along that area.

Petitioner, on the other hand, acknowledges that the exostosis was preexisting but contends that the accident aggravated the condition and accelerated the need for treatment. In support thereof, Petitioner testified that although her doctor had recommended surgical removal of the exostosis approximately two years prior to the work accident, she testified she felt relief with a pre-accident cortisone injection and was able to function for two years before the accident. Petitioner relies on the opinions of Dr. Malicky in support of her position. Dr. Malicky opined that Petitioner's accident which resulted in a pop, aggravated her condition but also caused the anterior tarsal tunnel syndrome, which was not present before the work accident.

The Arbitrator finds the medical opinions of Dr. Malicky more persuasive and credible than those of Dr. Vora. Regarding the exostosis, Dr. Malicky explained that Petitioner was able to function for nearly two years before the accident without the need for treatment or surgical intervention. Dr. Malicky noted that following the work accident, Petitioner developed a popping sensation in the foot which to him indicated that the exostosis had become aggravated, possibly loosened, resulting in increased pain. He also felt the aggravation of the exostosis contributed to the acute tarsal tunnel syndrome. The doctor's diagnosis was confirmed intraoperatively when he noted the exostosis was mobile and compressing on the peroneal nerve. Dr. Vora, on the other hand, did not actually review any radiographs and instead only looked at reports in concluding that he appreciated no interval change. He also did not consider the operative report for interval change. If he had, he would have noticed the exostosis compressing the peroneal nerve. Finally, he also dismissed Petitioner's lack of treatment for two years before the accident and onset of symptoms following the work accident. He nonetheless concluded the surgery was reasonable and necessary.

Regarding the anterior tarsal tunnel syndrome, Dr. Malicky's records show an absence of the syndrome before the work accident and an onset of symptoms consistent with anterior tarsal tunnel syndrome. For example, Dr. Malicky documented positive Tinel's sign and found the impingement of the nerve to be contributing to the syndrome. His clinical findings were ultimately correlated intra-operatively. Dr. Malicky noted that the syndrome was absent before the accident and he felt the popping sensation felt by Petitioner at the time of the accident were indications to him that Petitioner's exostosis was aggravated and that the syndrome was caused by the accident. Dr. Vora, on the other hand, stated that the anterior tarsal tunnel syndrome was not an anatomical location. In this regard, Dr. Vora does not offer any persuasive explanation for the tarsal tunnel release. Further, Dr. Vora's opinion is lacking in that he did saw Petitioner one time and did not actively manage or treat Petitioner's right foot. Based on the foregoing the Arbitrator finds that Petitioner's traumatic tarsal tunnel syndrome is causally related to her work accident and that the work accident further aggravated Petitioner's pre-existing exostosis.

ISSUE (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes Petitioner's treatment was reasonable and necessary. The Arbitrator relies on the opinions of Drs. Malicky who stated Petitioner's right foot treatment was necessary to treat her. The Arbitrator notes Dr. Vora took no real dispute with the reasonableness of Petitioner's treatment or her surgery.

At trial petitioner submitted the following unpaid medical bills: Aurora Medical Group $1,088.00 (Px6) and Aurora (Advanced) Healthcare in the amount of $33,348.29, which included various accounts and dates of service (Px5). Respondent shall pay reasonable and necessary medical services of **$34,436.29**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of **$18,669.26** for medical benefits that have been paid by its group carrier, Blue Cross Blue Shield, and Respondent shall hold Petitioner harmless from any claims by its group carrier and by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Ax1, Rx12. Respondent shall be given a credit of **$1,019.43** for medical benefits that have been paid by its workers' compensation insurance carrier and Respondent shall hold Petitioner harmless from any claims by its group carrier and by any providers of the services for which Respondent is receiving this credit. Rx11.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the foregoing issues, the Arbitrator concludes Petitioner is entitled to temporary total disability benefits. Evidence shows and Petitioner alleged she was temporarily totally disabled from October 24, 2014 through October 29, 2014 and from October 31, 2014 through February 3, 2015, a period of 14-4/7th weeks. Ax1. Respondent denied liability. Having found in favor of Petitioner, Respondent shall pay Petitioner temporary total disability benefits of **$1,184.63**/week for 14-4/7th weeks, commencing **10/24/2014** through **10/29/2014** and **10/31/2014** through **02/03/2015**, as provided in Section 8(b) of the Act.

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

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein. Petitioner last treated for her right foot on February 26, 2015. She said she has not returned since then for treatment. Therefore, Petitioner's claim for disability, if any, is ripe for adjudication.

In determining permanent partial disability, Section 8.1(b) provides that permanent partial disability shall be established using the following criteria: (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.

Regarding (i) or the reported level of impairment, Respondent introduced Dr. Vora's impairment rating for the right foot. He found a 0% impairment rating for the lower extremity based on a diagnosis of right foot contusion. The doctor reasoned that it would have been anticipated to resolve without sequelae and that there would have been no radiographic abnormalities associated with this as directly related to the contusion. The Guides provide that in performing an AMA rating, the first step is defining a reliable diagnosis. Here, Dr. Vora failed to explain how obtained a diagnosis of foot contusion, having previously acknowledged in his Section 12 report that he found it difficult to determine diagnosis since Petitioner had already had surgery. The Arbitrator does not find Dr. Vora's diagnosis reliable in the context of the impairment rating. Dr. Vora arrived at a 0% rating based on his anticipation that such a condition would resolve without sequelae and that there would be no radiographic abnormalities. The doctor found Petitioner's foot was normal, functional and without objective pathology. She had subjective neuritis along the surgery site. The doctor also used a diagnosis of metatarsal fracture dislocation but again failed to explain how he arrived at this diagnosis instead of or along with foot contusion. The doctor also used a diagnosis of peripheral nerve impairment but acknowledged the diagnosis as a possibility only. Based on the foregoing, the Arbitrator assigns little weight to the AMA rating.

Regarding (ii), Petitioner's occupation was and continues to be a firefighter/paramedic. She is working full duty, without restriction and at the same rate of pay or more. She testified this job requires her to go up and down ladders, respond to emergencies, carry gear and lift patients. Petitioner said she is more cautious with her foot. On cross, she said she passed her fitness for duty after her treatment and was cleared to return to work. The Arbitrator finds these facts capable of increasing the level of permanent partial disability and therefore assigns more weight to this factor.

Regarding (iii), Petitioner's age at the time of the injury was 42 years. The Arbitrator finds that this factor may increase Petitioner's level of permanent partial disability because she may live with the effects of her right foot injury longer due to a longer work life expectancy. The Arbitrator assigns more weight to this factor.

Regarding (iv) or future earning capacity, the evidence shows Petitioner works full-time, without restriction in her same position at or more than the same rate of pay prior to her work accident. There is no evidence her future earning capacity has been or will be impaired. The Arbitrator assigns no weight to this factor.

Regarding (v) or evidence of disability corroborated by the treating medical records, the Arbitrator weighs this factor in favor of Petitioner. Petitioner's uncontroverted testimony was detailed and credible regarding her disability relative to her right foot. Records confirm she underwent removal of the pre-existing exostosis, which

was aggravated as a result of her accident and underwent tarsal tunnel decompression. She explained tolerance but difficulty in work. She explained difficulty weight bearing and cautious use of her foot. She detailed lifestyle changes in playing football, playing basketball and running. The Arbitrator also notes that some of these complaints were present before the injury, although perhaps to a lesser degree. Petitioner says she experiences pain and numbness daily and takes over the counter medicine. The Arbitrator finds these complaints consistent with her treatment records.

Considering all of the factors pursuant to Section 8.1(b) in conjunction with Section 8(e), the Arbitrator concludes that the work accident caused injury to Petitioner's right foot resulting in permanent partial disability of **30%** loss of use of the right foot. Respondent shall pay Petitioner permanent partial disability benefits of **$735.37/week** for **50.1 weeks**, because the injuries sustained caused the **30%** loss of the right foot as provided in Section 8(e) of the Act.

Signature of Arbitrator Maria Bocanegra

4-21-2016
Date

Q-Dex On-Line
www.qdex.com

STATE OF ILLINOIS)
) SS.
COUNTY OF LA SALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Enedina Islas,

Petitioner,

vs. NO: 12 WC 20669

Mid-American Growers,

Respondent.

18IWCC0752

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was employed by Respondent, an agricultural company.

Q-Dex On-Line
www.qdex.com

2. On September 23, 2011 she was bending over to put plant rings on flowers. While bending over she experienced low back pain. She eventually sought medical treatment and was prescribed therapy, medication and injections.

3. After an initial §19(b) hearing on November 24, 2014 the Arbitrator found accident and causal connection and awarded temporary total disability (TTD) benefits through November 24, 2014, as well as medical expenses and prospective medical care (facet joint block injections at L3-4, L4-5 and L5-S1 to see if the pain generator is the joints) prescribed by Dr. Orteza, including all medical charges and TTD related to said prospective care. The Commission affirmed this ruling.

4. Respondent filed a §19(b) Petition, which was heard on February 23, 2018, alleging that Petitioner's condition should now be deemed to have reached maximum medical improvement (MMI) on July 9, 2015. The Arbitrator denied Respondent's Petition and upheld the award from the initial §19(b) hearing.

5. Respondent then filed this Review on April 9, 2018.

6. Petitioner noticed leg pain a few months after the accident date. She worked for a while after the accident but has not worked since November 2011. Her treatment since that time has consisted of therapy, injections and medications. She underwent 3 injections prior to the initial Arbitration hearing, which did not help.

7. Petitioner's first visit with Dr. Orteza after the initial Arbitration was April 7, 2015. Her pain was a 10/10 at the time. She stated that physical therapy did not help, but aquatic therapy did.

8. Petitioner underwent a facet joint block on July 9, 2015. She stated that it decreased her pain 80 percent, but only for about thirty minutes. On August 11, 2015 Dr. Orteza wrote a note opining that Petitioner would be able to return to work in November of 2015, however Petitioner had no discussions with him around that time about being able to return to work.

9. On September 1, 2015 Petitioner underwent a second facet joint block, which also provided relief for only thirty minutes.

10. Petitioner stated that now, her pain is 8/10 on a daily basis with no movement, and 11/10 with movement. She cannot perform activities of daily living, can only walk one minute before having to sit, can only sit for thirty minutes before needing to stand, cannot sit up straight, walks with a cane, cannot drive, can only grocery shop with an electrical cart, but cannot carry grocery bags. She attempts to cook on occasion, but mostly just rests in her bed or on the couch.

Q-Dex On-Line
www.qdex.com

18IWCC0752

11. Dr. Orteza testified that Petitioner was in need of a denervation procedure. He testified that since the initial facet block did not give ideal results, the amount of relief from a second injection was important to determine the need for a denervation or not. He stated that if there is no relief at all from an initial injection, there would be no need for a second one. If there is any relief, he would use the results to determine if a second injection is necessary.

12. Dr. Orteza acknowledged that he only observed Petitioner for 10 minutes after the second injection before discharging her. He also stated that, absent a denervation procedure, Petitioner has reached MMI, and that she might be able to return to sedentary or light duty work if she were to undergo the procedure.

13. Dr. Lewis is a board certified orthopedic surgeon and served as Respondent's Independent Medical Exam (IME) physician. He testified that Petitioner's condition was not causally related to her work activities. He noted that, in June of 2012, Petitioner's immediate complaint was low back pain with radicular leg pain beginning 1-2 months after the accident. He believed this sequence to be atypical. His exam revealed inconsistent signs of pain, and he found no definite orthopedic or acute pathology. In his opinion, Petitioner's complaints of pain should have rendered her bed-ridden.

14. Dr. Lewis testified that lumbar MRI's from November 8, 2011 and April 5, 2012 revealed a slight disc bulge at L4-5 with an associated annular tear. He stated that a slight disc bulge is normal and not indicative of an acute injury.

15. Dr. Lewis also disagrees with the previous 19(b) Arbitration Decision and opined that an annular tear is not indicative of an acute injury.

The Commission affirms in part and modifies in part the Arbitrator's rulings on all issues.

Although the Commission affirms the finding of causal connection, it also views the evidence slightly different than the Arbitrator and terminates causal connection on September 18, 2015. The Commission finds that there was no evidence submitted alleging any new injury to the lumbar spine which would sever the causal connection chain. Additionally, the opinion of Dr. Lewis that annular tears are not caused traumatically is not persuasive. Nevertheless, the Commission holds that the testimony of Petitioner's own treating physician, Dr. Orteza, can be relied upon to deny further treatment for Petitioner and terminate causal connection on September 18, 2015. Dr. Orteza testified that if two facet joint blocks only provided 30 minutes of relief each, he would not recommend a denervation procedure. Combine this with Petitioner's own trial testimony that she only received 30 minutes of relief after each injection, and it is difficult to find adequate medical reasoning to award the denervation procedure. Dr. Orteza also testified that, absent a denervation procedure, Petitioner has reached MMI.

Q-Dex On-Line
www.qdex.com

18IWCC0752

A review of the facts indicates that the *Law of the Case* doctrine does not apply in this case, as the ruling in the initial 19(b) hearing has been satisfied. Petitioner was able to undergo both facet joint blocks, but neither provided the necessary results with which to continue treatment.

Based on the testimony of her own treating physician, Petitioner is not entitled to undergo the denervation procedure, and has reached MMI as of September 18, 2015, which is the date she followed up with Dr. Orteza and discussed her amount of relief. Although the longevity of the relief is not noted in that day's medical record, it can be presumed that Dr. Orteza was made aware, or *should have* been aware, of the 30-minute time frame of relief. At that time Dr. Orteza would have known that the denervation procedure was not necessary. Accordingly, the Commission finds that causal connection should be terminated as of September 18, 2015.

The Commission affirms in part and modifies the medical expenses award. The Commission affirms the exclusion of bills for treatment that was not certified by the Utilization Review, as well as the exclusion of bills from 2012 that were not awarded at the time of the first arbitration hearing. However, the Commission modifies the award based on Dr. Orteza's testimony. The Commission finds that the results of the first facet block injection were encouraging enough to warrant a second injection, which was performed September 1, 2015. As stated above, it is reasonable to believe that Dr. Orteza was fully aware of the second block results by September 18, 2015. At that time the need for further medical care should terminate. Accordingly, the Commission modifies the medical expenses award, terminating benefits as of September 18, 2015.

In keeping with the causal connection ruling, the Commission modifies the TTD award and terminates benefits as of the MMI date of September 18, 2015. Moreover, although TTD is terminated on September 18, 2015, and Petitioner was still off work at the time, she is still not entitled to Maintenance benefits subsequent to the MMI date. Petitioner did not return to work, but also did not engage in a vocational rehabilitation program, nor did she perform a job search. Thus, there is no basis to award Maintenance.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner suffered back injury that was causally connected to her work duties, but that said causal connection terminated on September 18, 2015.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $286.00 per week for a period of 42-4/7 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.

Q-Dex On-Line
www.qdex.com

18IWCC0752

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable to pay Petitioner all unpaid reasonable and necessary medical expenses under §8(a) of the Act through September 18, 2015, excluding bills for treatment not certified by the Utilization Review, and also excluding bills from 2012 that were not awarded at the initial arbitration hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is not entitled to Maintenance benefits.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DEC 10 2018

DATED:
O: 10/10/18
DLG/wde
45

David L. Gore

Stephen Mathis

Deborah L. Simpson

Q-Dex On-Line
www.qdex.com

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

ISLAS, ENEDINA
Employee/Petitioner

Case# **12WC020669**

MID-AMERICAN GROWERS
Employer/Respondent

18IWCC0752

On 3/16/2018, 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 1.85% 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:

0400 LOUIS E OLIVERO & ASSOCIATES
DAVID W OLIVERO
1615 FOURTH ST
PERU, IL 61354

5265 WOLF LAW LTD
LEE A LAUDICINA
25 E WASHINGTON ST SUITE 801
CHICAGO, IL 60602

Q-Dex On-Line
www.qdex.com

MID-AMERICAN GROWERS)
)SS.
COUNTY OF LaSALLE)

☐ 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)

Enedina Islas
Employee/Petitioner

v.

Mid-American Growers
Employer/Respondent

Case # 12 WC 20669

Consolidated cases: N/A

18IWCC0752

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 **Ottawa** on **February 23, 2018**. 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

Q-Dex On-Line
www.qdex.com

FINDINGS

On the date of accident, September 23, 2011, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $13,510.606; the average weekly wage was $337.77.

On the date of accident, Petitioner was 36 years of age, *married* with 1 dependent child.

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

Respondent shall be given a credit[1] of $26,884.00 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $26,884.00.

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

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a continued causal connection between her condition of ill-being in the lumbar spine and her accident at work.

Temporary Total Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $286.00/week for 169 & 4/7th weeks, commencing November 25, 2014 through February 23, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 25, 2014 through February 23, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit[2] of $26,884.00 for TTD benefits that have been paid.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits that remain unpaid for medical treatment pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Petitioner's claim for payment of medical bills for treatment not certified by utilization review or for treatment in 2012 that was not awarded at the time of the first arbitration hearing is denied.

---

[1] The temporary total disability credit is not intended to be duplicative of amounts previously pain. As indicated by the parties, the $26,884.00 amount is inclusive of temporary total disability benefits paid as ordered in the prior 19(b)/8(a) decision as well as additional temporary total disability paid thereafter, for which Respondent disputes liability at this hearing. *See* February 23, 2018 Arbitration Hearing Transcript.

[2] *See* FN1.

Q-Dex On-Line
www.qdex.com

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator finds that the recommended prospective medical treatment is necessary and reasonable to alleviate Petitioner of the effects of her injury at work. Thus, the Arbitrator awards the prospective medical care in the form of a denervation as prescribed by Dr. Orteza pursuant to Section 8(a) of the Act.

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

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

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

Signature of Arbitrator

March 13, 2018
Date

MAR 16 2018

Q-Dex On-Line
www.qdex.com

18IWCC0752

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Case # 12 WC 20669

Consolidated cases: N/A

Enedina Islas
Employee/Petitioner

v.

Mid-American Growers
Employer/Respondent

FINDINGS OF FACT

Procedural History

On November 24, 2014, an arbitration hearing was held pursuant to Petitioner's Sections 19(b) and 8(a) petition. Petitioner's Exhibit[3] ("PX") 6. On January 5, 2015, the arbitration decision was issued. PX6. Findings included that the Petitioner's lumbar spine condition was causally related to the accident at work occurring on February 23, 2011. *Id.* Petitioner was awarded prospective medical treatment in the form of continued medications and injections. *Id.* The decision became final and Petitioner's case was eventually remanded to arbitration.

"The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606 (2nd Dist. 2003) (*citing McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill. App. 3d 1083, 1086-87 (1st Dist. 1984) (quotations omitted)). The law of the case doctrine is applicable to issues litigated before the Illinois Workers' Compensation Commission. *Ming AutoBody/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 252, 899 N.E.2d 365, 326 Ill. Dec. 148 (2008)). Thus, the findings of fact and conclusions of law from the first arbitration hearing in this case are binding, and herein adopted and incorporated by reference.

Issues in Dispute

The issues in dispute at this hearing include continued causal connection, Respondent's liability for certain unpaid medical bills, Petitioner entitlement to temporary total disability benefits commencing on November 25, 2014 through February 23, 2018, and Petitioner's entitlement to prospective medical care in the form of a denervation as prescribed by Dr. Orteza. Arbitrator's Exhibit[4] ("AX") 1. The parties have stipulated to all other issues. *Id.*

[3] The Arbitrator similarly references the parties' and Arbitrator's exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.
[4] 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.

Medical Treatment

Enedina Islas (Petitioner) testified through an interpreter at the hearing on February 23, 2018. Tr. at 11. She testified that at the time of the first arbitration hearing, she was under Dr. Orteza's care for her low back. *Id.* She continues under his care for her low back. *Id.*, at 11-12.

Petitioner testified that she was bending over when she originally injured her back on September 23, 2011. Tr. at 13. A couple of months later she started getting pain in your leg as well. *Id.* Petitioner continued to work for a little while after the day of the accident, but has not worked since November of 2011. *Id.* Petitioner acknowledged that her treatment since that time has included therapy, injections and some medications but no surgery. *Id.* Petitioner acknowledged that she underwent three injections before the first hearing, but they did not help. Tr. at 14.

The medical records reflect that Petitioner saw Deofil Orteza, M.D. (Dr. Orteza) on May 4, 2015. PX1. He noted the following in pertinent part:

> [Petitioner] is here today for a follow-up after having been seen almost 1 year ago for her intractable low back pain with radiation to both anterior thighs and legs. The patient indicates that most of her pain at this time is in the low back area. Activities that require walking, standing, bending, and right and left lateral rotational movements will significantly elicit the pain with a VAPS of 10/10. The patient was started on Gabap[e]ntin, Cymbalta, and Flexeril 1 year ago and they have only helped to a limited degree and she continued to have intractable low back pain. As a result, she is unable to do activities of daily living or physical therapy because of the pain. The patient's symptoms seem to be related to facet joint generated pain. Therefore, I recommend that a bilateral diagnostic lumbar facet joint block be done at the L3/4, L4/5, and L5/s1 facet joint levels to see if the pain generator is in the facet joints. If the initial injections indicates highly that her pain generator is in the facet joints, a second confirmatory injection will be done. If the second block also indicates that the pain generator is in the facet joints, this patient would then be a good candidate for a denervation procedure.

Id. Dr. Orteza diagnosed Petitioner with severe low back pain secondary to lumbar spondylosis and ordered the injections. *Id.* Petitioner followed up with Dr. Orteza on June 2, 2015 and August 7, 2015, making the same treatment recommendations. *Id.*

Petitioner testified that she reported very severe pain at a level of 10 out of 10 on April 7, 2015. Tr. at 14. She was taking pain medications and had therapy, but those modalities did not help her pain. *Id.* Petitioner testified that the aquatic therapy did help her pain. *Id.*, at 15. She explained that she asked for more aquatic therapy, but she did not recall if he recommended it. *Id.* Petitioner testified that she finally underwent wo facet joint blocks in 2015 performed by Dr. Orteza. Tr. at 16, 18. She explained that the treatment relieved about 80% of her pain for approximately half an hour. *Id.*

Dr. Orteza authored a note faxed on August 11, 2015, which indicates that Petitioner was unable to return to work for the next three months, and that Petitioner would then be reevaluated to see if her pain had resolved. PX1. Dr. Orteza also noted that Petitioner would be undergoing additional injections possibly followed by a denervation procedure. *Id.* He noted that Petitioner would then, tentatively, be able to return to work on November 16, 2015. *Id.* Petitioner testified that she was not aware that Dr. Orteza wrote a note in which he said he thought she would be able to return to work in November of 2015. Tr. at 17. She testified that she did not talk to Dr. Orteza about whether she could return to work and she never asked him if he would let her return to work or do work conditioning-type therapy to get her back to work. Tr. at 17-18.

On September 7, 2015, Petitioner returned to Dr. Orteza. PX1. He diagnosed her with severe low back pain secondary to lumbar spondylosis most notably at L2-3, L3-4, L4-5 and L5-S1. *Id.* Dr. Orteza ordered the previously noted two-session denervation procedure. *Id.* On December 21, 2015, Dr. Orteza reiterated his care plan for the denervation procedure. *Id.* Petitioner returned on April 11, 2016, at which time Dr. Orteza advised that he was still waiting on workers' compensation insurance approval for the denervation procedure. *Id.* He also adjusted Petitioner's medications. *Id.*

On May 24, 2016, Petitioner returned to Dr. Orteza reporting continued severe low back pain and symptomatology. PX1. Dr. Orteza also noted that the recommended denervation procedure had been denied by the insurance carrier. *Id.*

On October 10, 2016, February 14, 2017, and June 13, 2017, Dr. Orteza renewed or adjusted Petitioner's prescriptions given her severe low back pain noting that the recommended denervation procedure had been denied by the insurance carrier. PX1.

Petitioner testified that she last saw Dr. Orteza on June 13, 2017, almost a year ago. Tr. at 18. She testified that she was not aware that, at that time, Dr. Orteza told her to return in three months. *Id.*, at 19.

Section 12 Examination & AMA Guides Impairment Rating – Dr. Lewis

On June 22, 2016, Petitioner saw Michael Lewis, M.D. (Dr. Lewis) for the third time at Respondent's request. RX2. Dr. Lewis's report reflects that he took a history from Petitioner, examined her, reviewed various treating medical records, and rendered opinions regarding her lumbar condition and its relatedness, if any, to her injury at work. *Id.* Dr. Lewis noted that Petitioner had "multiple causative non-behavioral findings, which complicates making an appropriate diagnosis." *Id.* He found no objective evidence of orthopedic pathology and stated that he was "still of the opinion that activities at work on or about September 23, 2011, did not cause or aggravate her current conditions for reasons discussed above and for reasons discussed in [his] previous independent medical evaluation dated June 15, 2012, in [his] independent medical evaluation on September 8, 2014." *Id.* Dr. Lewis further noted that an annular tear is well known not to imply that a traumatic event occurred and that the site of Petitioner's tear does not correlate with her back pain. *Id.* Dr. Lewis further noted that EMG testing is unable to specifically test the medial branch of the dorsal ramus and the medial branch is the specific nerve branch that innervates the facet joints. *Id.*

Dr. Lewis opined that Petitioner was not in need of any additional medical treatment, and specifically that the denervation procedure was not recommended because Petitioner's first injection did not show sufficient improvement. RX2. He opined that, based solely on Petitioner's subjective complaints, she was able to work sedentary duty. *Id.* Dr. Lewis also maintained that Petitioner had reached maximum medical improvement three-to-four months after her injury at work. *Id.*

Deposition Testimony – Dr. Lewis

On December 12, 2016, Respondent called Dr. Lewis as a witness and he gave testimony at an evidence deposition regarding Petitioner's spine condition and its relatedness, if any, to Petitioner's injury at work. RX1. Dr. Lewis is a board-certified orthopedic surgeon. RX1 at 4-7; RX1 (Dep. Ex. 1). Dr. Lewis testified consistent with his first, second, and third Section 12 examination reports that Petitioner's condition was not causally related to her work activities. *See generally* RX1.

Dr. Lewis explained that at the time of his first examination on June 15, 2012, Petitioner's complaint of immediate low back pain with radicular pain in her legs beginning one or two months later was "not at all typical[.]" RX1 at 10-11. His physical exam revealed many inconsistent and nonorganic signs, and he testified he found no definite orthopedic pathology or evidence of acute pathology. *Id.*, at 11, 15. He explained Petitioner's pain disability questionnaire score indicating severe subjective pain that would render her virtually bed-ridden. *Id.*, at 21.

Dr. Lewis reviewed two lumbar MRI films, from November 8, 2011 and April 5, 2012, respectively. RX1 at 13-15. He testified the first film showed a slight disc bulge at L4-5, with an associated annular tear. *Id.* The second film was "essentially very similar[.]" *Id.* Dr. Lewis explained that a slight disc bulge is an extremely common finding and was not evidence of an acute injury. *Id.* Rather, he opined the findings on Petitioner's MRIs were age and size appropriate. *Id.*

Dr. Lewis testified that his second examination of Petitioner on September 8, 2014, strengthened his prior conclusions. RX1 at 22. He opined Petitioner reached maximum medical improvement four months after the incident on September 23, 2011. *Id.* at 23.

In conjunction with his third examination, Dr. Lewis reviewed the prior 19(b) arbitration decision, in which Petitioner's condition of ill-being was found causally related to the work accident at issue. RX1 at 30. Dr. Lewis respectfully disagreed with the decision because the annular tear was not suggestive of a traumatic injury. *Id.*, at 31-32. He further explained that the EMG and NCV studies were nonspecific and insufficient to conclude that treatment should be directed at the facet joints. *Id.*, at 20, 31-32.

Dr. Lewis also testified he disagreed with Dr. Orteza's recommendation for a medial branch denervation. RX1 at 33. He explained that Dr. Orteza's notes were inconsistent regarding the amount of relief the facet injections provided, and that "the conventional wisdom is that [relief from] an injection that lasted only for 30 minutes would not be an indication to consider a denervation procedure[.]" *Id.*

Dr. Lewis testified that at the time of his third exam of Petitioner on June 22, 2016, he again found no evidence of orthopedic pathology. RX1 at 26. He explained that the injections which Petitioner had after the first trial were designed to identify the pain generator in her back. *Id.*, at 27-29. Dr. Lewis testified that since Petitioner only had 30 minutes of relief from the first injection, no further treatment was warranted. *Id.*, at 29. He also testified it was not common to do injections at the same time at four levels because it is difficult to differentiate the effect of each. *Id.*, at 27-28.

Dr. Lewis ultimately opined that Petitioner's condition at the time of his deposition on December 12, 2016, was not casually related to the work injury in 2011. RX1 at 34. He also stated it was not typical for a lumbar strain to produce work restrictions for five years. *Id.*, at 34-35. Nor was it typical for a patient to experience such severe continuing pain complaints with no objective findings. *Id.* He was still of the opinion that Petitioner reached maximum medical improvement three to four months after the injury in 2011. *Id.*, at 35.

Deposition Testimony – Dr. Orteza

On May 4, 2017, Petitioner called Dr. Orteza as a witness and he gave testimony at an evidence deposition regarding Petitioner's spine condition and its relatedness, if any, to Petitioner's injury at work. PX2. Dr. Orteza testified that he is an anesthesiologist with a subspecialty in pain management. PX2 at 3-4.

Dr. Orteza testified that a denervation procedure uses radio frequency needles to burn the nerve that innervates the joint resolving or alleviating the patient's pain. PX2 at 6. Dr. Orteza addressed Petitioner's medical treatment with him and his September of 2015 recommendation for denervation. *Id.*, at 6-15. Thereafter, Dr. Orteza continued to recommend the denervation procedure to alleviate Petitioner's pain. *Id.*, at 16-17. He opined that the denervation procedure was reasonable and necessary to address Petitioner's pain. *Id.*, at 17.

On cross-examination, Dr. Orteza explained that Petitioner's diagnoses of facet joint impingement, myofascial pain and fibromyalgia were chronic in nature. *Id.*, at 31, 47. He also stated her right side bothered her more than her left side the entire time he treated her. *Id.*, at 31-32. Additionally, Dr. Orteza testified that he did not do any tests to confirm Petitioner's subjective complaints other than physical examination testing (i.e., range of motion, bending, flexion, etc.). *Id.* at 35-36.

Dr. Orteza testified that, since the first facet block did not give ideal results, the amount of relief from the second block was important to determine if the denervation procedure was indicated. *Id.*, at 54-56. Dr. Orteza acknowledged that he observed Petitioner for only ten minutes before she was discharged. *Id.*, at 57.

Dr. Orteza testified that Petitioner has reached maximum medical improvement if she does not undergo the denervation procedure. PX2 at 60-61. Dr. Orteza testified that Petitioner might be able to return to some light duty work after undergoing the recommended denervation procedure. *Id.*, at 67.

Utilization Review

In a letter dated March 6, 2017, Coventry Workers' Comp Services noted the non-certification of Dr. Orteza's order for Cymbalta, Gabapentin, and Norco. RX5. In so concluding, the evaluating physician, Stanley Yuan, M.D. (Dr. Yuan), an anesthesiologist and pain management doctor, found that the recommended treatment was not consistent with their clinical review criteria. *Id.*

Additional Information

Petitioner testified that she has not seen any doctor for her back pain since that time for anything other than prescriptions. *Id.*, at 19-20. Regarding her current condition of ill-being, Petitioner explained that her pain level remains normally about 8 out of 10, but is about 10 or 11 out of 10 with movement. Tr. at 21-22. She testified that her pain is increasing, and is the same on both sides. *Id.*, at 22. Petitioner explained that she cannot perform activities of daily living, sit up straight, sit for more than 30 minutes in a comfortable chair, or walk for over a minute without pain. *Id.*, at 22. She testified that she can go up and down steps a little bit, and slowly. *Id.*, at 23. Petitioner also uses a cane and cannot drive. *Id.* Petitioner testified that her husband assists her with groceries, and she has not gone to the hospital or emergency room since the last hearing. *Id.*, at 24-25.

Petitioner testified that Dr. Orteza has kept her off work during the entire time that he has been her physician. Tr. at 12. She testified that she continues to have pain in her low back. *Id.* She also testified that she wishes to undergo the recommended further treatment to help with her low back pain. Tr. at 12.

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 the hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

In consideration of the totality of the record, which necessarily requires reliance on the law of this case, the Arbitrator finds that Petitioner's claimed current condition of ill-being in the lumbar spine remains causally related to the injury sustained at work on September 23, 2011 based on the treating medical records and opinions of Petitioner's treating physician, Dr. Orteza.

No evidence was submitted that Petitioner sustained any new injury to the spine or developed a structural change in the spine severing causal connection. Respondent's Section 12 examiner, Dr. Lewis, performed a third examination of Petitioner at Respondent's request. His report and the sum of his deposition testimony result in his conclusions that Petitioner's September 23, 2011 work activities did not cause or aggravate any of her conditions, an annular tear cannot occur traumatically, the site of Petitioner's annular tear did not correlate with her subjective pain complaints, an EMG cannot specifically test the medial branch of the dorsal ramus such that it can suggest facet impingement, and denervation in the lower paraspinal muscles is not a valid indicator of Petitioner's pathology—which he was unable to diagnose as Petitioner had multiple causative non-behavioral findings complicating his ability to make an appropriate diagnosis. Dr. Lewis's medical opinions and, more importantly, the rationale for his medical opinions have not changed over the course of his three examinations of Petitioner. Concordantly, the opinions of Dr. Lewis, which have not changed in substance or the analyses resulting in his conclusions, are not persuasive. As such, the findings of fact and conclusions of law, which are the law of this case, relating to the causal connection between Petitioner's accident at work and lumbar spine condition remain intact.

Based on the foregoing, the Arbitrator finds that Petitioner has established a continued causal connection between her current lumbar spine condition of ill-being and accident at work.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

As explained more fully above, the Arbitrator finds that Petitioner's current condition of ill-being in the lumbar spine continues to be causally related to her injury at work. However, Respondent submitted a utilization

review report regarding the reasonableness and necessity of certain prescription medications. Dr. Orteza did not appeal the non-certification by utilization review. The bills that were not certified by utilization review are not reasonable or necessary, and Petitioner's claim for payment of those bills related to Cymbalta, Gabapentin, and Norco as reflected in Petitioner's Exhibit 4 is denied.

Petitioner also submitted medical bills related to hip x-rays taken in 2012 before the first arbitration hearing in this case. To the extent that these bills were claimed during the medical treatment was found causally related as a result of the first arbitration hearing, and they have not yet been paid, they should be paid in accordance with the first arbitration hearing decision pursuant to Sections 8(a) and 8.2. To the extent that these bills were not claimed at the time of the first arbitration hearing, they precede the period of treatment at issue in this arbitration hearing beginning November 25, 2014 and the bills reflected in Petitioner's Exhibit 5 are denied.

The remainder of the medical bills submitted into evidence relate to Petitioner's lumbar spine for reasonable and necessary medical care to alleviate her of the effects of her injury at work after the first arbitration hearing. Thus, the medical bills reflected in Petitioner's Exhibit 3 are awarded pursuant to Sections 8(a) and 8.2.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to her accident at work as claimed in reliance on Petitioner's credible testimony as well as the opinion of her treating physician, Dr. Orteza. Petitioner's condition has not improved after her accident at work and, as Dr. Orteza has opined, surgical intervention is required. Thus, the Arbitrator awards the recommended prospective medical care in the form of a denervation as prescribed by Dr. Orteza pursuant to Section 8(a) of the Act as this treatment is reasonable and necessary to alleviate Petitioner from the effects of her injury at work.

In support of the Arbitrator's decision relating to Issue (L), Petitioner's entitlement to temporary partial disability benefits, the Arbitrator finds the following:

Considering the causal connection analysis explained above, the Arbitrator turns to Petitioner's claim that she is entitled to temporary total disability benefits from November 25, 2014 through February 23, 2018.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that she was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The record reflects that during the claimed temporary total disability period Petitioner was placed off work as imposed by Dr. Orteza. Thus, the Arbitrator finds that Petitioner has established that she was temporarily totally disabled during the claimed temporary total disability period from November 25, 2014 through February 23, 2018. Respondent shall receive a credit for temporary total disability benefit payments that have been made as agreed by the parties. *See* AX1.

Q-Dex On-Line
www.qdex.com

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD ZALESKI,

Petitioner,

vs.

NO: 15 WC 09992

D & M ARCHITECTURAL METALS, INC.,

19IWCC0070

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, temporary partial disability, benefit rate, and the nature and extent of the 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.

After considering the record in its entirely including testimony, exhibits, pleadings and arguments submitted by the parties, the Commission modifies the Decision of the Arbitrator finding Petitioner's award should be under Section 8(d)2 and that he has not met his burden of proving entitlement to an award of a wage-differential under Section 8(d)1 for the reasons explained below.

Findings of Fact and Conclusions of Law

It is undisputed that the Petitioner in the subject case sustained a work-related injury and was assigned permanent restrictions on March 12, 2015 by his treating doctor, Alexander Ghanayem. Dr. Ghanayem specified Petitioner was limited to occasional lifting up to 80 pounds, with a 60-pound weight restriction from floor to waist with remaining restrictions pursuant to the limitations he demonstrated while participating in a functional capacity evaluation (FCE). The subject dispute arises out of the issue of whether as a result of those restrictions Petitioner is prevented from pursuing his usual and customary line of employment or Petitioner's earning

Q-Dex On-Line
www.qdex.com

capacity is diminished. Having reviewed the transcript and all of the evidence in its entirety, the Commission views the evidence different from the Arbitrator.

Permanent partial disability

Under the Act, when a claimant sustains a disability, an issue arises concerning what type of compensation (s)he is entitled to receive, a wage differential award (8(d)(1)) or a percentage-of-the person-as-a-whole award (8(d)(2)). 820 ILCS 305/8(d) (West 2012); *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 has expressed a preference for wage-differential awards. *Id.* (citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 674, 60 Ill. Dec. 629 (1982)). The purpose of a wage differential award under section 8(d)(1) is to compensate an injured claimant for her reduced earning capacity. *Dawson v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586, 888 N.E.2d 135, 139, 320 Ill. Dec. 918.

The Commission finds that the Petitioner's permanent partial disability in the case at bar would fall under the umbrella of section 8(d)(2) because his injuries do not prevent him from pursuing the duties of his employment and further he has not demonstrated an impairment of earning capacity.

The Court's analysis in *Jackson Park v. the Il Workers' Compensation Comm'n* is instructive in the present case although the facts are readily distinguished. In *Jackson Park*, the employer did not dispute the Commission's finding that the claimant sustained a work-related permanent partial disability and the claimant could not return to her pre-injury profession as a stationary engineer. The employer continued to pay the claimant the same union pay rate she had earned at her job as a stationary engineer when, in fact, the claimant was working as a public safety officer. The employer's other public safety officers were earning significantly less per hour than that which Respondent was paying the claimant. The Arbitrator found that these stipulated facts were "not relevant to any kind of wage loss because she doesn't have a wage loss, at this time." In response, the claimant made an "offer of proof" by requesting that the facts be admitted for all purposes" and for a potential section 8(d)1 or wage differential consideration or award." *Jackson Park v. the Il Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, P. 26 47 N.E.3d 1167, 1172, 400 Ill. Dec. 202, 207

The Appellate Court in *Jackson Park* took issue with the Commission's denial of the employee's wage-differential finding the decision was based "entirely on the post-injury wages that the employer paid the claimant at the time of the hearing." The Court held the Commission failed to consider and analyze all of the evidence that is relevant to the claimant's true earning capacity in the competitive job market." *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, P48-P51. The evidence presented at the arbitration hearing on the issue of Petitioner's transferable skills was through the only vocational expert who testified at the hearing. The Petitioner's vocational counselor offered opinions that Petitioner's "job skills as a stationary engineer were not transferable because of her physical limitations." *Id* at 48.

The Jackson Park Court vacated the PPD award and remanded the case for a hearing on a wage-differential PPD award based on Petitioner's vocational counselor's unrebutted opinion

Q-Dex On-Line
www.qdex.com

regarding the Petitioner's transferable skills given her physical limitations and eighth-grade education:

> ...the claimant might be able to procure entry level, unskilled employment as a cashier, gas station attendant, parking lot attendant, or central station monitor. In these positions, the claimant would earn between $8 and $9 per hour, far less than the $23.61 per hour the employer paid the claimant at the time of the hearing. The evidence presented at the hearing included testimony that the claimant did not actually meet the qualifications necessary to work as a public safety officer for the employer and that safety officers in the Chicago area, including all of the employer's other safety officers, typically earned between $8 and $11 per hour... that the claimant's earnings in excess of $23 per hour were not indicative of other security positions in the Chicago area. *Id.*

The *Jackson Park* Court further outlined the parties' positions:

> We acknowledge that the employer's argument on appeal raises a competing concern, *i.e.*, that the Commission's focus solely on the claimant's post-injury income is proper because, otherwise, there is a danger that a person could be awarded a wage differential award while still earning the same wages. However, under the Act, the claimant is entitled to a wage differential award if there has been an impairment of her earning capacity, and, as noted above, the supreme court has held that income and capacity are not synonymous. *Cassens Transport Co.*, 218 Ill. 2d at 531, 844 N.E.2d at 423. Therefore, the Commission's analysis cannot focus exclusively on a comparison of pre- and post-injury income when other evidence is offered that is relevant to the employee's earning capacity in the competitive job market.
>
> [*P51] Furthermore, under the employer's interpretation of the Act, an injured worker could be denied a wage differential award simply because the employer pays the injured worker an inflated wage in an employer-controlled job that does not otherwise exist in the labor market and which may be temporary in duration. [***26] If other employers would not hire the employee with her limitations at a comparable wage level, the post-injury wage cannot be considered an accurate reflection of the claimant's earning capacity. Denying such a claimant a wage differential award undermines the purpose of such awards, which is to compensate the injured worker for her reduced earning capacity. *Dawson*, 382 Ill. App. 3d at 586, 888 N.E.2d at 139. It is essential for the Commission to consider all of the evidence relevant to the claimant's actual earning capacity in the competitive job market in determining whether the claimant is entitled to a wage differential award. *Jackson Park Hosp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431WC, P50-P51.

Therefore, the Commission is compelled to examine all the evidence relevant to the subject Petitioner's earning capacity in a competitive job market to determine whether he is entitled to a wage- differential award. Initially, the Commission notes that the subject Petitioner is working for Respondent doing essentially the same work he was doing before the injury and earning the same

Q-Dex On-Line
www.qdex.com

19IWCC0070

wages he was earning before his injury. While the Petitioner in *Jackson Park* was also earning her pre-injury wages, she was not working in the same capacity as she was before her injury and that is the primary and significant difference between the subject Petitioner and the claimant in *Jackson Park.* Further, the Petitioner in *Jackson Park* was earning an inflated wage for the job she was doing. There is no evidence the Respondent in the subject case is paying the Petitioner an inflated wage in an employer-controlled job that does not otherwise exist in the labor market or that his job may be temporary in duration.

It has long been held that an accommodation that is a "sham" or merely an avoidance of liability under the Act, will be rejected by this Commission and Reviewing Courts. (See *Reliance Elevator Co. v. Industrial Comm'n*, 309 Ill. App. 3d 987, 723 N.E.2d 326, 243 Ill. Dec. 294 (1999) wherein the wages accompanying Respondent's job offer to the Petitioner were higher than economically justifiable.) Therefore, the nature of the accommodation must be considered to avoid over emphasis on a claimant's wages at the time of the arbitration hearing. The *Jackson Park* Court also focused on the issue of whether other employers would hire the employee with the same limitations for a comparable wage level, thus the Commission notes the significance of the following testimony of the Petitioner and witnesses in the case at bar.

Petitioner's restrictions and job duties

In the subject case, there was ample testimony that the Petitioner continues to work for Respondent in his pre-accident job as an Ironworker Local 63 foreman and nothing to suggest that he was offered a high wage for "light duty" work. (1/27/17 T, p. 96) Petitioner testified that he is a glazing foreman doing storefronts, curtain walls, metal and glass and supervising other glazing ironworkers. (1/27/17 T, p. 98) Petitioner also testified he is a working foreman meaning during the eight hours he is "on the clock" he is required to install and be part of the crew. (1/27/17 T, pp, 99-100). Petitioner confirmed he has been a working foreman since he worked for Respondent. (1/271/7 T, p. 100)

Petitioner further testified that after his work-related injury he underwent physical therapy and eventually participated in a FCE on March 4, 2015. (1/27/17 T, p. 106) Petitioner testified Dr. Ghanayem released Petitioner to return to work pursuant to the FCE results lifting 50 pounds occasionally from floor to waist, occasionally lifting up to 80 pounds, carry up to 70 pounds and push/pull 55 pounds. (1/27/17 T, p. 107) Petitioner testified he has been working for Respondent since his release working within those restrictions. (1/27/17 T, p. 108)

Dr. Ghanayem's office notes reflect he restricted Petitioner's lifting from floor to waist to 60 pounds and occasional lifting up to 80 pounds. The FCE report reflects Petitioner demonstrated the ability to occasionally lift up to 80 pounds floor to waist, 60 pounds waist to shoulder, carry up to 70 pounds, push 65 pounds of force, and pull 55 pounds of force. (Px1, p. 1) The FCE shows Petitioner demonstrated the ability to lift 50 pounds frequently floor to waist, 40 pounds frequently waist to shoulder and that Petitioner meets the Heavy Physical Demand level. (Px5, p. 2)

Petitioner was asked on direct examination to compare his work capabilities before to after the injury. Petitioner testified "I'm not as fast. Slow." (1/27/17 T, p. 113) Petitioner also testified that although he was doing his job physically slower, "you could make up hours in different ways. I do it with smarts and ability and understanding of the trade, where other guys will do something

19IWCC0070

Q-Dex On-Line
www.qdex.com

and then redo it because they don't understand what they're actually trying to install." (1/27/17 T, pp. 115-116) Petitioner testified that he is running the whole job site. His supervisor, Dan Lang, comes out once a week to give them supplies. (127/17 T, pp. 127-128) Petitioner testified that Mr. Lang is aware of his restrictions, that he and Mr. Lang have a good working relationship. (1/27/17T, p. 114)

Petitioner testified that he confers with his boss, Dan Lang every day to coordinate the performance and completion of job sites including discussion of materials. (2/2/4/17 T, p. 11) Dan Lang testified he his part owner, CFO, project manager and truck driver and that he has been working in those capacities for Respondent since 1999. (1/27/17 T, p. 196) Lang described Petitioner as an employee: "He's been a foreman for us, and he's very good as a foreman in terms of laying out, trouble-shooting the jobs, managing the people we've had on the jobs, and he's been a very good employee." (1/27/17 T, p. 197) Lang further described Petitioner as a "highly skilled employee." (1/27/17 T, p. 197) Lang testified there has been no change after the Petitioner's injury in the way he assigns or bids work and Petitioner is able to do what he was doing before. (1/27/17 T, pp. 217-218) Lang also testified that he has every plan to keep him because he is good at his job, trustworthy and Lang can rely upon him. (1/27/17 T, pp. 220, 221)

Petitioner testified that he obtained the job with Respondent through a friend. (1/27/17 T, p. 126) Petitioner further testified that Local 63 ironworkers can find jobs without going to the Union Hall to get called out. (1/27/17 T, p. 127) Petitioner confirmed on cross-examination that he works with Local 27, Glazers' union guys and that Respondent employs composite crews, which means Local 27 guys and Local 63 guys. (1/27/17 T, pp. 127-128)

Paul Thompson testified that he is president and business agent for the Architectural Ironworkers Local 63, holding that title for four years and having been a representative for 15 years and ironworker for 31 years. (1/27/17 T, p. 12) Thompson further testified he has been a business agent since 2001 and added the title of president to that role for the last four years. As a business agent, Thompson was required to visit job sites daily. As such he is familiar with the work requirements and duties of a Local 63 ironworker. (1/2/7/17 T, pp. 12-13)

Thompson testified that he has known Petitioner for 15 or 20 years or all the years he has been a Local 63 ironworker. (1/27/17 T, p. 14) Thompson testified Respondent is one of the union's signatories. Thompson further testified Respondent is a smaller company specializing in storefront and doors, smaller to medium curtain walls, storefront window work. (1/27/17 T, p. 15)

Thompson testified typically there are not "non-working" foremen in the industry and typically the job requires a 40-hour workweek. (1/27/17 T, p. 23) Thompson further identified Petitioner's exhibit number four and described it as a "some of the job requirements" including "lift 100 pounds." Thompson testified that they have the description to give to people coming into their trade. Thompson did not create the document. (Px4, T, p. 32)

Thompson further testified that if a member of Local 63 person cannot meet one of the physical demand requirements listed on Petitioner's exhibit number four, the Union does not tell the person that they are not welcome, but that limits their ability to earn a living. (1/27/17 T, p. 36) When asked if an ironworker with restrictions can keep working as Local 63 ironworker under those circumstances, get paid and pay union benefits and dues, Thompson replied "Well, typically

Q-Dex On-Line
www.qdex.com

not, because if they're not productive workers on the job, then the contractors won't keep them, and they usually end up going to do something else." (1/27/17 T, p. 37) Thompson admitted, however, the union does not test individuals to confirm they meet the physical requirements listed on the job description nor does the union measure if an individual is physically capable of working as a Local 63 ironworker. Thompson explained if they (ironworkers) can't do the physical part of the job, they have a hard time getting a job or if the union dispatches someone that's not physically capable of doing the job, they would be laid off. (1/27/17 T, p. 39)

Thompson also testified within Local 63 there are different elements in different sectors of the work. (1/27/17 T, pp. 28-30). The structural ironworkers, for instance, do heavier work than the ironworkers who focus on the glass, the glazing and the extruded metal framing. (1/27/17 T, p. 30) The latter group described by Thompson, with focus on the glass, glazing and extruded metal framing is the type of work Petitioner has engaged in during his career. Petitioner testified that there are two different fields in the ornamental ironworking deal -installing fences and stairs (rails) and there is ornamental. Petitioner testified that he is a glazing foreman. Petitioner described it as a field that was created over time that the ironworkers took over doing storefronts and curtain walls and metal and glass. (1/27/17 T, p. 98)

Thompson also testified sometimes ironworkers don't have to lift that much at all and Local 63 ironworkers are also working often side by side with the glazer union contractors. (1/27/17 T, p. 30) Thompson was also not sure that within the contracts with the various signatories for jobs whether the ironworkers' requirements listed in Petitioner's exhibit number four are included or are even referenced in the contract anywhere. (1/27/17 T, p. 37)

Thompson conceded, however, if a union member cannot lift 100 pounds that restriction does not preclude the individual from being a member of Local 63 Ironworkers. (1/27/17 T, p. 40) Thompson also conceded that Petitioner has been able to remain a union Local 63 ironworker, "if he pays his dues, he's still a member." (1/27/17 T, p. 41) Thompson had met Petitioner on a job and Petitioner told him that he had hurt himself. He was allowed to stay a union member and keep working his Local 63 ironworkers' union job thereafter. Thompson admitted that was an issue the union is not involved in. (1/27/17 T, p. 43)

Thompson also admitted that besides getting called out of the union hall, there are other ways ironworkers get work, "by their reputation and their work ethic." He agreed Petitioner has a very good reputation and a very good work ethic and getting (Local 63) work is done through networking and someone may recommend them for a job. (1/27/17 T, pp. 44-45)

Thompson also conceded there might be some non-working foremen and someone out there bidding jobs that include non-working foremen. (1/27/17 T, pp. 47, 51) Thompson has had ironworkers with similar restrictions ask for help getting jobs and he helped them find a job, albeit on a limited basis. Thompson testified some ironworkers are "going back to school and becoming safety guys." He conceded that there are no guarantees, but work is good and — "the prospects of work are excellent for the next two years." "Pretty much, everybody is working." (1/2717 T, pp. 57-58)

Petitioner testified that he reviewed surveillance video of his job performance and testified that on the video he was working at a school in Tinley Park and they "were there for quite a while."

Q-Dex On-Line
www.qdex.com

(2/24/17 T, p. 13) The Commission views the video different than the Arbitrator finding that the video is compelling and persuasive evidence of the fact that the Petitioner is pursuing his usual and customary line of employment. (Rx4a-e)

The Commission finds that Petitioner's and Thompson's testimony comport. There are different types of ironworkers and skill sets and each of them have varying degrees of physical demands. If overall a worker is not able to meet their particular job demand, that person will soon not get work. Petitioner, however, testified he always has a partner. (1/271/7 T, p. 118) Petitioner also testified, and proved, that he is capable with using his mind and modifications of getting his job done.

The Commission, therefore, finds that Petitioner can continue to work in his usual and customary line of work with his physical limitations. Even if, arguendo, Petitioner was not working for Respondent, the testimony from the Petitioner, the witnesses and the President of the Ironworkers, Paul Thompson compels this Commission to find that Petitioner can pursue his usual and customary job based on the following: 1) the Petitioner's expertise, skills and reputation are factors that enter into his employability; 2) obtaining work as an ornamental ironworker can be accomplished by networking and outside the Union Hall; 3) that to be an ironworker, no physical capabilities are tested by the Union; 4) there are three sub-types of ironworkers and Petitioner's expertise as an ornamental ironworker is lighter than the physical requirements of the structural ironworkers; and 4) that non-Union jobs do not have the same physical requirements as the union jobs.

Impairment of Earnings

The Commission further finds that Petitioner has not met his burden of proving he has an impairment in his earning capacity based upon the above referenced testimony. Local 63 Ironworkers' President and business agent Thompson testified the wages for a Local 63 ironworker are $45.75 per hour. (1/27/17 T, p. 23) Petitioner testified he is earning $47.50 per hour, receiving an extra $2.50 per hour as a foreman. (1/27/17 T, p. 131)

Furthermore, and distinguished from *Jackson Park*, there are competing vocational rehabilitation reports and testimony in the case at bar that the Commission has reviewed and considered. The Commission finds that the vocational counselor reports and testimony in this case are extraneous since the Petitioner is working in his pre-injury position with no evidence that he is precluded from performing his usual and customary job duties despite the physical restrictions assigned by Dr. Ghanayem and he is earning his pre-injury wage with no evidence that his restrictions will affect his future earnings capacity.

The Commission further finds both counselors' initial reports were flawed because they ignored the fact that Petitioner is doing his pre-injury job and earning pre-injury wages. Both counselors initially relied upon a comparison of Petitioner's physical limitations as described in the FCE to the Union job description in Petitioner's exhibit number four, and determined those eliminated Petitioner's prospects of continuing as an ornamental ironworker glazing foreman. The Petitioner's and Thompson's testimony confirms that there are other factors that also can determine whether any ironworker can get ornamental iron work as a glazing foreman when he has physical restrictions. The nature of the physical restrictions, and the ironworkers' experience and reputation

Q-Dex On-Line
www.qdex.com

are some of those factors. Petitioner testified that he always has at minimum a second worker present at his job site and to make up for being slow, Petitioner can make up "with smarts and ability and understanding of the trade."

In addition, if arguendo the Petitioner was not working for Respondent, the Commission finds the vocational counselor, Sharon Babat's testimony to be more credible than James Boyd's testimony. Mr. Boyd testified per his report that Petitioner could be a metal fabricator with a little more training, however, Boyd's testimony contradicts the first page of Boyd's report documenting that Petitioner had learned metal fabricating in his first job at U.S. Aluminum. Boyd admitted that Petitioner's first job was not taken into consideration when he opined that Petitioner needed additional training to be a metal fabricator. (1/27/17 T, pp. 74-77) Further, the Commission discounts Boyd's testimony because Boyd also testified that he did not take the Petitioner's first job into consideration because the Petitioner's training was 20 years ago, however, Boyd admitted he did not know what changed in that field and he did not find out how Petitioner came to be employed at U. S. Aluminum. Boyd also admitted it is quite possible that Petitioner is capable of working in other positions beyond what the test scores showed. Finally, Boyd could not testify whether the Petitioner's test scores qualified Petitioner to work as a journeyman ironworker without additional research.

The Commission also finds Babat's testimony to be credible regarding the reasons she added Petitioner's skill as an ironworker foreman in her January 11, 2017 report. When Babat wrote her first report, she wrote "No available positions with Employer of Injury," and she explained "That was the knowledge I had at that time." (1/27/17 T, p. 152) It was her understanding at that time that Petitioner was not working in his current position and her understanding of that changed by the time she prepared her second report dated January 11, 2017. (1/27/17 T, p. 183)

The Commission also notes that neither counselor considered that Petitioner could be employed as a foreman or return for safety training as suggested by the President of the Local 63 Ironworkers, Paul Thompson. Thompson testified some ironworkers are "going back to school and becoming safety guys." He conceded that there are no guarantees, but work is good and — "the prospects of work are excellent for the next two years." "Pretty much, everybody is working." (1/2717 T, pp. 57-58)

The Commission also finds alternatively that Petitioner is also qualified to do some of the jobs Babat referenced that would provide training including the City of Chicago in a position as a sign painter, at a starting average weekly wage rate of $31.08. The subject Petitioner has been working as an ornamental ironworker for almost two years since he was declared at maximum medical improvement. Based on the testimony of the Petitioner and the witnesses, Petitioner's job with Respondent is secure and there is no evidence the job was created for him or that he cannot continue to perform his job if at some time in the future he could not work for Respondent.

Based upon all the other evidence relevant to his future earning capacity and the wages the claimant can earn in a competitive job market including the testimony by the Union business agent that the future job market looks good and unanimous testimony that the Petitioner's reputation is sterling and a factor that would play into whether or not he could find another position as a working foreman, the Commission finds the Petitioner can pursue the duties of his usual and customary line of employment despite the physical limitations he has documented in the FCE and Petitioner did

Q-Dex On-Line
www.qdex.com

not prove a loss in his future earning capacity. He has a high school diploma and other transferable skills including experience with metal fabricating.

The Commission notes the *Jackson Park* analysis requires consideration of the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market. The Commission finds the subject Petitioner's employment is readily distinguished from the Petitioner in *Jackson Park.* Petitioner was not offered a job created by Respondent to avoid its liability under §8(d)1 of the Act and instead is working in his usual and customary line of employment earning his same wages. Any other conclusion is speculative and based solely on conjecture.

If, however, arguendo, the Petitioner could not work for Respondent, there is also evidence that he would be marketable in the same capacity. The Commission finds Babat's January 11, 2017 labor market survey is credible because the Petitioner was doing his job for over one year, (21 months) since the March 2015 FCE and between her two reports Babat learned that the physical requirement some companies that employ non-union workers are less than the union described and specifically of the companies she listed one position described skills that were preferred not required. (1/27/17 T, p. 144, 173) The Commission notes the Petitioner's exhibit four Local 63 requirements included welding and using a torch and finds Babat's comments regarding the non-union jobs to be reasonable.

The Act is a remedial statute enacted to abrogate the common law rights and liabilities which previously governed an injured employee's ability to recover damages from his employer. *Sharp v. Gallagher*, 95 Ill. 2d 322, 326, 447 N.E.2d 786 (1983). It established a system of liability without fault under which injured employees gave up their common law rights to sue their employers in tort in exchange for the right to recover for injuries arising out of and in the course of their employment without regard to any fault on their part. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 172, 180, 384 N.E.2d 253 (1978).

As the Supreme Court articulated "The purpose of the Act is to compensate, or "make whole," an injured employee, not to provide a windfall." *Hasler v. Industrial Comm'n.*, (1983) 97 Ill. 2d 46, 52, 454 N.E.2d 307, 310, 73 Ill. Dec. 447, 450.

It is axiomatic that liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. Similarly, an award for loss of earnings cannot be based on speculation as to the particular employment level or job classification which a claimant might eventually attain. See *Deichmiller v. Industrial Comm'n* (1986), 147 Ill. App. 3d 66, 497 N.E.2d 452, 100 Ill. Dec. 474. *Forest City Erectors v. Industrial Comm'n* (Wajerski), 264 Ill. App. 3d 436, 441, 636 N.E.2d 969, 973, 201 Ill. Dec. 537, 541. Conversely, the Commission cannot base an award for loss of earnings on speculation that a claimant might not maintain a position that he has proven he can do for two years between the date of his medical release and the arbitration hearing when there is no indication that he is employed for the purpose of avoiding liability under the Act.

The Commission finds therefore, that the Petitioner is entitled to an award based on loss of use of person as a whole under section 8(d)2, thus an analysis under Section 8.1b(b) is warranted.

The Commission finds neither party submitted an impairment rating report or opinion into

Q-Dex On-Line
www.qdex.com

evidence under Section 8.1b(b)(i), thus no weight is given to the first factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Commission notes that the petitioner was a foreman/laborer at a physically demanding job at the time of the injury. Petitioner has returned to his regular job working within his restrictions. This is the same position of employment that Petitioner had prior to his work accident. Petitioner also testified that he has help or makes adjustments, thus the Commission gives moderate weight to this factor.

With respect to Section 8.1b(b)(iii), the Commission notes that the Petitioner was 52 years old at the time of accident, thus he will have to work with his disability for a number of years until the age of retirement, however, Petitioner will not have to bear his disability for decades of his work life. Further, the Petitioner testified the Respondent is accommodating and/or they make adjustments and there is no indication that Petitioner would be unable to continue working his regular duty job with permanent restrictions, thus the Commission assigns this factor lesser weight.

Under Section 8.1b(b)(iv), as it relates to Petitioner's future earning capacity, the Commission finds that Petitioner has not proven that his future earning capacity will be diminished and the Commission assigns little weight to this factor.

With respect to the treating medical records as corroborative of Petitioner's disability under Section 8.1b(b)(v), the Commission notes the last visit, number 41, at Achieve Manual Physical Therapy documented the "Patient Status" wherein Petitioner reported "that back has been feeling really good lately, almost no pain." When Dr. Ghanayem saw Petitioner on February 12, 2015 he noted that Petitioner felt much stronger with the additional therapy and his neurologic exam is without motor or sensory deficits. Dr. Ghanayem recommended the FCE. The Commission finds that the therapy and Dr. Ghanayem's medical records that confirm Petitioner's condition required solely conservative treatment, his final neurologic exam was without motor or sensory deficits, and at his last physical therapy visit he reported that he had little or no pain, to be indicative of Petitioner's disability, and assigns moderate weight to this factor.

The determination of permanent partial disability is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of permanent partial disability, consideration is not given to any single enumerated factor as the sole determinant. Therefore, applying §8.1b of the Act, the Commission finds the Petitioner has sustained lumbar injuries that caused 30% loss of use of the person as a whole under Section 8(d)2 as the result of the August 22, 2014 work-related accident.

Accordingly, the Commission strikes that portion of the Arbitrator's Decision on pages seven through nine, under Conclusions of Law, "Issue (L), (O), What is the nature and extent of the injury?" and vacates the Arbitrator's award based on a wage-differential under section 8(d)1.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2017 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of a wage-differential based upon Section 8(d)1 is vacated.

Q-Dex On-Line
www.qdex.com

19IWCC0070

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 150 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 30% of a person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for payment of medical bills in the amount of $50.88 is denied.

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 5 - 2019
KWL/bsd
O: 12/4/18
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

Q-Dex On-Line
www.qdex.com

ZALESKI, RICHARD
Employee/Petitioner

Case# 15WC009992

19IWCC0070

D & M ARCHITECTURAL METALS INC
Employer/Respondent

On 5/11/2017, 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 1.01% 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:

0391 HEALY SCANLON LAW FIRM
JACK CANNON
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
DANIEL J UGASTE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

Q-Dex On-Line
www.dex.com

19IWCC0070

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RICHARD ZALESKI
Employee/Petitioner

v.

D & M ARCHITECTURAL METALS, INC.
Employer/Respondent

Case # 15 WC 09992

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 **MARIA S. BOCANEGRA** Arbitrator of the Commission, in the city of **CHICAGO**, on **1/27/2017 & 2/24/2017**. 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. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **8(d)(1) wage differential**

Q-Dex On-Line
www.qdex.com

19IWCC0070

FINDINGS

On **8/22/2014**, 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 **$94,889.08**; the average weekly wage was **$1,824.79**.

On the date of accident, Petitioner was **52** 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 **$19,378.10** for TTD, **$4,051.45** for TPD, **$0** for maintenance, and **$5,178.85** for other benefits, for a total credit of **$28,604.40**. Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

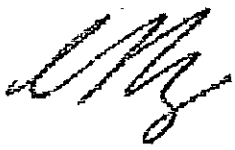
ORDER

Respondent shall pay Petitioner permanent partial disability benefits, commencing **2/24/2017**, of **$820.00/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.

Petitioner's request for payment of medical bills in the amount of $50.88 is denied.

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

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



Signature of Arbitrator

5-11-2017
Date

MAY 11 2017

ICArbDec p. 2

Q-Dex On-Line
www.qdex.com

BACKGROUND

Richard Zaleski ("Petitioner") alleged injuries to his low back arising out of and in the course of his employment with D&M Architectural Metals, Inc. ("Respondent") occurring on August 22, 2014. By agreement of the parties, this matter proceeded to arbitration on the following disputed issues: liability for unpaid medical bills, nature and extent of the injury and 8(d)(1) wage differential or 8(d)(2) man as a whole. The following is a recitation of the facts adduced at trial.

FINDINGS OF FACT

The parties stipulated that Petitioner suffered a work-related injury within the meaning of the Act. The parties agreed in opening statements that Petitioner returned to work with the Respondent under permanent restrictions. The dispute is whether the matter falls under an 8(d)(1) wage differential or on an 8(d)(2) man award. (TR. pp. 10, 11).

Petitioner's Testimony

Petitioner is a 55-year-old high school graduate. He has been an ornamental ironworker since 1983. He is a member of Architectural and Ornamental Ironworkers Local 63 for 18 years. (TR. pp. 100, 101) He has been employed as a working foreman for the Respondent for 3 years.

It is undisputed between the parties that Petitioner injured his low back when he slipped off a ladder on August 22, 2014. He was eventually diagnosed with a herniated disc at L5-S1 by Dr. Alexander Ghanayem that was non-operated and treated conservatively. Px1:15-16. Dr. Ghanayem placed Petitioner on permanent restrictions of occasionally lifting up to 80 pounds, floor to waist 60 pounds, waist to shoulder 70 pounds, push 65 pounds of force and pull 55 pounds of force. *Id.* at 1, Px5:1.

Petitioner returned to work as a foreman for the Respondent in March of 2015. (TR. pp. 107, 108) Petitioner testified that he has modified his work activity due to his injury. He estimates that he works at 50% of his former capacity. (TR. p. 115) He avoids lifting anything over 60 pounds. He asks co-workers or delivery men to assist him in lifting anything over 60 pounds. (TR. p. 112) He testified that the job requires lifting up to 420 pounds with assistance. (TR. p. 102) He takes over the counter medication every day. He testified that he experiences pain every day. (TR. pp. 112, 113)

Dr. Ghanayem/Loyola University

The records from Dr. Ghanayem at Loyola University show that Petitioner reported injuring his low back while falling from a ladder. Px1:27. Petitioner denied prior low back complaints. *Id.* The MRI of October 9, 2014 showed a disc bulge at L5-S1 with superimposed focal point paracentral disc protrusion causing mild central stenosis and minimal left neural foraminal stenosis. The disc protrusion appears to encroach on the traversing left S1 nerve roots minimally. *Id.* at 23-24. Dr. Ghanayem diagnosed Petitioner with an L5-S1 disc herniation and referred him for physical therapy. *Id.* at 15-16, 40. Dr. Ghanayem placed Petitioner at MMI on March 12, 2015 and adopted the work restrictions per FCE of 80 pounds occasional lifting, 60 pounds floor to waist. The doctor noted that the prescribed work restrictions were permanent in nature. *Id.* at 22.

Functional Capacity Evaluation

The FCE states that Petitioner demonstrated the ability to occasionally lift up to 80 pounds, floor to waist 60 pounds, waist to shoulder 70 pounds, push 65 pounds of force and pull 55 pounds of force. Px5. Petitioner demonstrated consistent performance throughout the testing. The FCE reports that ironwork generally falls into the heavy physical demand classification. The definition of heavy physical demand category under the U.S. Department of Labor, Dictionary of Occupational Titles is exerting 50 pounds to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical demand requirements are more than those for medium work.

Dr. Frank Phillips

The Respondent sent Petitioner for a Section 12 exam with Dr. Frank Phillips. Px8. Dr. Phillips concurred with the permanent restrictions which were outlined in the functional capacity evaluation and adopted by Dr. Ghanayem.

Paul Thompson

Paul Arthur Thompson testified on behalf of Petitioner. Thompson is the President for the Architectural Ironworkers Local 63. He has been an ironworker for 31 years. He has been a business agent since 2001. (TR. pp 12 & 13) Thompson dispatches men to work, teaches school, visits jobs and helps negotiate contracts. He meets with the contractors, meets with the employees, and settles disputes.

Thompson has known Petitioner for 14 years. (TR. p. 14) Petitioner is an Ornamental ironworker. Ornamental ironwork includes glass work in various stages of the erections of storefront doors and everything. (TR. pp. 19, 20) He also knows the Respondent. He testified that the Respondent specializes in storefronts, doors, smaller to medium curtain walls and storefront window work. (TR. p. 15) The lifting requirement could be several hundred pounds. (TR. p. 20)

Thompson is familiar with work requirements and duties of a Local 63 ironworkers. Thompson submitted a pre-printed list of job requirements for Local 63 Ironworkers. Px4. In the document, Thompson noted that lifting 100 pounds was a requirement and that light duty was not a consideration for the iron worker industry. Thompson testified that Px4 is a list of essential job requirements for an ironworker and is a document the union created and not specifically created for Petitioner.

Thompson testified that there are no non-working foreman positions on any consistent basis. (TR. p. 51) Thompson testified that "jobs are bid tightly so everybody has to be pulling on the rope making things happen so nobody is standing around." (TR. pp. 47, 48). Thompson testified that light duty is not a consideration, that every man must be capable of doing all these things because otherwise he could put in jeopardy his fellow workers. (TR. p. 21). Thompson testified that a foreman in the industry are hands-on. They are working foreman. Light duty jobs are few and far between and not stable. Thompson called them "fleeting" (TR. pp. 24, 37, 45, 54, 56). He confirmed that the current hourly rate for Local 63 ornamental ironworkers is $45.75. (TR. p. 34).

Vocational Counselor James Boyd

On August 30, 2016, Petitioner was evaluated at the request of his attorney by vocational counselor James Boyd. Px6. PX6. The counselor noted that Petitioner had returned to his work with his preinjury

Q-Dex On-Line
www.qdex.com

employer and had been accommodated with both part-time and full-time lighter duty work that has allowed him to continue working as an ornamental iron worker and earning union scale wages. However, the counselor noted that Local 63 clearly states a 100 pounds lifting capacity in their ironworker job requirements and that light-duty is not a consideration for the ironwork industry. In other words, if Petitioner was no longer employed by Respondent he would be unable to qualify for additional work through Local 63. As a result, the counselor identified the following jobs as entry and median hourly wage jobs available to Petitioner: stock clerk, billing clerk, order clerk, retail sales clerk and customer service representative. With additional coursework and certificate programs in areas of construction management technology and CAD technology additional jobs included: production expediting clerk, purchasing agent, cost estimator, procurement clerk, metal fabricator and CNC machine operator. James Boyd eventually testified at Arbitration on behalf of Petitioner. He is a certified vocational evaluator. He has over 40 years of experience in vocational rehabilitation. (TR. pp. 61, 62). Mr. Boyd was asked to assess Petitioner's employment prospects assuming he cannot be an ironworker. Mr. Boyd testified Petitioner has one year of college at Western Illinois University and completed an apprenticeship with Sheet Metal Workers' Local 73 in 1983. Petitioner's employment experience from that point on is exclusively within the ironworker trade. (TR. pp. 63, 64)

Mr. Boyd testified that Petitioner has very few transferable skills. Mr. Boyd testified that Petitioner doesn't have many skills that would apply to alternate skilled work and he would qualify for jobs basically in the billing, clerical, order customer services types of occupations. The starting wage ranges from $8.91 an hour to $21.14. (TR. pp. 69, 70), Px6.

Sharon Babat

On August 3, 2016, Sharon Babat issued a vocational assessment report and labor market survey on behalf of Respondent. Rx1. Babat opined that Petitioner had transferable skills and would be able to obtain employment in his local labor market. The jobs identified in the labor market survey included: machine operator, damage restoration technician, painter, lawn care technician, maintenance worker municipal or other, manufacturing worker or helper, construction worker, picker packer and warehouse stockroom worker.

On January 11, 2017, Respondent updated its labor market survey with Babat. Rx2. This time the identified job titles now also included an ironworker foreman and a welder. The twelve employer contacts included: Lamonaca Ornamental Ironworks, Mueller Ornamental Ironworks, Protech Water Damage, Environmental Restoration, Restore Restoration, Tech USA, City of Highland Park, Rainbow Property Maintenance, Vivint Smart Homes, City of Chicago, Servicemaster and Site Tech staffing. Babat confirmed with Respondent that Petitioner would not be required to lift more than 70 pounds and that the union does not test for physical abilities prior to job placement. In addition, Babat was able to secure and identify alternative occupational positions within his local labor market including: an ornamental iron worker, mold remediation technician, environmental technician, water fire restoration technician, MIG/TIG welder, maintenance worker, installation technician, sign painter and disaster restoration technician. Starting salaries range from $11 per hour to $31.08 per hour. Nonunion iron worker positions salaries range from $21.65 to $24.00 per hour to start. The second report was prepared 16 days before trial.

Babat eventually testified on behalf of Respondent at trial. She is a certified vocational counselor hired by the Respondent. Babat concluded that Petitioner's physical restrictions prevented him, on paper, from being an ironworker. (TR. pp. 145, 146) Babat performed two transferable skills analysis for Petitioner. Neither analysis stated Petitioner could work as a full-fledged ironworker or ironworker foreman. Babat admitted on cross that nothing in Petitioner's employability in physical capabilities had changed between the first and second analysis. Babat also conceded she wasn't sure that Petitioner could perform the higher paying jobs identified in

Q-Dex On-Line
www.qdex.com
19IWCC0070

the second analysis. Petitioner took the stand a second time and pointed out multiple job requirements of the higher paying jobs in Babat's second analysis which he could not perform. (2nd TR. pp. 14 - 17).

Daniel Lang

Daniel Lang was called by the Respondent. Mr. Lang is part owner of the Respondent since 1999. (TR. p. 195) He is also a project manager. He estimates jobs, gets materials, and manages projects. (TR. p. 196). Mr. Lang testified that Petitioner has been a foreman for his company for three years. Mr. Lang has not noticed a diminution in Petitioner's work capacities since he returned to work with restrictions. (TR. pp. 203, 204). He testified that he believed Petitioner would be able to find similar work in the field if he left the Respondent's employment. (TR. p. 216). On cross, Mr. Lang admitted that he has little opportunity to watch Petitioner perform ironworker duties. Mr. Lang is only on the job site for 20 minutes a week and during this time, Petitioner, as his foreman, is consulting with him. (TR. pp. 223, 224). Mr. Lang testified that all foreman are working foreman and have to be on the tools. (TR. pp. 224 – 227). He believed Petitioner could find work with other companies but would not say if he knew that for sure. (TR. pp. 225, 226). Mr. Lang has not worked for anyone else since 1999 and he does not know what other contractors are requiring of their workers. (TR. pp. 232 – 233). Mr. Lang agreed that if he had a new worker who could not keep up, he would get rid of him. (TR. p. 226).

Pay Stubs

Petitioner testified that his regular work week is 40 hours. The Respondent is accommodating Petitioner's permanent restrictions. Petitioner submitted 26 pay stubs between the week ending August 18, 2015 and December 24, 2016 where the Respondent was unable to provide Petitioner 40 hours of work or provided less than 40 hours of work per week. Px7. Petitioner worked a total of 628 hours over that time period. A full forty work week would provide 1,040 hours of work over 26 weeks.

Michael Wallace

Michael Wallace testified on Respondent's behalf. Mr. Wallace is president and part owner of D&M Architectural Metals; he has been involved with the company since its inception. (2/24/17 Trans. p.33) He has estimated, bid projects, ordered material, project managed, and installed. (2/24/17 Trans. p.34) When bidding school projects, to determine what glass to order, there is a specification book provided by the architect, and everything is specified by the architect exactly what can and cannot be used; the size of the glass is then ordered based upon what is specified. (2/24/17 Trans. p.34-35) Altering that requires a submittal process through the architect and through the general contractor to try to get somebody to accept something alternate. To his knowledge, Respondent has never requested use of a different type of glass. (2/24/17 Trans. p.35-36) He explained most buildings have architect specifications that go along with them. Especially when working with a general contractor, the specifications are provided. An architect usually will do a drawing and create a specification package. Respondent has to bid the jobs according to the architectural drawing and the specification, whether it's a school or not. (2/24/17 Trans. p.40-41)

Mr. Wallace testified he was a member of Local 63 for 14 years. He deals with and is aware of Local 63 and how it functions. He stated Local 63 offers training: "They have industry upgrading classes within. You can go to school at night to be taught welding. You can become a certified welder if you were to choose to go to school at night where they teach you at no cost. They have other training for different areas within the trade, because it's a pretty wide varying trade. There is a lot of things that you can do." (2/24/17 Trans. p.39-40) Mr. Wallace stated he had not seen the surveillance video but he understands what Petitioner does for the company

day in and day out as an employee: "I do the scheduling. I schedule all of the employees for every project every day for all the field employees. He installs aluminum framing, glass, caulk, brake metal, doors, door hardware." (2/24/17 Trans. p.47-48).

Video Surveillance

Respondent submitted six hours of video surveillance. Rx4a-e. The surveillance takes place over a two day period when Petitioner is working for the Respondent. Petitioner is observed appearing to limp around to the other side of his truck, standing and walking around, using a cutting tool, a drill, a caulking gun and operating a lift. The Arbitrator notes that anything involving glass moving, installing and lifting was done witht the aide of a coworker. He is also observed taking a break, getting up in a slow fashion, limping somewhat and then laying down.

CONCLUSIONS OF LAW

ISSUE (L), (O) What is the nature and extent of the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The parties do not dispute that Petitioner sustained accidental injuries to the lower back/lumbar spine arising out of and in the course of his employment with Respondent on August 22, 2014. Nor do the parties dispute that Petitioner's current condition of ill-being, which resulted in permanent work restrictions, is casually related to this accident. There is also no dispute that Petitioner's permanent restrictions prevent him from performing all of the normal work duties of an ornamental ironworker, as Respondent is accommodating Petitioner's work restrictions. The dispute as to nature and extent centers over whether Petitioner's injuries entitle him to an award under Section 8(d)(1) or Section 8(d)(2).

There is no dispute that Petitioner suffered a work related injury within the meaning of the Act. There is also no dispute that he has permanent restrictions as a result of his work related injury. There is little dispute that the restrictions prevent him from performing all of the duties of an ornamental ironworker. The issue is whether the appropriate award is under 8(d)(1) or 8(d)(2) of the Act. The Arbitrator concludes the Petitioner has proven by a preponderance of the evidence that he is entitled to a wage differential award under Section 8(d)(1) because he has suffered an impairment of his earning capacity that prevents him from fully returning to his usual and customary work as a union ornamental ironworker.

Jackson Park Hospital noted that once the claimant proves that he has sustained a disability, the question of compensation under Section 8(d) arises. *Jackson Park Hospital v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 142431 WC ¶ 39. Here, the parties do not dispute Petitioner has sustained a disability as a result of his low back injury. The Supreme Court has expressed a preference for wage-differential awards. *Id.* (citing *Gallianetti v. Indus. Comm'n*, 315 Ill. App 3d 721, 727, 734 N.E. 2d 482, 487 (2000)). The purpose of a wage differential award under section 8(d) (1) is to compensate an injured claimant for his reduced earning capacity. *Id.*

Under Section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is partially incapacitated from pursuing his usual and customary line of employment and (2) there is a difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he is earning or is able to earn in some suitable employment or business after the accident. 820 ILCS 305/8(d)(1) (West 2012), *Id.* at ¶ 40. Here, Petitioner has met both prongs of this test.

Q-Dex On-Line
www.qdex.com
19IWCC0070

First, Petitioner is partially incapacitated from pursuing his usual and customary employment as a union ornamental ironworker. Whether a claimant has sustained an impairment of earning capacity cannot be determined simply by comparing pre and post injury income. *Id.* at ¶ 45. The analysis requires consideration of other factors, including the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market. Here, Petitioner's undisputed FCE found Petitioner unable to return to his regular job. The FCE's job description used was not seriously challenged by Respondent. In addition, Petitioner's permanent restrictions were of the type that needed to be accommodated by Respondent and in fact were for some time prior to Babat's initial vocational evaluation. Px7, Rx1. Petitioner's partial incapacitation is also supported by vocational counselor Boyd, who credibly and persuasively testified that Petitioner does not have access to his former employment as his restrictions prevent him from full performance of those duties. Moreover, Respondent's initial vocational assessment and labor market survey conducted by Babat conceded that Petitioner's access to his local labor market did not include his usual and customary employment. Rx1. Babat's second survey came only after Petitioner obtained accommodated employment with Respondent and Babat then included ironworker jobs in that survey. Rx2. The second survey did not include union ironworker jobs and instead only included non-union ironworker jobs. Babat conceded that nothing had changed in terms of Petitioner's restrictions from her first report to her second report. Babat's second report also came several weeks before trial. Respondent asserts that Petitioner is not partially incapacitated from his usual and customary employment. However, that Respondent is accommodating a restriction in the first place suggests that Petitioner cannot fully perform his usual and customary employment duties. In addition, Respondent's surveillance videos show several instances where Petitioner is visibly seen with difficulty in getting up or rising and with some limping. Petitioner is observed laying down during a break at one point. In the Arbitrator's assessment of this evidence, this supports the conclusion that Petitioner cannot fully perform his job as a foreman ironworker. The Arbitrator also notes that Thompson credibly explained, as did Lang, that foreman are working foreman and need to perform on the job. In the videos, Petitioner is observed receiving assistance when lifting glass and performing less work that that described in Babat's labor market survey for similar positions. Rx2. The Arbitrator also notes Petitioner's employment with Respondent is essentially part time based upon the wages submitted. Px7. The foregoing, along with the record as a whole, is sufficient to show that Petitioner has suffered an impairment of earning capacity.

Second, the difference in Petitioner's earnings are readily demonstrated in both Boyd and Babat's first reports, which highlighted a reduced earning capacity in non-ironworker positions. In addition, Petitioner's post-injury employment scheme, while at the same or better hourly rate, is essentially part-time thereby creating a difference in pre- and post-injury earnings. And although he continues to hold the title of foreman, Petitioner's job duties and evidenced on video do not show him to be a working foreman, as noted to be required by both Thompson and Lang. The video depicts mostly hand tool work with assistance in most lifting activities. The Arbitrator concludes that Petitioner's post-injury earnings fail to reflect his true earning capacity. Respondent asserts that Petitioner should not be entitled to a wage differential award because he has returned to his same position and at the same rate. However, income and capacity are not synonomous. *Id.* at ¶ 50.

Petitioner is a 57 year old high school graduate with minimal transferable skills. Each of the vocational counselors concede that Petitioner's permanent restrictions prohibit him from being an ironworker. Petitioner's restrictions do not meet the stated job requirements identified in either the pre-printed job descriptions provided by the union or the job requirements identified in the FCE. Neither Respondent's nor Petitioner's certified vocational counselor contested these job requirements. Moreover, the Respondent's vocational counselor did not offer union ironworker jobs in her analysis.

In awarding 8(d)(1) benefits, the Arbitrator elects to adopt the analysis conducted by Boyd and the analysis conducted by Babat in her first report. The average wage Petitioner could earn based on Mr. Boyd's

analysis was $14.17 an hour. The average wage Petitioner could earn based on Babat's first analysis was $15.00 an hour. Babat's second analysis was flawed and not applicable. The current hourly rate for a journeyman ironworker is $45.75 according to Thompson. Respondent shall pay Petitioner permanent partial disability benefits, commencing **2/24/2017**, of **$820.00/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.

ISSUE (J) ***Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?***

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner offered into evidence Petitioner's Exhibit Number 3, a medical bill itemization from Loyola University Medical Center, and claiming entitlement to $50.88 in outstanding medical expenses. The Arbitrator has reviewed the exhibit and notes the charges at issue stem from a December 17 2015 date of service with Dr. Brent Scott Rieger. (PX 3, p.16) The exhibit further shows the charges associated with Petitioner's treatment with Dr. Ghanayem through March 12, 2015 had a zero balance. As there is no medical evidence to show the December 17, 2015 date of service was related to the accidental injury, the Arbitrator finds the $50.88 balance is not related and the bill is denied.

Signature of Arbitrator

5-11-2017
Date

Q-Dex On-Line
www.qdex.com

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kristin Roeing,

Petitioner,

vs. NO: 13 WC 2673

Mannheim School District #83,

Respondent.

18IWCC0762

DECISION AND OPINION ON REVIEW

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

The Arbitrator concluded Petitioner sustained a 4% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act. The Commission agrees with the permanence determination but believes a more detailed explanation of the relevance and weight placed upon factors is necessary to satisfy the requirements of Section 8.1b. *820 ILCS 305/8.1b(b)* (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶ 52, 56 N.E.3d 1101.

Section 8.1b(b)(i) – level of impairment

Dr. Lami provided a 0% impairment rating based upon the 6th Edition AMA Guidelines. RX3. The level of impairment is not solely determinative of an award of permanent partial

Q-Dex On-Line
www.qdex.com

disability and must be weighed with the other four factors. Such factor is relevant in assessing Petitioner's ongoing disability. The Commission finds this weighs in favor of a decreased permanence.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner sustained injury while performing her duties as an early childhood autism teacher. Following her injury, Petitioner returned to work in her full capacity as an early childhood autism teacher. Her job duties require her to physical interact with students who may become combative at times. The Commission finds this weighs in favor of an increased permanence.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 28 years old on the date of accident. The Commission observes Petitioner is still relatively young, has many work-years ahead of her, and will therefore have to deal with the effects of her injury for a longer period of time. The Commission finds this weighs in favor of an increased permanence.

Section 8.1b(b)(iv) – employee's future earning capacity

Petitioner returned to work in her pre-injury occupation. No evidence was presented that Petitioner's wages or her earning capacity was affected by the injury she sustained. The Commission finds this weighs in favor of a decreased permanence.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Following her injury, Petitioner underwent a course of physical therapy as well chiropractic treatments. PX1. Despite such treatments, Petitioner continued to experience pain requiring her to undergo facet joint injections. Following the injections, Petitioner's pain decreased significantly and was manageable. PX3. Petitioner testified she continues to experience periodic flare-ups of pain. T. 18-19. The Commission finds this weighs in favor of an increased permanence.

The Commission finds Petitioner sustained a 4% loss of use of the person as a whole pursuant to Section 8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's October 2, 2017 decision, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable, necessary and related chiropractic expenses to Dukane Chiropractic Rehab for treatment of Petitioner's low back from October 19, 2012 through November 18, 2012 pursuant to

Q-Dex On-Line
www.qdex.com

§8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act. Respondent shall receive credit for payments of $5,917.28 made to Dukane Chiropractic Rehab. Respondent shall also pay the reasonable, necessary and related medical expenses to the following providers: $1,700.00 to American Diagnostic MRI; $20,260.00 to Aiden Center for Day Surgery; $875.00 to Oak Brook Anesthesiologists, Ltd.; $372.00 to Pain Care Specialists; pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $647.18 per week for a period of 20 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 4%.

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

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: DEC 12 2018
LEC/maw
o10/24/18
43

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Joshua D. Luskin

Charles J. DeVriendt

Q-Dex On-Line
www.qdex.com

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROEING, KRISTIN
Employee/Petitioner

Case# **13WC002673**

MANNHEIM SCHOOL DISTRICT#83
Employer/Respondent

18IWCC0762

On 10/2/2017, 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 1.17% 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:

4103 GRAVLIN, MICHAEL J LLC
JAKUB BANASZAK
134 N LASALLE ST SUITE 2020
CHICAGO, IL 60602

0863 ANCEL GLINK
ERIN BAKER PELL
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

Q-Dex On-Line
www.qdex.com

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

Kristin Roeing
Employee/Petitioner

v.

Mannheim School District #83
Employer/Respondent

Case # 13 WC 02673

Consolidated cases:

18IWCC0762

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 **Michael Glaub**, Arbitrator of the Commission, in the city of **Chicago**, on **7/26/17**. 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 _____

Q-Dex On-Line
www.qdex.com

FINDINGS

On 9/25/12, 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.

In the year preceding the injury, Petitioner earned $56,089.36 the average weekly wage was $1,078.64

On the date of accident, Petitioner was 28 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 $5,917.28 for other benefits (payments to Dukane Chiropractic Rehab, Ltd), for a total credit of $5,917.28.

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

ORDER

Respondent is responsible and shall pay the necessary medical services, pursuant to the medical fee schedule, for the petitioner's chiropractic treatment from October 19, 2012 through November 18, 2012 (after a credit of $5,917.28 for prior payments is applied) to Dukane Chiropractic Rehab, Ltd. Respondent is responsible and shall pay the necessary medical services of the following medical providers pursuant to the Illinois Medical fee Schedule at costs not to exceed: $1,700.00 to American Diagnostic MRI; $20,260.00 to Aiden Center for Day Surgery; $875.00 to Oak Brook Anesthesiologists, Ltd.; and $372.00 to Pain Care Specialists, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $647.18/week for 20 weeks ($12,943.60), 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

October 2, 2017
Date

OCT 2 - 2017

Q-Dex On-Line
www.qdex.com

Kristin Roeing v Mannheim School District #83
13 WC 2673

FINDINGS OF FACT

The issues in dispute in this matter are: 1) causal connection; 2) medical bills; and 3) the nature and extent of Petitioner's injury.

Accident and Treatment

Petitioner Kristin Roeing (hereinafter "Petitioner") is employed by Respondent Mannheim School District #83 (hereinafter "Respondent"), and has been for about eight years, including the date of the accident, September 25, 2012. The parties stipulated to an average weekly wage of $1,078.64. At the time of the accident, Petitioner was a 28 year old single female with no dependent children under the age of 18.

Petitioner testified that on September 25, 2012 she was working as an early childhood autism teacher for Respondent. She was a newer teacher at the time, having worked less than two years at this school. Her duties involved various tasks associated with teaching, helping, and caring for autistic students throughout the school day.

Petitioner testified that on September 25, 2012 she was outside on the blacktop with some students for recess. As recess was ending, Petitioner attempted to bring one of the students back inside to the classroom. The aide who was usually assigned to this student was not present on this day. As Petitioner was holding the student's hand, the student began resisting and threw himself to the ground, yanking Petitioner's arm and body down in the process. Petitioner testified that she immediately felt pain in her lower back. Petitioner also testified that she had never felt pain in her back like this prior to this incident.

Petitioner sought treatment with her primary care physician, Dr. Steven Rittman, on October 18, 2012 and complained of low back pain which had persisted for three weeks (since September 25, 2012, the date of the accident) (Rx. 4).

Physical Therapy and Chiropractic Treatments – DuKane Chiropractic

At the advice of her primary care physician, Petitioner sought chiropractic treatment at Dukane Chiropractic with Dr. Allan Kirchner-Gomez. (Px 1). Her initial evaluation was on October 19, 2012. (Px 1). Dr. Gomez noted that Petitioner presented with the following symptoms "due to a work related injury: constant pain in low back, sharp pain localized in right lumbar and left lumbar, shooting pain into lower right lumbar area, right posteriolateral upper thigh, right posterolateral thigh, right popliteal region, right calf, right gluteal area, and right coccyx region." (Px 1). On examination, Dr. Gomez noted "vertebral fixation and restricted joint function at C4, C6-C7, T3-T5, T9-T10, L3-L5, increased intensity of pain at C4, C6 to C7, T3 to T5, T9 to T10, L3 to L5, and the right ilium bilaterally was elicited on examination of the spine". (Px 1). Dr. Gomez recommended that Petitioner come in for physical therapy and chiropractic treatments four times a week. (Px 1). Petitioner began regularly treating with Dr. Gomez for the

Q-Dex On-Line
www.qdex.com

next few months to treat her low back pain. (Px 1). Treatments which Petitioner underwent at Dukane Chiropractic included: interferential current therapy, placement of refrigerated gel packs on Petitioner's back (cryotherapy), various spinal manipulations and adjustments and manual therapies. (Px 1). Petitioner was also given a back brace and a TENS unit to use at home. (Px 1).

Dr. Gomez recommended that Petitioner attain an MRI of her lumbar spine, which she did on October 22, 2012. (Px 2). The MRI as read by the radiologist showed "central protrusion, L5-S1 with disc bulging, L4-L5". (Px 2).

Petitioner continued to treat with Dr. Gomez at Dukane Chiropractic; however her response to treatment was slower than Dr. Gomez expected. (Px 1; p53). A month into the treatment, Petitioner rated her low back pain as a 4 out of 10. (Px 1; p19). Two months into the conservative treatment, Petitioner's low back pain was still constant and described as "stiffness with dull and achy pain generalized in the right lumbar, left lumbar, right sacroiliac area, left sacroiliac area, right lower lumbar area, and right sciatic region". (Px 1; p31). Petitioner's back pain actually began to get worse in January of 2013, and she elected to undergo lumbar facet joint injections. (Px 5; Px 1).

Petitioner testified that she continued to receive physical therapy and chiropractic treatments with Dr. Gomez for a few weeks following the injection, and that the treatments were beneficial). Petitioner last treated with Dr. Gomez on April 29, 2013, at which point she was discharged from care. (Px 2).

Pain Management – Dr. Morgan and Dr. Jain

Petitioner sought treatment with pain care specialist Dr. Christopher Morgan on October 24, 2012, about a month after the injury she sustained at work. (Px 5). Petitioner relayed her work accident history to Dr. Morgan, and explained that her low back pain had not subsided over the previous month. (Px 5). Her low back pain was severe at times, caused her to lose sleep, and increased with any prolonged walking, sitting, and bending. (Px 5). Petitioner was experiencing low back pain traveling to the right and left buttocks area, and she denied any prior history of similar type of symptoms. (Px. 5). At this time, Petitioner was working modified duty, avoiding any lifting more than ten pounds and avoiding bending. (Px 5). On physical examination, lumbar range of motion was moderately to severely limited in flexion and extension in both the right and left. (Px 5). Straight leg raising on both the right and the left were positive for low back and buttocks pain ipsilaterally. (Px 5). Dr. Morgan discussed treatment options including lumbar epidural steroid injections; however Petitioner did not want to consider any injections at this time. (Px 5). Dr. Morgan recommended that Petitioner continue treating with Dr. Gomez, and reevaluate in a few weeks. (Px 5).

Petitioner followed up with Dr. Morgan on January 1, 2013 after the pain in her low back had not subsided. (Px 5). Petitioner relayed that she continued to experience low back pain with part of her pain extending up to her mid back, and no recent leg pain or paresthesias. (Px 5). She reported increased pain especially with sitting and bending, and that she recently sneezed which caused an increase in her pain. (Px 5). On physical examination, lumbar extension was limited

Q-Dex On-Line
www.qdex.com

both forward flexion and extension causing axial low back pain without leg pain. (Px 5). Dr. Morgan recommended that Petitioner undergo lumbar facet joint injections (Px 5).

Petitioner testified that the pain reached a point in January, that she could not sleep at night, had to stay with her parents, and had to miss a few days of work due to the severity of the pain. Petitioner testified that she did undergo the facet joint injections as recommended by Dr. Morgan. (Px 3). Petitioner underwent bilateral L3-L4, L4-L5, L5-S1 facet joint injections administered by Dr. Neeraj Jain on January 30, 2013. (Px 3).

Petitioner followed up with Dr. Morgan on March 14, 2013 and relayed that she was doing much better with regards to her low back pain. (Px 5). Petitioner was able to function better and able to dress herself now without much difficulty. (Px 5). Her pain was rated as a 1 of 10 on this visit. (Px 5). Petitioner testified that the injection greatly helped improve her pain symptoms.

Petitioner testified that although her back feels better today, she still has flare ups from time to time which require the use of the back brace and TENS unit.

IME - Dr. Klaud Miller

Petitioner testified that she was seen for an Independent Medical Examination by Dr. Klaud Miller on January 2, 2013. (Rx 1). Petitioner testified that she explained her incident at work on September 25, 2012 to Dr. Miller. Dr. Miller authored a report with his findings and opinions regarding Petitioner's work related injury. (Rx 1). He also authored an addendum to his report. (Rx 2). Petitioner denied any previous back trauma, pain, or treatment before the work related injury on September 25, 2012, and relayed her injury wherein she "was escorting a student with autism who dropped suddenly to the floor pulling her arm". (Rx 1). Petitioner relayed that she had missed a couple days of work, that her pain is constant, and that she occasionally has pain at night that wakes her up. (Rx 1). Petitioner relayed that she has pain with essentially all activities and takes Naproxen and Ultram for the pain. (Rx 1). Dr. Miller reviewed Petitioner's medical records as well as an accident report dated October 22, 2012 – relaying the same incident occurring on September 25, 2012. (Rx 1). Dr. Miller opined that Petitioner had undergone reasonable treatment to date, that it was minimally aggressive and marginally successful. (Rx 1). Dr. Miller recommended an "exercise program" to help with Petitioner's back pain. (Rx 1).

In conjunction with his addendum report, Dr. Miller reviewed medical records from Petitioner's primary care physician dating back to 2006. (Rx 2). All of the medical records reviewed were for unrelated medical issues, and there was no mention of any prior back pain or injury. (Rx 2). Dr. Miller opined that Petitioner's back pain may have been caused by a sneeze, and any connection to the work accident in question is "completely speculative". Dr. Miller stated in his report that petitioner told him on January 2, 2013 that she was unimproved. Dr. Miller believed that chiropractic care was appropriate for up to one month on a trial basis. Dr. Miller also believed that as petitioner was not benefiting from the chiropractic therapy, it was not appropriate on a continuing basis. (Rx 2). He also stated that "MMI is not applicable since no injury can be related to the accident". (Rx 2).

Q-Dex On-Line
www.qdex.com

AMA Rating - Dr.Babak Lami

Petitioner underwent another independent medical examination for the purpose of obtaining an AMA rating with Dr. Babak Lami on July 22, 2016. (Rx 3). Dr. Lami reviewed medical records and summarized them in his report in chronological order. (Rx 3). Dr. Lami only reviewed the IME reports and chiropractic records. (Rx 3). Dr. Lami did not review the MRI films or any records from Dr. Jain and Dr. Morgan. (Rx 3). He notes that Petitioner presented with "chronic recurring" back symptoms and relays that she has "degenerative changes" seen on MRI. Petitioner relayed to Dr. Lami that she continues to have intermittent low back pain. (Rx 3). Her back pain episodes "can sometimes be significant and they last for several days to weeks". (Rx 3). Dr. Lami opined that Petitioner fell under Class 0 and was given 0 percent impairment. (Rx 3).

Dr. Jain Narrative Report

Dr. Neeraj Jain authored a narrative report regarding Petitioner's treatment and it's relation to her work accident. (Pet. Ex. 6). Dr. Jain reviewed all of Petitioner's medical treatment and records, including his injection records from January 30, 2013. (Pet. Ex. 6). Dr. Jain opined that all of Petitioner's treatment was completely appropriate, reasonable and of necessary frequency and duration. (Pet. Ex. 6). Dr. Jain also noted that Petitioner's low back pain and symptoms were all directly related to the incident at work on September 25, 2012. Dr. Jain's opinions were based on Petitioner's history, physical examination, imaging studies, and medical records which were provided to him for review. (Pet. Ex. 6).

CONCLUSIONS OF LAW

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

Based upon the testimony of the Petitioner and based upon the medical records, the Arbitrator finds that the petitioner's low back condition is causally related to her accidental injuries of Septemebr 25, 2012. The Arbitrator adopts the medical opinion of Dr. Jain on this issue. (Px 6). Petitioner testified that she had never had previous back pain or any of the symptoms which she experienced following the incident on September 25, 2012. Petitioner testified to the accident at work, and the respondent stipulated to the claimed accident of September 25, 2012. Respondent argues that the chiropractic records make a reference that petitioner had a chronic medical condition that had been exacerbated. However, the respondent offered no medical records that pre-date the accident which contain any mention of back pain or any treatments for back injuries. In fact, the respondent's expert, Dr. Miller reviewed the medical records of the petitioner's primary care provider, AMITA Health which date back to 2006 and states in his narrative report that those records contain no reference to any complaints or treatment for low back pain.

The respondent also argues that petitioner sustained an intervening accident when she sneezed on January 7, 2013 and when she slipped in the shower on January 23, 2103. However, the

Arbitrator notes that the petitioner was receiving active medical care at that time. The petitioner therefore had not reached maximum medical improvement prior to these incidents. There was no evidence presented to show that the intervening incidents changed the nature of the petitioner's underlying low back condition. At best, these incidents could have only exacerbated or contributed to the petitioner's underlying condition and symptoms related to her employment injury of September 25, 2012. *ABF Freight Systems v Illinois Workers' Compensation Commission, 396 Ill. App. 3d 1122, 6 N.E.3d 446, 379 Ill. Dec. 369.*

Based upon all of the above, the Arbitrator concludes that Petitioner's condition of ill-being is causally related to the injury which occurred in the course of Petitioner's employment for Respondent on September 25, 2012.

(J) REASONABLE AND NECESSARY MEDICAL SERVICES AND RESPONDENT'S PAYMENT OF ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES

Dr. Miller opines in his initial narrative report that chiropractic care can be appropriate empiric therapy. Dr. Miller also opines that if a patient does not improve after one month of care, the chiropractic therapy should be stooped (Rx 1). Dr. Miller states in his second narrative report that chiropractic care can be appropriate for up to one month on a trial basis. Dr. Miller notes that the petitioner reported to him that she was unimproved at the time of his examination o fher on January 2, 2013. Therefore, Dr. Miller stated that it was his medical opinion that there was insufficient evidence to substantiate continued chiropractic care. (Rx 2).

Based on the above, the Arbitrator finds chiropractic care from October 19, 2012 through November 18, 2012 was necessary and that the respondent is responsible to pay the charges for those dates of treatment (after a credit of $5,917.28 for prior payments is applied) to Dukane Chiropractic Rehab, Ltd pursuant to the medical fee schedule.

The Arbitrator finds that Petitioner's treatment at American Diagnostic MRI was necessary medical care. Petitioner's low back pain had not subsided for weeks, and Dr. Gomez recommended Petitioner attain an MRI. Petitioner did so on October 22, 2012, less than a month after the accident at work. The MRI revealed a central protrusion at L5-S1 with disc bulging L4-L5. The Arbitrator finds that Respondent is responsible for the $1,700.00 charges owed to American Diagnostic MRI to be paid pursuant to the medical fee schedule.

The Arbitrator finds that Petitioner's treatment at Pain Care Specialists with Dr. Morgan and Dr. Jain was reasonable and necessary, and the $372.00 charges associated with the treatment were reasonable and necessary. Petitioner was referred to a pain care specialist by Dr. Gomez for evaluation and possible pain care management. Dr. Morgan ended up recommending the lumbar facet joint injection which eventually greatly improved Petitioner's low back pain. The Arbitrator finds that Respondent is responsible for the $372.00 charges owed to Pain Care Specialists to be paid pursuant to the medical fee schedule.

The Arbitrator finds that Petitioner's treatment at Aiden Center for Day Surgery where she received the lumbar facet joint injection administered by Dr. Jain and the $20,260.00 charges

Q-Dex On-Line
www.qdex.com

associated with the treatment was necessary medical care. Further, the Arbitrator finds that the anesthesia services provided by Oak Brook Anesthesiologists, Ltd were reasonable and necessary and the $875.00 charges associated with the anesthesia treatment was necessary medical care. After conservative treatment had failed to alleviate Petitioner's low back pain, Dr. Morgan recommended that Petitioner undergo a lumbar facet joint injection. Petitioner followed through on the recommendation, and the injection greatly helped improve her low back pain and placed her on track to pain relief and attaining MMI. The Arbitrator finds that Respondent is responsible for the $20,260.00 charges owed to Aiden Center for Day Surgery and $875.00 owed to Oak Brook Anesthesiologists, Ltd to be paid pursuant to the medical fee schedule.

(L) NATURE AND EXTENT OF THE INJURY

Based upon the medical records and the credible and unrebutted testimony of the Petitioner, the Arbitrator finds that Petitioner has sustained a loss pursuant to section 8(d)(2) of the Act.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating of 0% of use of man as a whole as determined by Dr. Luni, pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (Res. Ex. 3). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. The Arbitrator gives the appropriate 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 an early childhood autism teacher at the time of the accident and that she was able to return to employment in her prior capacity after the injuries she sustained. The Arbitrator notes that Petitioner's injury arose out of and in the course of her employment as an early childhood autism teacher. Her employment does not require much heavy lifting or prolonged physical labor, and she is able to perform her duties proficiently. Because of the foregoing, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was twenty eight years old at the time of the accident. Due to the fact that Petitioner was relatively young, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner can continue to perform her employment related duties, and her future earnings will not be impacted by this accident and injury. Because of the foregoing, 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 that Petitioner's testimony regarding her low back pain and accident are corroborated by the treating medical records. Petitioner was injured in late September, sought treatment several weeks later, and when conservative treatment failed, received a lumbar facet joint injection in January. Petitioner and was released from care in late April 2013, seven months after her accident. Petitioner testified that her lower back feels better

Q-Dex On-Line
www.qdex.com

today, however she continues to have episodes and flare ups of pain in her lower back. Petitioner underwent an MRI on October 22, 2017 which was interpreted by the radiologist to reveal a central protrusion at L5-S1 and a bulge at L4-5.

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 4% loss of use of man as a whole pursuant to §8(d)(2) of the Act, equivalent to 20 weeks of benefits, as a result of the injury she sustained while working for Respondent.

Q-Dex On-Line
www.qdex.com

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

Heriberto Mares,

Petitioner,

19IWCC0053

vs.

No. 12 WC 04403

The Salvation Army,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical care, temporary disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission does not believe an award of penalties and attorney fees is appropriate. Respondent has disputed this claim and questioned Petitioner's credibility from the outset. On review, Respondent explains: "[T]here were reasons to dispute the accident from the beginning. No witnesses confirmed the accident and, in fact, the Petitioner did not call any co-worker to testify. No written accident report was described. The Petitioner was unable to even identify the date of injury weeks afterward. He hired two different attorneys and related two separate dates of accident. It also must be noted that it was discovered while investigating the claim that the Respondent learned that the Petitioner had been using another person's Social Security Number and had none of his own. *** The Respondent also discovered an Accident Report suggesting a

Q-Dex On-Line
www.qdex.com

19IWCC0053

person of the same name, address and Social Security identification injured his back with another employer in 2006." The Commission finds that Respondent had valid reasons to dispute accident and question Petitioner's credibility.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2016, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $239.21 per week for a period of 115 3/7 weeks, from January 20, 2012 through July 22, 2014, 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, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the related medical bills in evidence pursuant to §§8(a) and 8.2 of the Act, but not the costs of non-emergency transportation.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties and attorney fees is vacated.

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

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

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

Q-Dex On-Line
www.qdex.com

19IWCC0053

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.

JAN 28 2019

DATED:
o-12/20/2018
SM/sk
44

Stephen Mathis

David L. Gore

Deborah Simpson

Q-Dex On-Line
www.qdex.com

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

MARES, HERIBERTO
Employee/Petitioner

Case# 12WC004403

12WC030522

THE SALVATION ARMY
Employer/Respondent

19IWCC0053

On 5/12/2016, 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 0.38% 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
GARY A NEWLAND
121 S WILKE RD SUITE 301
ARLINGTON HTS, IL 60005

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

Q-Dex On-Line
www.qdex.com

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK

19IWCC0053

☐ 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)

HERIBERTO MARES,
Employee/Petitioner

Case # 12 WC 04403

v.

Consolidated cases: 12 WC 30522

THE SALVATION ARMY,
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 **MOLLY MASON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **February 16, 2016, and April 18, 2016.** 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. X 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

Q-Dex On-Line
www.qdex.com

19IWCC0053

FINDINGS

For the reasons set forth in the attached decision, the Arbitrator finds that the date of accident was January 11, 2012. The Arbitrator amends the date of accident alleged in the Application in 12 WC 4403 from January 12, 2012 to January 11, 2012 to conform to the proofs.
On the date of accident, 1/11/2012, Respondent *was* operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.
On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.
Timely notice of this accident *was* given to Respondent.
Petitioner's current condition of ill-being *is* causally related to the accident.
In the year preceding the injury, Petitioner earned $12,438.92; the average weekly wage was $239.21. THESE FIGURES ARE BASED ON THE PARTIES' POST-ARBITRATION WRITTEN STIPULATION.
On the date of accident, Petitioner was **28** 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 $28,903.36 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $ **28,903.36**. Arb Exh 1.
Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $**239.21**/week for 115 3/7 weeks, commencing 01/20/12 through 7/22/14, as provided in Section 8(b) of the Act, with Respondent receiving credit for the $28,903.36 in benefits it paid prior to arbitration. As noted in the attached decision, the Arbitrator finds that Petitioner's condition stabilized as of July 22, 2014, the date on which Dr. Bello expressed agreement with Dr. Shapiro's finding of maximum medical improvement.

Medical benefits
Respondent shall pay reasonable and necessary medical services of $531.29 to Concentra, $27,160.12 to Pro Clinics, $2,840.34 to Herron Medical Center, $1,801.46 to Lake Shore Open MRI, $3,589.41 to Delaware Place MRI, $8,530.00 to Alivio PT & Chiro, $112,855.08 to Lake Shore Surgery Center, $330.00 to Dr. Malek and $234.77 to Illinois Bone and Joint, as provided in Section 8(a) of the Act, subject to the medical fee schedule and with credit for any prior payments by Respondent. The Arbitrator declines to award the non-emergency transportation and taxi expenses charged by some of the foregoing providers, for the reasons set forth in the attached decision. The Arbitrator also awards the Injured Workers Pharmacy charges itemized in PX 34, with Respondent receiving credit for the payments reflected both in that document and in RX 11.

Penalties and Fees
For the reasons set forth in the attached decision, the Arbitrator finds that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in delaying the first payment of temporary total disability benefits to March 5, 2013. RX 10. Respondent shall pay to Petitioner attorney fees of **$2,808.90**, as provided in Section 16 of the Act, penalties of **$7,022.26**, as provided in Section 19(k) of the Act; and penalties of **$10,000.00**, the statutory maximum, as provided in Section 19(l) of the Act.

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

Q-Dex On-Line
www.qdex.com

19IWCC0053

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 E Mason

Signature of Arbitrator

Date 5/12/16

ICArbDec19(b)

MAY 12 2016

Q-Dex On-Line
www.qdex.com

Heriberto Mares v. Salvation Army
12 WC 4403 and 12 WC 30522 (consolidated) **19IWCC0053**

Procedural History

On February 6, 2012, Petitioner filed an Application for Adjustment of Claim numbered 12 WC 4403 alleging a work accident of January 12, 2012. On September 4, 2012, via his current counsel, Petitioner filed a second Application for Adjustment of Claim numbered 12 WC 30522, alleging a work-related back injury of January 9, 2012. The cases were subsequently consolidated.

At the hearing, Petitioner testified to only one accident. He was able to pinpoint the week in which this accident occurred but was uncertain about the exact date.

Summary of Disputed Issues

The disputed issues include accident, notice, causal connection, medical, temporary total disability/maintenance and penalties/fees. The Request for Hearing form (Arb Exh 1) does not list prospective care as an issue before the Arbitrator.

Stipulations Reached On April 18, 2016

At the continued hearing, held on April 18, 2016, the parties stipulated to the following: 1) Petitioner deactivated his Facebook page after the initial hearing of February 16, 2016 and reactivated it on April 18, 2016; and 2) with the potential exception of the third functional capacity evaluation, conducted in August 2013, for which Petitioner is not seeking payment, Petitioner did not exceed the choices of physicians/referrals afforded by Section 8(a) of the Act.

Post-Arbitration Stipulation as to Earnings and AWW

At the initial hearing, the parties agreed to earnings of $15,560.00 and an average weekly wage of $299.23. Arb Exh 1. After proofs were closed, they submitted a written stipulation agreeing to earnings of $12,438.92 and an average weekly wage of $239.21. [See April 27, 2016 stipulation attached to Request for Hearing.]

Arbitrator's Findings of Fact

Petitioner testified through an interpreter. He described his English skills as poor.

Petitioner testified he was born on April 14, 1983. He grew up in Mexico. He attended high school there but did not graduate. He worked in his father's office, answering telephones. He spoke in Spanish at this job.

Petitioner testified he left Mexico in 2001. His jobs in the United States have included working for his father, helping a person at a Chicago radio station and working at Respondent. He denied working for anyone after he stopped working at Respondent.

Petitioner denied having any low back problems before his January 2012 work accident. The accident occurred at a Respondent store at some point during the week before Monday, January 16, 2012. He and a co-worker were carrying bags of compressed clothing and piling these bags on top of one another. At the time of the accident, he was lifting one of the bags in the back part of the store. He reported the accident to his shift supervisor within 5 to 10 minutes of the accident. At some point after the accident, a female general manager sent him to Concentra for treatment.

The Concentra records (PX 1) identify "Amy Sahba" as Respondent's contact person. The records reflect that Petitioner saw Dr. Lambos on January 16, 2012. The doctor's note states that Petitioner reported injuring his back on January 11, 2012 while "carrying big packages in the back area" at Respondent's store in Arlington Heights. The note also sets forth another, somewhat more detailed history: "lifted 200-lb. object with co-worker 3 times when he felt some pain sides of low back – has lifted on previous occasions same weight w/out prob." The doctor noted that Petitioner denied falling or striking his back.

Dr. Lambos described Petitioner as taking medication for diabetes. He described Petitioner's past surgical history as negative. On examination, he noted some tenderness bilaterally to the low to middle lumbar musculature, "diffusely w/o assoc findings." He described straight leg raising as negative bilaterally. He described Petitioner's gait as normal and indicated Petitioner was able to walk on his heels and toes. He prescribed Flexeril, to be used only at home and as needed, and Ibuprofen. He released Petitioner to light duty with no lifting, pushing or pulling over 10 pounds, limited bending/twisting, no climbing, kneeling or squatting and no prolonged walking or standing. He directed Petitioner to start physical therapy and return to him later that week.

Dr. Lambos indicated he discussed the foregoing "with night manager." He described Petitioner as having a "fairly good understanding of English" and noted Petitioner's wife translated all of his directions as well. PX 1.

Petitioner underwent a physical therapy evaluation at Concentra the following day, January 17, 2012. The evaluating therapist noted that Petitioner reported injuring his back at 6 PM on January 11, 2012, while "lifting a box of clothes." He noted that Petitioner's duties at Respondent involved carrying furniture and boxes of clothes and that Petitioner denied any history of low back injuries or impairments. On examination, he noted limited forward flexion, extension and rotation. PX 1.

Petitioner returned to Concentra on January 19, 2012 and saw a different physician, Dr. Debra Nelson. The doctor noted that Petitioner rated his back pain at 7/10 and described this pain as worsening. She also noted that Petitioner had attended one therapy session. She

indicated Petitioner was performing light duty but a separate handwritten note states: "no LD at work." On examination, she noted a right lateral shift, bilateral spasms, negative straight leg raising bilaterally in the seated position, with the maneuver producing back pain but no sciatic pain. She also noted normal strength, markedly decreased flexion and extension, tenderness from L1 through L5 bilaterally, a normal gait and negative Waddell's testing. She diagnosed a lumbosacral strain. She prescribed Hydrocodone and continue therapy. She directed Petitioner to stay off work on January 20 and to resume light duty on January 21 with no mopping, no lifting over 10 pounds, no pushing or pulling over 20 pounds, no bending and sitting 50% of the time. She directed Petitioner to return in one week or sooner if he had problems. PX 1.

The Concentra records reflect Petitioner was scheduled to return on January 23rd for therapy and January 26th for a follow-up visit. There is no indication Petitioner returned on either of those dates. PX 1, 2.

Petitioner testified he went to Concentra twice and then began treating elsewhere.

Records in PX 11 reflect Petitioner saw Dr. Barnabas at Alivio Physical Therapy and Chiropractic [hereafter "Alivio"] on January 24, 2012. The doctor's note of that date sets forth a very detailed history of Petitioner's employment, accident and subsequent treatment at Concentra. The history reflects that Petitioner reported having worked at a Respondent thrift store for one year, cashiering, performing maintenance and loading clothes. The history also reflects that, at about 5:30 or 6:00 PM on January 12, 2012, Petitioner and a co-worker named Javier were lifting and moving packages of clothes weighing 250 pounds. Petitioner reported that, when he and Javier moved the third package, he "felt a pain in his lower back causing the package to almost fall."

Dr. Barnabas described Petitioner's past medical history as positive for diabetes. He noted that Petitioner complained of 6-7/10 pain going down the back into both legs, left worse than right. On initial examination, he noted tenderness over the left SI joint and L4-L5, a markedly reduced range of lumbar spine motion, 5/5 strength except for the left toe, which was 4/5, intact sensation and positive straight leg raising and sciatic tension sign on the left.

Dr. Barnabas provided Petitioner with a back brace. He prescribed therapy and a lumbar spine MRI. He took Petitioner off work for one week and directed him to avoid driving and continue taking the medication prescribed at Concentra. PX 11.

On January 26, 2012, Petitioner underwent MRIs of both the thoracic and lumbar spine at Delaware Place MRI. Dr. Shafaie interpreted the thoracic spine MRI as showing multi-level spondylotic changes without any evidence of significant disc protrusion, stenosis or cord compression. He interpreted the lumbar spine MRI as showing a mild disc bulge with no significant stenosis at L4-L5, a 5.3 mm central disc protrusion at L5-S1, with no displacement of the S1 nerve root, facet arthritis of the lower lumbar spine and no acute fracture or significant spondylolisthesis. PX 11.

Petitioner saw a chiropractor, Dr. Bermudez, at Alivio on January 27, 2012. The doctor noted a complaint of 6/10 back pain radiating to the mid back and bilateral gluteal maximus. He also noted that the MRI results were not yet available. He conducted therapy consisting of electrical stimulation, hot packs, massage, mobilization and various exercises. PX 11.

On February 1, 2012, Dr. Bermudez noted persistent low back pain radiating into the buttocks. He also noted a complaint of occasional bilateral leg numbness. He reviewed the MRI results and conducted therapy, using the same modalities described in the preceding paragraph. He indicated that Petitioner would be undergoing pain management. PX 11.

Petitioner saw Dr. Bermudez again on February 3 and 6, 2012, with the doctor noting persistent pain and performing the same therapy. PX 11.

On February 16, 2012, Petitioner saw Dr. Abdellatif at ProClinics. The doctor's note of that date reflects a referral from Dr. Bermudez. The note sets forth a consistent history of the work accident, with Petitioner indicating he experienced a sudden onset of low back pain while lifting a third 250-pound bin with a co-worker. The doctor noted that Petitioner complained of low back pain radiating to both legs, causing tingling and numbness. He also indicated that Petitioner reported a "minimal response to physical therapy and meds." On examination, he noted abnormal reflexes at the ankle bilaterally and multiple trigger points in the cervical and thoracic spine and at S1 bilaterally.

Dr. Abdellatif diagnosed lumbar radiculopathy, lumbar facet SI syndrome and myofacial pain of the thoracic spine. He recommended a lower extremity EMG and a thoracic spine MRI. [There is no indication he reviewed the MRIs performed on January 26, 2012.] He directed Petitioner to "continue physical therapy and meds." PX 3.

Petitioner continued undergoing therapy with Drs. Bermudez and Barnabas thereafter, with these providers consistently documenting 6/10 to 7/10 pain levels through late June 2012. PX 11.

On March 1, 2012, Dr. Abdellatif saw Petitioner again and noted persistent symptoms. On March 2, 2012, he administered an epidural steroid injection and facet blocks at Lake Shore Surgery Center. PX 3.

On March 8, 2012, Dr. Abdellatif noted that Petitioner reported "no relief" from the injection and blocks and complained of falling at the surgery center secondary to bilateral leg weakness. The doctor noted complaints relative to the right hand and right leg. PX 3.

On March 15, 2012, Petitioner underwent another lumbar spine MRI at Dr. Abdellatif's direction. Dr. Kuritza interpreted this MRI as showing a 3-4 mm broad-based posterior disc protrusion/herniation at L4-L5, with no associated stenosis, and a 6-7 mm central posterior subligamentous herniation at L5-S1 "with an extruded nucleus pulposus indenting the ventral

surface of the thecal sac with central stenosis and mild bilateral neuroforaminal narrowing." PX 3.

Petitioner also saw Dr. Abdellatif on March 15, 2012. The note of that date reflects that Petitioner was there for the MRI results and "would like to know why he has bilateral leg weakness." PX 3.

Dr. Abdellatif administered another injection, additional facet blocks and trigger point injections at Lake Shore Surgery Center on March 16, 2012. PX 3.

On March 22, 2012, Dr. Abdellatif noted that Petitioner was "now able to walk and sleep longer" but reported falling again at the surgery center when his legs gave out on him as he tried to get out of bed. PX 3.

On April 2, 2012, Dr. Abdellatif preformed radiofrequency ablation and a third epidural injection. PX 3.

On April 4, 2012, Dr. Barnabas re-evaluated Petitioner and noted that none of the original treatment goals, i.e., decreased pain, increased strength and range of motion and return to light duty, had been met. PX 11.

On April 19, 2012, Dr. Abdellatif noted 30% improvement. He recommended a lumbar CT discogram, another injection and continued medication and therapy. PX 3.

On April 23, 2012, Dr. Abdellatif performed an injection and a four-level discogram. He described the discogram as "concordant with L4-L4, L5-S1 levels discogenic pain." He recommended percutaneous disc decompression at those levels. He directed Petitioner to continue the therapy and medications. PX 3. Dr. Kuritza interpreted the post-discogram lumbar spine CT scan as showing no significant pathology at L2-L3 or L3-L4, a 3-4 mm broad-based protrusion/herniation at L4-L5, with mild spinal stenosis and a 4-5 mm central disc herniation at L5-S1 with central stenosis and mild bilateral neuroforaminal narrowing, greater on the right. PX 3.

On April 27 and May 17, 2012, Dr. Abdellatif noted persistent complaints of constant low back pain radiating to both legs and bilateral leg weakness. PX 3.

On May 21, 2012, Dr. Abdellatif performed a percutaneous discectomy at L4-L5 and L5-S1, another epidural injection and additional trigger point injections. PX 3.

On June 21, 2012, Dr. Bermudez noted persistent lower back pain, rated 6/10. He referred Petitioner to Dr. Salehi for a surgical consultation. PX 11.

There is no evidence indicating Petitioner saw Dr. Salehi.

On June 28, 2012, Dr. Abdellatif noted that Petitioner complained of severe low back pain radiating to both legs and an inability to stand for long periods. He noted that Petitioner planned to see a surgeon. He recommended work conditioning and a functional capacity evaluation. PX 3.

Petitioner saw Dr. Malek on August 3, 2012. The doctor's CV (PX 15) reflects he underwent fellowship training in spine surgery and is board certified in neurosurgery and independent medical examination.

Dr. Malek's note of August 3, 2012 reflects a referral from Dr. Hassan [Abdellatif]. The note sets forth a detailed history of the work accident, with the doctor indicating Petitioner reported his injury to his supervisor the same day, "went to work on Friday with pain" and spoke with his manager, "Amy Sava," the following Monday, with the manager then sending him to Concentra. Dr. Malek also noted that, "in 4 days the pain started progressing down the lower extremities with tingling, numbness and weakness all the way down." He indicated that Petitioner denied any history of previous serious injury or neck or back surgery. He stated that Petitioner "did work after being at Concentra but that is only because the pain was off." He noted that Petitioner failed to respond to the injections administered by Dr. Abdellatif. He reviewed the March 15, 2012 lumbar spine MRI report and noted that Petitioner had undergone a CT discogram.

Dr. Malek described Petitioner as walking with a cane. He noted 7/7 negative Waddell's signs. He indicated that straight leg raising produced back pain.

Dr. Malek diagnosed a resolved lumbar sprain/strain and lumbar radiculopathy. He prescribed bilateral lower extremity EMG/NCV testing. He told Petitioner he wanted to obtain the MRI film and the discogram report before making any surgical recommendation. He directed Petitioner to remain off work and return to him after the EMG. PX 3, 16.

There is no evidence indicating Petitioner returned to Dr. Malek thereafter.

On September 6, 2012, Dr. Abdellatif noted that Petitioner remained symptomatic and was seeking a surgical consultation. He recommended work conditioning and a functional capacity evaluation. He directed Petitioner to remain off work and return in four weeks. PX 3.

On October 16, 2012, Petitioner underwent a functional capacity evaluation at United Rehab Providers. Ahmed Mohamed, PT, DPT performed this evaluation. In his report, Mohamed described Petitioner as putting forth full and consistent effort. He found that Petitioner's job fell into the medium physical demand category and that Petitioner was capable of performing 68.2% of the physical demands of his job. He indicated that "the return to work test items [Petitioner] was unable to achieve . . . include occasional pulling, occasional pushing, walking and total standing." He noted that, during part of the walking test, Petitioner used an assistive device and exhibited a right antalgic gait pattern. PX 3, 24.

On November 1, 2012, Dr. Abdellatif noted that Petitioner remained symptomatic and was pursuing a surgical consultation "pending approval." He recommended work conditioning and released Petitioner to "return to work according to FCE results." PX 3.

On February 21, 2013, Dr. Abdellatif noted that Petitioner remained symptomatic and was still awaiting approval of a surgical consultation. He found Petitioner to be at maximum medical improvement and instructed him to follow up as needed. PX 3.

Petitioner testified he then began a course of treatment with Dr. Shapiro at Illinois Bone and Joint. He testified it was Respondent who referred him to this physician.

Petitioner first saw Dr. Shapiro on March 21, 2013. The note of that date reflects a referral from Petitioner's current counsel. The history reflects that Petitioner lifted something heavy at work on January 12, 2012 and fell. The history also reflects that Petitioner last worked on January 18, 2012.

Dr. Shapiro noted that Petitioner complained of 8-9/10 low back pain radiating to both thighs, left worse than right. He also noted that Petitioner reported undergoing some injections which did not help. He described Petitioner as walking with a cane. On examination, he noted "severe back pain with attempted straight leg raising bilaterally." He reviewed films and reports concerning a lumbar spine MRI and CT discogram.

Dr. Shapiro described Petitioner as "significantly limited by his level of pain" and deriving ineffective relief from various conservative measures. With Petitioner's uncle acting as a translator, Dr. Shapiro recommended a two-level fusion to address L4-L5 and L5-S1. He indicated Petitioner expressed a desire to discuss the proposed surgery with his attorney and family members. PX 20.

Dr. Shapiro wrote to Petitioner's current counsel on March 21, 2013 and addressed causation as follows: "[Petitioner's] history, physical exam and imaging studies document a permanent aggravation of a pre-existing asymptomatic degenerative condition of L4-L5 and L5-S1." PX 20.

Petitioner returned to Dr. Shapiro on May 7, 2013. The doctor noted that Petitioner remained symptomatic and was still walking with a cane. Through a translator, he again recommended a two-level fusion. He indicated he anticipated Petitioner would reach maximum medical improvement nine months following this surgery. PX 20.

On August 12, 2013, Petitioner underwent a pre-operative evaluation, with a nurse practitioner noting that he reported taking Melformin for his diabetes and significantly cutting back on his cigarette smoking during the previous two years. PX 22.

Dr. Shapiro operated on Petitioner at Evanston Hospital on August 14, 2013. Petitioner was started on Morphine and Norco postoperatively. On August 15, 2013, Petitioner saw Dr.

Boatwright in consultation for diabetes management, with the doctor noting elevated blood sugar levels postoperatively. On August 16, 2013, Petitioner underwent an occupational therapy evaluation, while using a rolling walker. The therapist indicated it would not be safe to discharge Petitioner since he was in pain and reported living in a 3-story apartment with no elevator. She recommended gait training. On August 17, 2013, Petitioner underwent a lumbar spine CT scan due to persistent post-operative leg pain. The scan demonstrated post-operative changes. The radiologist described the hardware as intact but indicated one screw had a "partially extra pedicular course" and another screw had "its tip extending just lateral to the lateral margin of the L5 vertebral body on the right." The radiologist also noted a non-specific soft tissue density in the inferior aspects of L4-L5 and L5-S1. He could not exclude recurrent right L4-L5 and L5-S1 foraminal disc protrusions. PX 22.

At the first post-operative visit, on August 21, 2013, Dr. Shapiro met with Petitioner, Petitioner's father and uncle and Norma Slimmer, RN, a medical case manager. He noted that Petitioner reported checking his sugar levels at home. He also noted that Petitioner complained of persistent back discomfort and moderate discomfort in both anterior thighs. He removed the surgical staples and noted negative straight leg raising bilaterally. He obtained lumbar spine X-rays, which showed excellent position of the fusion implants. He ordered a repeat lumbar spine MRI. On preliminary reading of the MRI film, he saw no evidence of an epidural hematoma. He prescribed Lyrica and Oxycontin, in addition to the Norco, and directed Petitioner, via Petitioner's uncle, to stay off work and remain in touch with his office. He indicated he provided "all appropriate paperwork" to Petitioner and Ms. Slimmer. PX 20.

The repeat lumbar spine MRI report of August 21, 2013 reads as follows: "post-operative findings with attempted fusion L4 through S1. There is suggestion of central and right paramedian protrusion at the L5-S1 level but without significant mass effect. This may also represent fibrosis, follow-up study with gadolinium would be helpful in this differential." PX 20.

At the next post-operative visit, on September 5, 2013, Dr. Shapiro met with Petitioner and some of his family members. He noted that Petitioner had originally been scheduled to return one week earlier. He noted that Petitioner complained of persistent low back pain and intermittent leg pain, worse on the right. He also noted that Petitioner "has the perception that he has weakness in the right leg."

Dr. Shapiro described Petitioner as using a walker to ambulate. On examination, he noted well-healed incisions and negative straight leg raising bilaterally. He obtained various lumbar spine X-rays and interpreted the films as showing no changes in the position of the surgical hardware.

Dr. Shapiro assessed Petitioner as having a "persistent high level of pain in the lumbar spine with intermittent pain in both legs following lumbar fusion." He recommended another MRI, to be performed with and without contrast. He prescribed Zanaflex. He attributed Petitioner's ongoing symptoms to the "relatively large" size of the procedure and to his "poorly controlled diabetes," which he felt was slowing Petitioner's recovery. He indicated he was

reluctant to prescribe any steroids due to this condition. He referred Petitioner to pain management. PX 20.

Petitioner went to Evanston Hospital's Emergency Room on September 6, 2013, complaining of persistent post-operative right leg pain and four days of numbness below the knee to the ankle. An orthopedic resident noted that Petitioner's pre-operative leg pain was worse in the left leg but that now he seemed to have greater problems with his right leg. She described her examination as "limited by effort." Petitioner was admitted to the hospital and underwent an MRI and CT scan to check the surgical hardware. Petitioner was discharged on September 7, 2013, with Dr. Shapiro indicating the MRI did not show an epidural hematoma and the CT was still pending. PX 20.

On September 24, 2013, Dr. Shapiro met with Petitioner, a family member, a translator and Norma Slimmer, RN, a medical case manager. He indicated that Petitioner was still experiencing low back and left leg pain as well as right leg numbness. He also indicated that the post-fusion CT and MRI scans showed "appropriately placed hardware and the absence of any infection, hematoma or fluid collection." He described Petitioner as relying on a walker. He recommended that Petitioner stay off work, start therapy and see Dr. Bello for pain management. PX 20.

Petitioner underwent an initial physical therapy evaluation at Accelerated Rehabilitation on September 25, 2013. The evaluating therapist, Phillip Gonzalez, PT, MPT [hereafter "Gonzalez"], recorded a consistent history of the work accident and noted complaints of "pain with all positions that does not vary with activity" and numbness and weakness in the left leg. He described Petitioner as using a rolling walker to ambulate. He stated that Petitioner's reports of "high and unvaried pain . . . could be a limitation to physical therapy." He described Petitioner's rehabilitation potential as fair.

On October 4, 2013, Dr. Shapiro's nurse contacted Petitioner for an update. She noted that Petitioner had attended five therapy sessions to date and stated he felt worse after each session. Dr. Shapiro placed therapy on hold and scheduled Petitioner to see Dr. Bello for pain management. PX 20.

Petitioner first saw Dr. Bello on October 15, 2013. The doctor recorded a history of the work injury and subsequent two-level fusion. He indicated that the fusion "resolved much of [Petitioner's] symptoms" but did not resolve his low back pain. He noted Petitioner was still relying on a walker. On examination, he noted significant tenderness around the incision site with significant paraspinal spasms and negative straight leg raising. He diagnosed "postlaminectomy syndrome, likely multi-factorial." He continued the Norco and increased the OxyContin and Lyrica. He indicated he discussed his findings with a medical case manager. PX 20.

On October 29, 2013, Dr. Shapiro described Petitioner as "slow to change positions during the examination" and requiring "motivation in order to give full motor effort." He

recommended that Petitioner transition from a walker to a four-pronged cane. He also recommended that Petitioner consider an epidural injection and restart therapy after returning to Dr. Bello. PX 20.

On December 16, 2013, Kim Stewart of Chesterfield Services sent Acclerated Rehabilitation an E-mail authorizing a six-week course of physical therapy. PX 25.

In a therapy progress note dated December 15, 2013, Gonzalez noted he had last seen Petitioner on October 2, 2013. He indicated that therapy had been stopped at that time due to Petitioner's pain symptoms. He described Petitioner as demonstrating "positive Waddell's signs for symptom magnification and unreliable pain reports without clinical objective findings." PX 20, pp. 307-308 of 342. PX 25.

On December 26, 2013, a different therapist, Snehal Patel, PT, MPT [hereafter "Patel"], noted that Petitioner complained of increased pain and was still "heavily guarded" during passive stretching and walking. PX 25.

On December 30, 2013, Dr. Bello administered an epidural steroid injection. PX 20.

On January 7, 2014, Patel described Petitioner as reporting minimal change from the injection. He noted that Petitioner walked with a hunched over gait and continued to use a quad cane. PX 25.

On January 9, 2014, Gonzalez noted that Petitioner described the injection as "having no effect." Gonzalez described Petitioner as demonstrating "atrophy deficits secondary to self-limiting behaviors." PX 25.

On January 13, 2014, Gonzalez issued a physical therapy report indicating that Petitioner demonstrated 4/5 positive Waddell's signs "for symptom magnification and unreliable pain reports without clinical objective findings." He also indicated Petitioner scored 90% on the Oswestry Low Back Questionnaire, suggesting Petitioner was either bedbound or exaggerating his complaints. PX 25.

On January 15, 2014, Dr. Shapiro noted that Petitioner denied improvement secondary to the epidural steroid injection. He also noted that Petitioner was still using OxyContin, Norco and Lyrica. He indicated he reviewed physical therapy notes "where there was some concern about Waddell signs." He described Petitioner as continuing to rely on a four-pronged cane. He prescribed a lumbar spine CT scan and directed Petitioner to continue attending therapy and seeing Dr. Bello. PX 20.

Respondent offered into evidence a Millennium Laboratories medication screening report dated February 26, 2014 reflecting "inconsistent results" in that the screening was negative for a reported medication, Oxycontin. RX 8.

On February 28, 2014, Dr. Bello's nurse noted the inconsistent toxicology screening results and indicated that the doctor had ordered a functional capacity evaluation. PX 20.

In a therapy discharge summary dated March 7, 2014, Gonzalez noted that Petitioner had not participated in therapy since January 27, 2014 and that therapy had been placed on hold "per patient" on January 30th. Gonzalez also noted that Petitioner had last been evaluated on January 10, 2014 "with inconsistent pain limiting factors and questionable performance in physical therapy." PX 25.

At Respondent's request, Petitioner submitted to a Section 12 examination by Dr. Hsu on April 7, 2014. The doctor's letterhead reflects he is affiliated with the department of orthopedic surgery at Northwestern University.

Dr. Hsu indicated he reviewed records from Concentra, Alivio, Herron Medical Center, Dr. Shapiro, Accelerated Rehabilitation and Dr. Bello in connection with his examination.

Dr. Hsu indicated that Petitioner reported deriving no relief from the fusion or post-operative injections. He also indicated that Petitioner described his low back and leg symptoms as the same as they were before the fusion.

Dr. Hsu described Petitioner as appearing to be in no acute distress but flexing forward when he initially walked into the examination room. On range of motion testing, he noted 40 degrees of flexion, 20 degrees of extension and 20 degrees of lateral rotation to the left and right. He described straight leg raising as negative in the sitting and supine positions. He noted "positive Waddell signs with axial compression, supersensitivity, hip rotation and distraction 4/4.". He also noted 4+/5 strength in both legs in all muscle groups.

Dr. Hsu indicated he reviewed the lumbar spine MRI of March 15, 2012 and the lumbar spine CT scan of January 27, 2014. He described the MRI as showing severe degenerative disc disease at L4-S1 with evidence of Modic changes at L4-L5. He interpreted the CT scan as showing excellent positioning of the cages and screws, "incomplete bony healing across the L4-L5 and L5-S1 disc spaces," interval bony consolidation and "no evidence of screw loosening or adjacent segment degeneration."

Dr. Hsu diagnosed lumbar spondylosis at L4-S1, following a two-level fusion, lumbar pseudo-arthrosis and myofascial pain syndrome. He did not believe that Petitioner's current pain stemmed from the pseudo-arthrosis shown on the CT scan since that scan was performed only six months after the fusion. He did not believe the scan showed any gross instability at the level of the surgery.

Dr. Hsu opined that the medical treatment to date "has been reasonable and necessary." He viewed Petitioner as experiencing a less than ideal recovery from this treatment. He noted that individuals of Petitioner's age who have his diagnosis "do not tend to have quick and painless recoveries." He did not believe that any pre-existing co-morbid

condition contributed to Petitioner's post-operative course. He opined that the positive Waddell's signs "suggest a psychosocial component to [Petitioner's] low back pain."

Dr. Hsu found Petitioner to be at maximum medical improvement for the work injury. With respect to the myofascial pain syndrome, which he did not link to the work injury, he recommended epidural injections and physical therapy. He also indicated Petitioner might be a candidate for a revision fusion but not in the immediate future. He stated that there was still time for further healing within one year of the fusion. He viewed Petitioner as a good candidate for a functional capacity evaluation. He stated that, if this evaluation was valid, he would recommend restrictions, but if it was invalid, he would find Petitioner capable of full duty. RX 1.

Respondent offered into evidence a Millennium Laboratories medication screening report dated May 8, 2014 that showed inconsistent results in that Hydrocodone, Norhydrocodone and Hydromorphone were detected "but could not be matched to any of the reported prescriptions." RX 9.

On June 23, 2014, Petitioner underwent a second functional capacity evaluation at Accelerated Rehabilitation Centers. A registration form in PX 25 reflects that Chesterfield Services authorized the evaluation. The report describes Dr. Shapiro as the referring physician. The evaluator was Phillip Gonzalez, the same individual who had administered therapy to Petitioner postoperatively. Gonzalez concluded that Petitioner demonstrated consistent effort through only 57.9% of the evaluation. He found this suggestive of "significant observational and evidence-based contradictions resulting in consistency of effort discrepancies, self-limiting behaviors and/or sub-maximal effort." He concluded that the overall results of the evaluation did not truly or accurately represent Petitioner's physical capabilities. He described Petitioner's pain reporting as 95% unreliable. He stated that Petitioner demonstrated the ability to perform 35.6% of the physical demands of his store clerk job and that he needed to be able to function at a medium physical demand level in order to be able to perform that job. He indicated that a formal job description was available. [Such a description, describing a "thrift store clerk" job at the Salvation Army, appears in PX 25. The physical demand section reflects that the employee is required to stand, use hands, walk frequently, reach with arms and hands, stoop, kneel, crouch, regularly lift and/or move up to 10 pounds, frequently lift and/or move up to 25 pounds and occasionally lift and/or move up to 50 pounds.]

Petitioner returned to Dr. Shapiro on July 10, 2014. In his note of that date, the doctor indicated that Petitioner was accompanied by his father and the medical case manager, Norma Slimmer. The doctor also indicated that he reviewed the results of the June 23, 2014 functional capacity evaluation with Petitioner "in detail." He recommended that Petitioner be placed at maximum medical improvement "from a non-operative standpoint" and he gave Petitioner a note indicating he could lift up to 10 pounds. He again recommended an anterior and posterior reconstruction "to revise the L4-S1 fusion that has gone on to non-union." He noted that Petitioner was still seeing Dr. Bello and continuing to use Fentanyl patches and Lyrica. He also noted that Petitioner "does not feel that he is getting any better and that his pain level is 7/10

most times." He described Petitioner as limping and using a 4-pronged cane. He noted 4/5 strength in the right leg and described Petitioner as "extremely limited in his ability to change positions." In an addendum, also dated July 10, 2014, he indicated that Petitioner's "chief complaint remains severe low back pain as well as radiating pain in his left leg and numbness in his right leg." He indicated Petitioner could return to him on an "as needed" basis. RX 12.

On July 22, 2014, Dr. Bello noted that Petitioner was still experiencing fairly significant pain as well as nausea secondary to use of Duragesic patches. He discontinued the patches and started Petitioner on Exalgo. He also indicated Petitioner "did seek a second opinion who suggested hold off on any surgery at this time in favor of progressive physical therapy." [No such opinion is in evidence.] He described urine testing as "negative for opiates." He discussed Petitioner's case with Dr. Shapiro and expressed agreement with Dr. Shapiro's finding of maximum medical improvement. PX 20.

Respondent discontinued the payment of temporary total disability benefits on July 31, 2014. RX 10.

Petitioner underwent a third functional capacity evaluation at Athletico on August 19, 2014. The report describes Dr. Shapiro as the physician recommending this evaluation. The evaluator, Jacquelyn Hendrix, described Petitioner as putting forth "near full levels of physical effort." She indicated the findings suggested the presence of "minor inconsistency to the reliability and accuracy of [Petitioner's] reports of pain and disability." Specifically, she indicated that, based on his responses to the Oswestry Low Back Disability Questionnaire and Lower Extremity Functional Scale, Petitioner would be rated "crippled" and "bedbound/exaggerating symptoms." She also noted 5/7 positive Waddell's signs.

Hendrix found Petitioner to be performing at a sedentary physical demand level. She relied on the "stock clerk" description in the Dictionary of Occupational Titles as well as Petitioner's description of his former duties in concluding that Petitioner did not meet the demands of the job he performed at Respondent. She rated that job as heavy. She described Petitioner as walking with a small based quad cane and failing to meet the job demands for "carrying, standing, climbing, balancing, stooping, crouching, squatting or twisting/spinal rotation." She noted that Petitioner attributed the cane usage to balance issues and "did demonstrate difficulties when performing dynamic balancing activities where stand-by assistance and occasional contact guard was required to prevent a loss of balance." PX 28.

On August 21, 2014, Petitioner's counsel sent a letter to Respondent's counsel enclosing the August 19, 2014 functional capacity evaluation and asking Respondent to provide either sedentary duty or reinstatement of weekly benefits retroactive to July 31, 2014. PX 39, Exh. 2.

Surveillance video obtained on September 26 and October 1, 2014 shows Petitioner walking short distances while using a cane. RX 6, 7(a).

At Respondent's request, Dr. Hsu re-examined Petitioner on October 1, 2014. In his report of that date, Dr. Hsu indicated he reviewed toxicology screen reports and the June and August 2014 functional capacity evaluations in connection with his re-examination. Dr. Hsu opined that the toxicology screen reports, which were negative for the hydromorphone that had been prescribed for Petitioner, made him "suspicious whether [Petitioner] is using the drugs prescribed to him."

On re-examination, Dr. Hsu noted negative straight leg raising in the seated and supine positions and 3/4 positive Waddell's signs. He described Petitioner's gait as "methodical with a flexed forward posture."

Dr. Hsu diagnosed lumbar spondylosis at L4 to S1, status post-fusion, lumbar pseudoarthrosis and myofascial pain syndrome.

Dr. Hsu indicated that nothing about the August 2014 functional capacity evaluation prompted him to change any of his previous opinions, commenting as follows:

> "Although there is a second [sic] FCE which demonstrates valid effort, it is much more likely than not that the first report from Accelerated Rehabilitation Center is much more reflective of his overall condition and effort. I base these opinions on my previous interactions, my examination of [Petitioner] and the documentation."

He reiterated that Petitioner should resume full duty. RX 2.

On November 10, 2014, Petitioner's counsel sent a letter to Respondent's counsel citing the June and August 2014 functional capacity evaluations and requesting that Respondent provide vocational rehabilitation services. PX 39, Exhibit 3.

On November 11, 2014, Dr. Bello noted complaints of nausea and vomiting secondary to Exalgo. He discontinued that medication and started Petitioner on Nucynta. PX 20.

On December 15, 2014, Dr. Bello noted complaints of nausea and vomiting secondary to Nucynta. He decreased the Nucynta dosage to 100 mg twice daily. PX 20.

On January 16, 2015, Dr. Bello noted that Petitioner denied nausea and was "actually doing well on the lower dose of Nucynta." He also noted that Petitioner was still using a cane but that his gait was "actually significantly improved overall." PX 20.

On February 25, 2015, Edward Pagella, M.S., CRC, a certified vocational rehabilitation counselor (PX 29), met with Petitioner, with a translator sitting in. Pagella indicated that Petitioner used a four-prong cane to walk and described himself as speaking and understanding very little English.

In his report of March 17, 2015, Pagella indicated he reviewed records from Drs. Shapiro, Bello and Hsu along with the last two functional capacity evaluations and the Dictionary of Occupational Titles.

Pagella noted that Petitioner reported taking Nucynta for his pain. He also noted that Petitioner described this medication as making him "drowsy, dizzy and nauseated."

Pagella indicated that Petitioner stated he is "always in pain" and reported experiencing a lot of pain during the functional capacity evaluations. He noted that Petitioner also reported limited sitting tolerance. He described Petitioner as standing up about 20 minutes into the meeting.

Pagella noted that Petitioner reported growing up in Mexico and coming to the United States in approximately 2003. He also noted that Petitioner described himself as separated, having two children and residing with his father in Palatine. He indicated that Petitioner is not a citizen or legal resident of the United States.

Pagella opined that, based on the last functional capacity evaluation and Dr. Shapiro's non-union diagnosis and 10-pound lifting restriction, Petitioner would not be able to resume his former job with Respondent. Pagella further opined that Petitioner would thus be relegated to unskilled occupations at a sedentary level and that he would have an "almost impossible take [sic] of obtaining work" based on his lack of transferable skills, work history, education and lack of English skills. He stated that prospective employers would see Petitioner as a liability rather than an asset and would not realistically hire him once they learned his fusion was not healed and he might require more surgery. He further stated that Petitioner would face the same difficulty securing work in his native Mexico. Citing that country's National Commission, he indicated that the current minimum wage in Mexico is equivalent to $4.19 to $5.18 U.S. dollars per day. He stated that, in Mexico, jobs Petitioner might be able to perform would include hand packer, hand sorter or assembler. PX 30.

On April 17, 2015, Dr. Bello decreased Petitioner's Nucynta dosage to 50 mg twice daily secondary to a complaint of nausea. He added Celebrex to the medication regimen. PX 20.

On May 18, 2015, Dr. Bello noted an increase in Petitioner's pain secondary to the lowered Nucynta dosage. He increased the Nucynta "back to 100 mg extended release twice daily", continued the Celebrex and ordered urine toxicology testing. PX 20.

Surveillance video obtained on the evening of June 2, 2015 showed Petitioner parking and getting out of a vehicle and walking across a lot toward his residence. The investigator conducting the surveillance indicated Petitioner "appeared to move in a slightly slowed manner with the use of a four pronged cane he carried in his right hand." RX 7(c).

Surveillance video obtained on June 10, 11 and 16, 2015 showed Petitioner walking with a cane, getting into a vehicle and conversing with another individual. RX 6, 7(c).

On June 19, 2015, Dr. Bello described Petitioner's urine toxicology testing as "consistent with therapy." He continued the Nucynta and Celebrex and found Petitioner to be at maximum medical improvement. PX 20.

Petitioner returned to Dr. Bello on July 20, August 21 and September 21, 2015. At each of these visits, the doctor noted that Petitioner rated his pain at 7/10 and used a cane to ambulate. On July 20, 2015, the doctor added Zofran to Petitioner's pain medication regimen due to a complaint of nausea. On August 21, 2015, he noted some improvement secondary to the Zofran. PX 20.

On November 20, 2015, Petitioner returned to Dr. Bello, with the doctor noting no change in his symptoms. The doctor continued the Nucynta and Zofran. PX 20.

On December 21, 2015, Dr. Bello noted that Petitioner was now complaining of increased stiffness and pain due to weather changes. He started Petitioner on a Medrol Dosepak and continued the other medications. PX 20.

On January 15, 2016, Petitioner filed a Section 19(b) petition and a detailed Section 8(a) petition and petition for penalties and fees, with various attachments. PX 39.

On January 21, 2016, Dr. Bello noted that Petitioner had discontinued the Medrol Dosepak secondary to significant vomiting. He described Petitioner's symptoms as stable, again noting a 7/10 pain rating. He continued the other medication. PX 20.

On January 25, 2016, Dr. Bello issued a "Statement of Medical Necessity" indicating he disagreed with the utilization review determination. The doctor further indicated he had been treating Petitioner for chronic pain since October 13, 2013. He described Petitioner as "consistent with his medications and [receiving] urine toxicology monitoring without issues." He attributed the chronic pain to "surgery which did not resolve [Petitioner's] symptoms." He stated he foresaw Petitioner on chronic pain medications "with the hope to taper them to the lowest most effective doses." PX 31.

On February 16, 2016, Petitioner filed an amended Section 19(b) petition and an amended Section 8(a) petition and petition for penalties and fees, with various attachments, including a detailed list of claimed medical and prescription expenses. PX 39.

Petitioner testified he is depressed because his life changed following the surgery. He has seen Dr. Torres for his depression. His primary care physician referred him to Dr. Torres after the surgery. PX 35, 36. He is unable to sleep and cannot engage in the same activities he engaged in before the accident. Dr. Shapiro discussed a revision surgery with him but he was afraid to undergo this, in part because the doctor told him there is a risk he might not be able to have more children. He wants to deal with his depression before giving any further consideration to more surgery.

Petitioner acknowledged receiving temporary total disability benefits for a while. Respondent did not offer to accommodate the permanent lifting restriction that Dr. Shapiro imposed. He would have returned to Respondent if an accommodation had been offered. He has not worked in any capacity since the last date on which he worked for Respondent. Respondent has not offered any vocational counseling or training. He has never prepared a resume on his own.

Under cross-examination, Petitioner testified he worked for an employee of a Chicago radio station called "La Ley."

Petitioner testified he was working with a co-worker named "Javier" at the time of the accident. He could not recall Javier's last name. He provided notice of the accident to Braulio Farias. [He identified this individual as a supervisor on the Request for Hearing form. Arb Exh 1.]

Petitioner had no recollection of which physician sent him to the functional capacity evaluation at Accelerated Rehabilitation or the subsequent evaluation. He could not recall whether Dr. Shapiro imposed permanent restrictions after the evaluation at Accelerated Rehabilitation.

Petitioner testified that people associated with "Medical Legal" sent him to Dr. Malek.

Petitioner acknowledged the United States government has not issued a Social Security card to him. When Respondent hired him, he provided a Social Security number ending in 5438. He invented that number. He completed written forms when he applied to Respondent. He cannot recall when he started working for Respondent. He met with Amy during the application and hiring process. Respondent did not hire him on the first date he went to Respondent. He cannot recall how he transmitted the Social Security number to Respondent. He found his original attorney via "Medical Legal." He cannot recall what forms he signed at that point. He does not recall the exact date of his accident but he knows the accident occurred during the week preceding Monday, January 16th.

Petitioner testified he is currently restricted to lifting items that weigh less than 10 pounds. He follows this restriction.

Petitioner did not recall undergoing a functional capacity evaluation in 2012. Nor did he recall being released to work following that evaluation.

Petitioner reiterated that his jobs in the United States have consisted of working for a radio station employee, working for his father and working for Respondent. He denied working full-time as a deli clerk at a Fresh Market store. He denied injuring his lower back in January 2006 while carrying a bag of garbage.

Petitioner attributed the results of the May 2013 functional capacity evaluation to a lack of clear instructions. He could not recall whether he explained this to Dr. Shapiro.

Petitioner testified he is taking medication prescribed by Drs. Shapiro and Bello. He uses all of the medication he receives. He has periodically undergone drug screenings. No one has told him that some of the results of these screenings do not match with his prescribed medication.

Petitioner denied being aware of the surveillance while the surveillance was underway. He would sometimes see people near the entrance to his house but he did not know who these people were.

Petitioner initially denied using any aliases. He then admitted that people at the radio station used to call him "Heri M. Beltran." He uses the name "Heri Mazzizo" when he posts on social media.

Petitioner admitted creating an entity known as "Mazzizo Productions." He created this before he began working for Respondent. "Mazzizo Productions" is "just a hobby," not a job. It involves music. He has a recording studio in his home. The recording studio is equipped with a clarinet, keyboards and a saxophone. If asked, he will arrange music for a friend. In the past, before he worked for Respondent, he would travel to musical shows under the name "Mazzizo Productions." He received money for doing this. He does not do that now. Since the accident, he has not traveled to Miami or Phoenix. When asked about his February 20, 2013 Facebook post, which indicated he was at the Miami airport, he indicated he did not recall this post. A friend, who works for him as a designer, designed a logo for him on a "friend to friend" basis. The friend was not his employee.

On redirect, Petitioner testified he did not walk around with a scale when he worked for Respondent. From watching television, he is aware that security personnel work at airports. He has never flown on a plane.

Jennifer Cunningham, an Internet researcher employed by Litigation Solutions, testified on behalf of Respondent. Cunningham testified she has worked for Litigation Solutions for 3 ½ years. She is not a licensed private investigator. She conducted two searches, in September 2014 and March 2015. She limited the first search, time-wise, to information from January 11, 2012 forward. She relied on background information, including Petitioner's name and date of birth, three aliases, injury date and phone number, in doing her research. None of the aliases was "Heri Beltran" or "Heriberto Mares." Most of the information she found was on Facebook and You Tube. She cannot disable a user's privacy settings. Everything she found is available to the public. On Facebook, Petitioner identified himself as "Heri M. Beltran (Mazzizo)" and "Heri Beltran." The images in her reports (RX 5A and 5B) are from Petitioner's Facebook site. That site contains many photographs. In a Facebook post dated February 20, 2013, Petitioner indicated he was checking in from the airport in Miami. She had no way to verify Petitioner's actual location as of that post. In another post, Petitioner indicated he was in Phoenix. Some

19IWCC0053

posts referenced "M Productions" and indicated Petitioner was promoting or helping promote musical performances. Posted photographs dated January 1, 2013 show a stage with big screens and speakers. Two photographs show Petitioner in a surgical gown. There are some references to Petitioner being in pain and seeing doctors.

Under cross-examination, Cunningham acknowledged there is no way to know when the posted photographs were actually taken. She found no information indicating Petitioner was charging for any services. She found no pictures showing Petitioner lifting anything. If someone had Petitioner's password, that person could post something on Petitioner's Facebook page. One of Petitioner's posts relates to him returning to college. It could be that someone other than Petitioner posted this. Many of the posts are in Spanish. She does not speak Spanish.

On redirect, Cunningham testified that the post relating to the setting up of a show states "here doing the set up." Her reports contain maybe fifty images of Petitioner. None of those images show Petitioner with a cane.

Under re-cross, Cunningham acknowledged that none of the images show Petitioner in the process of walking.

At a continued hearing held on April 18, 2016, Petitioner called **Lizet Astorga.** Astorga testified Petitioner has been her boyfriend for five years and five months. She knew Petitioner before his work accident. At that point, they would see one another from Friday through Sunday. In 2015, they began seeing one another five days a week. Petitioner now attends school near where she lives.

Astorga testified that, before the work accident, she and Petitioner frequently went out dancing. Since the accident, they have not resumed that activity. After Petitioner underwent surgery, in 2013, she assisted him with various activities, including bathing and toileting. Petitioner was not able to do much. Before the surgery, she did not have to provide this assistance. Now she sometimes helps Petitioner by taking out the garbage or picking something up off the floor.

Astorga described Petitioner as "very vain" before the accident. Petitioner liked to dress up, go out to dance and listen to music and go to work. Since the accident, Petitioner has to be told what to do. Petitioner is "kind of loafing" and does not want to go out or engage in any activities.

Astorga testified that Petitioner has not lost interest in things that interested him before the accident. Petitioner wants to resume working. He has started school. He is studying English and taking courses to obtain his GED.

Under cross-examination, Astorga testified that Petitioner attends school from 6 to 9:30 PM, Monday through Thursday, and from 9:30 AM to 3:00 PM on Saturday. She does not go to

school with Petitioner. She is appearing at the hearing voluntarily, at Petitioner's request. She would like not only to assist Petitioner but tell the truth. She accompanied Petitioner to the Commission at the time of the first hearing but she did not sit inside the hearing room on that date. After that hearing, she and Petitioner talked about Petitioner's testimony but she does not recall what was said.

In addition to the exhibits previously summarized, Respondent offered into evidence print-outs of the payments it has made to date. RX 10 reflects that Respondent paid a total of $28,903.36 in temporary total disability benefits, covering the period January 19, 2012 through July 31, 2014. The first such payment, totaling $13,612.20, was made on March 5, 2013. That payment covered the period January 19, 2012 through March 15, 2013. RX 11 shows various payments totaling $155,144.83. Many of these payments were made to certain of Petitioner's medical and prescription providers. Others were made to Respondent's examiner, Hsu Group, LLC, and medical case managers, Genex Services, Inc. The last date of payment shown on RX 11 is February 15, 2016.

Respondent also offered into evidence a utilization review report dated October 5, 2015. The report is addressed to Dr. Bello and is authored by Dr. Rana, an Illinois physician with board certification in anesthesiology and pain medicine. In this report, Dr. Rana recommended non-certification of three medications prescribed by Dr. Bello in August and September 2015: Nycynta ER 100 mg #60, Celecoxib 200 mg #60 (+ 4 refills) and Ondansetron HCL 4 mg #90 (+ 3 refills). Dr. Rana indicated Nycynta ER should be non-certified because, per ODG guidelines, it is recommended as second line therapy for patients who develop intolerable adverse effects with first line opioids and, based on the available records, "there is no prior documentation of trial and failure of first line opioid therapy." Dr. Rana indicated that Celecoxib should be non-certified because it is a non-steroidal anti-inflammatory intended for short term use and the records showed Petitioner had been taking this medication since April 2015 with no change in his pain ratings. Dr. Rana indicated that Ondansetron should be non-certified because it is an anti-nausea medication intended for acute use and "ODG does not support the use of this medication for nausea caused by chronic opioid use." The report reflects that a telephone conference with Dr. Bello could not be scheduled because the doctor had no time on September 30th or October 1st to complete a peer to peer discussion. RX 4.

Arbitrator's Credibility Assessment

Petitioner's accident- and notice-related testimony was detailed and credible. Also credible was Petitioner's denial of any pre-accident lower back problems. It appears, based on the parties' stipulation as to earnings, that Petitioner worked for Respondent for some period before the accident and none of his records mention any pre-existing back injuries or treatment.

Much attention has been directed to the issue of the legitimacy of Petitioner's reported symptoms. The initial providers at Concentra, Respondent's selected facility, did not note any positive Waddell's signs. Nor did Dr. Malek. In April 2014, Dr. Hsu, Respondent's examiner,

noted positive Waddell's and concluded that Petitioner's pain had a "psychosocial element." Petitioner's first functional capacity evaluation (performed in 2012, about ten months prior to his surgery) was valid. Phillip Gonzalez, a therapist who had already formed a negative impression of Petitioner, performed a second evaluation in June 2014, about ten months after the surgery. Gonzalez noted self-limiting and described 95% of Petitioner's pain complaints as invalid. He found Petitioner capable of returning to his job at Respondent. It appears he relied on a formal job description that did not indicate Petitioner had to lift the type of heavy item he said he was lifting when his injury occurred. The individual who performed the third evaluation, on August 19, 2014, described Petitioner as putting forth "near full" effort but also noted 5/7 positive Waddell's signs. She found Petitioner capable of performing only at a sedentary duty level. She indicated she did not have access to a formal job description. Instead, she relied on Petitioner's description of his job along with the Dictionary of Occupational Titles. Like Gonzalez, she indicated that Petitioner's responses to Oswestry Low Back Disability Questionnaire placed him in a "crippled" category.

At the hearing, Petitioner attributed the results of the second evaluation to miscommunication. He testified that the evaluator spoke only "Spanglish" and that he followed directions as well as he could. He indicated a translator was present during the last evaluation, although this is not documented anywhere in the evaluation report.

The Arbitrator views all three of the functional capacity evaluations as flawed. The first was performed prior to a major lumbar spine surgery that resulted in a non-union, with the prescribing physician (Dr. Abdellatif) noting, incongruously, that Petitioner was at maximum medical improvement but still seeking a surgical consultation. The second was performed by an individual who had already formed a negative impression of Petitioner and who, according to Petitioner, really did not speak Spanish. Moreover, this individual relied on a job description that does not mesh with the evidence as to the very heavy lifting Petitioner sometimes performed. The third was performed by an individual who did not have access to any formal job description.

The three evaluations are consistent to the extent that each evaluator found Petitioner unable to perform certain aspects of a store clerk job, although each evaluator seemed to have a different impression of what such a job entailed.

The Arbitrator has considered the foregoing along with the testimony of Cunningham, the various Facebook posts and photographs (which, for the most part, show Petitioner posing for "selfies" in what appears to be a residence) and the testimony of Petitioner's girlfriend. The Arbitrator has also considered the video surveillance, which consistently shows Petitioner relying on a cane. The Arbitrator does not agree with Dr. Hsu's opinions as to causation and work capacity but does agree that there may be a psychological element to Petitioner's overall presentation. Petitioner has a legitimate physical condition, i.e., a non-union following a fusion, and appears to have some degree of depression, but the Arbitrator has some concerns about his passivity. Even his girlfriend seemed to question his motivation. The Arbitrator also has some doubts about Petitioner's testimony that he is currently attempting to obtain a GED.

Q-Dex On-Line
www.qdex.com

Neither Petitioner nor his girlfriend identified the school Petitioner is purportedly attending. On social media, Petitioner expressed happiness about "returning to college" and indicated he studied communication and political science at Robert Morris University in Pittsburgh, referencing the "class of 2002." RX 5b. To the Arbitrator's knowledge, it is not possible to attend college without a high school degree or GED. The Arbitrator also has some doubts about the extent of Petitioner's participation in the music industry. Petitioner admitted having a recording studio in his residence. He also acknowledged arranging music for friends. He described his musical endeavors as merely a "hobby" but the Arbitrator has some questions about this. This is not, however, to suggest that Petitioner has been exceeding his restrictions or working, in the traditional sense. The Arbitrator merely believes that Petitioner may, on some occasions, derive occasional income from music-related activities.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident arising out of and in the course of his employment?

The Arbitrator finds that Petitioner sustained an accident in January 2012 arising out of and in the course of his employment. The Arbitrator further finds, based on the Concentra records, that this accident occurred on the evening of January 11, 2012.

In finding in Petitioner's favor on the issue of accident, the Arbitrator relies in part on Petitioner's credible testimony concerning his lifting duties and the mechanism of his injury. Petitioner indicated he was with a co-worker at the time of the accident. He was able to identify that co-worker by name. No one refuted Petitioner's testimony that one of his job duties was to lift and stack bags or packs of clothing. The Arbitrator also relies on the consistent histories set forth in the various treatment records. All of those histories reflect Petitioner experienced an abrupt onset of low back pain while lifting a heavy bag or pack of clothes at one of Respondent's stores. The slight variance as to the accident date does not trouble the Arbitrator since several days passed before Respondent sent Petitioner to Concentra. What is important to the Arbitrator is that Petitioner was performing a job task on Respondent's premises during a regular workday when the injury occurred.

Did Petitioner provide Respondent with timely notice of his accident?

The Arbitrator finds that Petitioner provided Respondent with timely notice of his January 11, 2012 accident. In so finding, the Arbitrator relies primarily on Petitioner's credible testimony that, very shortly after the accident, he notified his immediate supervisor, Braulio, of the accident. Petitioner described the accident as occurring around 6 PM. The Concentra records of January 16, 2012 reflect that Dr. Lambos communicated his findings to Respondent's "night manager." Petitioner testified a female general manager sent him to Concentra and the Concentra records show that "Amy Sahba" authorized the treatment. PX 1. Finally, Petitioner filed his first Application on February 6, 2012, within the 45-day notice period.

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

The Arbitrator finds that Petitioner established a causal connection between the work accident and the need for the two-level lumbar fusion that Dr. Shapiro performed in August 2013. In so finding, the Arbitrator relies in part on Petitioner's credible denial of any pre-accident back problems. The Arbitrator also relies on the chain of events, with the Concentra and other early treatment records describing an abrupt onset of symptoms following the accident. The Arbitrator further relies on Dr. Shapiro's opinion that the accident permanently aggravated an underlying degenerative condition. PX 20. As noted previously, Dr. Shapiro was a physician of Respondent's selection. The Arbitrator further finds that Petitioner established causation as to the non-union that was diagnosed postoperatively and as to the need for the revision surgery recommended by both Drs. Shapiro and Hsu. Petitioner declined to undergo that revision surgery in 2014, based on his understanding of the potential risks. At the hearing, Petitioner again expressed significant reservations about having another operation.

Finally, the Arbitrator finds that Petitioner established causation as to the permanent 10-pound lifting restriction that Dr. Shapiro imposed on July 10, 2014. In his note of that date, the doctor made it clear he was imposing this restriction (and again recommending revision surgery) despite the inconsistent results of the June 23, 2014 functional capacity evaluation. In other words, he took Petitioner at his word concerning his pain level. The Arbitrator finds this compelling, in light of Petitioner's testimony that it was Respondent who chose Dr. Shapiro. Respondent did not offer any evidence contradicting this testimony.

Is Petitioner entitled to temporary total disability?

Petitioner proceeded pursuant to Section 19(b). He did not place permanency at issue. Arb Exh 1. He claims weekly benefits from January 19, 2012 through February 16, 2016 (the first date of hearing). Arb Exh 1. Respondent disputes that claim, based on its various defenses. The parties agree Respondent paid $28,903.36 in temporary total disability benefits and discontinued paying these benefits on July 31, 2014.

The Arbitrator finds that Petitioner was temporarily totally disabled from January 20, 2012 (the first date on which a physician [Dr. Nelson at Concentra] directed Petitioner to stay off work) through July 22, 2014, the date on which Dr. Bello expressed agreement with Dr. Shapiro's finding of maximum medical improvement. This is a period of 915 days or 130 5/7 weeks. The Arbitrator believes that Petitioner required ongoing pain management after July 22, 2014 but views Petitioner's condition as stabilizing as of that date. Petitioner's condition could potentially de-stabilize if he were to change his mind about the revision surgery, assuming such surgery remains an option, but it seemed to the Arbitrator that his mind is made up. He did not ask the Arbitrator to award the surgery. Nor did he offer any records indicating he had returned to Dr. Shapiro since July 2014.

The Arbitrator declines to award additional weekly benefits through the first date of hearing, as requested by Petitioner. Those benefits would be in the form of maintenance. Petitioner offered into evidence the opinion of a certified vocational rehabilitation counselor that he is not readily employable, due to various factors, but that evidence goes to permanency, which is not at issue. Petitioner is subject to a permanent 10-pound lifting restriction, per Dr. Shapiro, but did not testify to looking for work within that restriction. Petitioner did testify to recently starting school in order to obtain his GED but that testimony is in conflict with a 2013 Facebook post, which reflects he studied communication and political science at Robert Morris College as part of the "class of 2002." Dr. Torres' note of January 26, 2016 refers to Petitioner starting to take college, not GED, classes. PX 35. If Petitioner is indeed attending classes, whether they are GED- or college-level, that is a good thing, but the Arbitrator has some concerns about the accuracy of his testimony and the true level of his education.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid bills from ten medical and prescription providers. Arb Exh 1. Respondent disputes that claim, based on its various defenses. Respondent also maintains it paid a number of medical and prescription expenses. Respondent offered into evidence a print-out (RX 11) of so-called medical payments RX 11 but some of those payments were made to non-treaters, including a Section 12 examiner (The Hsu Group) and medical case managers (Genex Services, Inc.).

The Arbitrator has previously found in Petitioner's favor on the issues of accident, notice and causation. The Arbitrator has also noted that, when Dr. Hsu examined Petitioner in April 2014, on behalf of Respondent, he characterized the treatment to date as reasonable and necessary.

The Arbitrator, having reviewed the claimed bills and having compared them with the payments made by Respondent, awards Petitioner the following, subject to the fee schedule [neither party offered a fee schedule analysis into evidence]:

Concentra Medical Center 1/16/12 – 1/19/12, office visits and therapy evaluation	$ 531.29
Alivio Physical Therapy & Chiropractic 1/24/12 – 6/21/12 [The Arbitrator declines to award the non-emergency transportation charges totaling $4,520.00. There is no evidence in the record supporting these charges.]	$ 8,530.00 (PX 12)
Delaware MRI 1/26/12, thoracic and lumbar spine MRIs [The Arbitrator declines to award the non-emergency transportation	$ 3,589.41 (PX 10)

Q-Dex On-Line
www.qdex.com

charges of $250.00 delineated in PX 10. There is no evidence in the record supporting the need for such transportation.

Herron Medical Center 1/24/12 – 6/14/12	$ 2,840.34 (PX 6)
Pro Clinics (Dr. Abdellatif) 2/16/12 – 2/21/13 [The Arbitrator declines to award the non-emergency transportation charges of $300.00 for taxi service provided on February 16, 2012. There is no evidence in the record supporting the need for such transportation.]	$ 27,160.12 (PX 4)
Lake Shore Surgery Center 3/2/12 – 5/21/12 [The Arbitrator declines to award the non-emergency transportation charges dated 3/2/12, 3/16/12, 4/2/12, 4/23/12 and 5/21/12. These charges total $1,375.00 (5 x $275)]. There is no evidence in the record supporting the need for such transportation.]	$ 112,855.08 (PX 14)
Lakeshore Open MRI 4/23/12, post-discogram lumbar spine CT scan	$ 1,801.46 (PX 8)
Michel Malek, M.D. 8/3/12, consultation	$ 330.00 (PX 17)
Illinois Bone and Joint (Drs. Shapiro and Bello)	$ 234.77

The Arbitrator turns to the claimed prescription expenses from Injured Workers Pharmacy. PX 34. Petitioner maintains this facility is owed $48,530.33. This is indeed the "outstanding balance" shown on the top of the first page of PX 34 but Petitioner has provided no assistance to the Arbitrator in interpreting the various pre-allowance, net amount and "open balance" figures listed in that exhibit. Moreover, PX 34 and RX 11 reflect many payments by Respondent to Injured Workers Pharmacy between June 16, 2014 and September 19, 2015. The Arbitrator awards Petitioner the prescription charges from Injured Workers Pharmacy from May 27, 2014 through March 31, 2016, as reflected in PX 34, but with Respondent receiving credit for the payments shown on the same document. In awarding the Injured Workers' Pharmacy expenses, the Arbitrator relies on the opinions expressed by Dr. Atchison in his report of February 5, 2016. PX 33. Dr. Atchinson, a board certified physiatrist and professor at Northwestern University's Feinberg School of Medicine (PX 32-33), ably refuted the opinions that Dr. Rana expressed in the utilization review non-certification reports. He pointed out that it did not appear Dr. Rana had access to all of the records of Dr. Bello, the prescribing physician.

The Arbitrator also notes that Dr. Bello is a referral from Dr. Shapiro, a Respondent-selected provider.

Is Respondent liable for penalties and fees?

The Arbitrator initially considers the issue of whether Respondent is liable for penalties and fees based on the delay in payment of temporary total disability benefits.

The indemnity payment print-out (RX10) reflects that Respondent first paid temporary total disability benefits in this case on March 5, 2013, more than a year after the accident. As of that date, Respondent had not obtained any Section 12 examination. At the hearing, Respondent placed accident and notice in dispute but did not offer any evidence to support those defenses. The records from Concentra, a provider of Respondent's selection, significantly undermine the validity of the defenses. When Respondent eventually obtained a Section 12 examination, in April 2014, following the two-level fusion, its examiner, Dr. Hsu, reviewed records and characterized the treatment to date as reasonable and necessary. He did not attribute Petitioner's ongoing pain to the non-union but he did not question causation as to the need for the fusion. Nor did he find Petitioner capable of working in any capacity. Instead, he recommended a functional capacity evaluation.

Based on the foregoing, the Arbitrator finds that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in delaying the initial payment of temporary total disability benefits for more than one year. It is unclear to the Arbitrator why Respondent would persist in its accident and notice defenses at the hearing since Respondent had no evidence to offer along those lines.

The Arbitrator finds Respondent liable for the statutory maximum award of Section 19(l) penalties, i.e., $10,000.00, based on the delay of more than one year in the initial payment of temporary total disability benefits. RX 10. The Arbitrator further finds Respondent liable for Section 19(k) penalties in the amount of $7,022.26 and Section 16 attorney fees in the amount of $2,809.90. The Arbitrator relies on the parties' post-arbitration earnings/wage stipulation in arriving at these figures. After the hearing, the parties agreed to an average weekly wage of $239.21. This is also the temporary total disability rate, based on the stipulation as to marital status/dependents and the applicable minimums. The period from January 20, 2012 through March 5, 2013 (the date of first payment, RX 10) represents 411 days or 58 5/7 weeks. 58 5/7 multiplied by $239.21 equals $14,044.53. 50% of $14,044.53 equals $7,022.26 and 20% of $14,044.53 equals $2,809.90.

The Arbitrator turns to the issue of whether Respondent is liable for additional Section 19(k) penalties and Section 16 attorney fees based on its failure to pay the awarded medical expenses. The Arbitrator views Respondent as having acted in an objectively unreasonable manner in having failed to pay these expenses, given Dr. Hsu's opinion that the treatment rendered prior to his examination was reasonable and necessary. However, the Arbitrator is unable to calculate 19(k) penalties and Section 16 attorney fees on the awarded expenses since

Q-Dex On-Line
www.qdex.com

they are not reduced per the fee schedule. As noted previously, neither party offered a fee schedule into evidence.