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

Cody Harris,

Petitioner,

vs. NO: 15 WC 33018

United Parcel Service,

17IWCC0550

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 4, 2017, is hereby affirmed and adopted.

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

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

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

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

DATED: SEP 7 - 2017
TJT:yl
o 7/11/17
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would find that Petitioner failed to prove by a preponderance of the credible evidence that she sustained accidental injuries arising out of and in the course of her employment. Much discussion has occurred across many contested interpretations of the evidence. I would assert that this is a simple issue of credibility. The majority has found the Petitioner credible I am not persuaded. The Petitioner must carry the day and ultimately prove her case by the preponderance of the credible evidence. I am not persuaded that Respondent asked Petitioner to come into work early as a random early starter on the morning of the incident. I am not persuaded that Petitioner was driving a PITO unit throughout the facility looking for tubs for the bulk line. I am not persuaded that Petitioner ever explained why she was "badged" into the facility at 3:06am for a shift starting at 5:30am.

I am left with the question was the Respondent on site driving a PITO unit as part of her job responsibilities or as part of a personal errand and if it was personal does the personal comfort doctrine apply? The personal comfort doctrine provides:

"Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the *** method chosen is so unusual and unreasonable that the conduct cannot be

considered an incident of the employment." 2 A. Larson & L. Larson, Workers' Compensation Law §21.00, at 5-5 (1998).

"[I]f the employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment. [Citation.] The employer may, nevertheless, still be held liable for injuries resulting from an unreasonable and unnecessary risk if the employer has knowledge of or has acquiesced in the practice or custom. Karastamatis v. Industrial Commission, 306 Ill. App. 3d 206 (1st Dist. 1999), citing " Eagle Discount Supermarket v. Industrial Commission, 82 Ill. 2d 331, 340 (1980).

Regardless of the majority's belief that the Petitioner after ostensibly having "badged" in was in the course of her employment as she ate french fries while attempting to operate a PITO unit, the glaring issue remains whether the accident arose out of the employment. I am not persuaded that this behavior was anything other than an unreasonable and unnecessary risk, and would recommend a reversal.

Kevin W. Lamborn

17IWCC0550

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
19(b)

CODY HARRIS
Employee/Petitioner

v.

UNITED PARCEL SERVICE
Employer/Respondent

Case # 15 WC 33018

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 **January 20, 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. ☒ 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 _____

Harris v. UPS
15 WC 33018

17IWCC0550

FINDINGS

On the date of accident, **October 2, 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 year preceding the injury, Petitioner earned **$19,110.54**; the average weekly wage was **$415.45.**

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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 under Section 8(j) of the Act.

ORDER

Respondent shall pay temporary total disability benefits of **$276.97** per week for **15-6/7th weeks** commencing **10/2/15** through **1/20/16** as provided in Section 8(b) of the Act.

Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$82,692.52**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay for and authorize the medical treatment as recommended by Dr. Erling Ho.

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

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

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

Signature of Arbitrator

4-4-2016
Date

APR 4 - 2016

FINDINGS OF FACT

Cody Harris ("Petitioner") testified as of the date of trial, she was single with no children. she testified she was hired by UPS ("Respondent") in May 2004. Her duties include working the bulk line and working as a collection roller.

In the bulk line, she said her duties involve making sure she has enough carts and tubs to pick up packages. She explained she works the bulk line approximately 45 minutes before start time, which is the time everyone usually starts their shift. That start time differs every day.

Regarding collection, her duties include working a conveyor and making sure packages come down the line in a single file. She explained that packages are diverted to her when those packages are not loaded into a truck and her job is to place them back in line. Under cross, petitioner testified that when packages come down a conveyer, her position is stationary and does not require her to drive a PITO unit. She testified she usually works the sunrise shift, which is 4 am to 9 am, Monday through Friday at that the Hodgkins facility.

On 10/2/15, a Friday, Petitioner began her work at 4:32 am per a swipe card she used. She said she swiped in near the front of the bulk line located near Outbound 1 Area. Petitioner testified that a "random early starter" is someone randomly picked by Respondent to "start up" every day. Duties include setting up the bulk line earlier than regular start time. petitioner had been chosen before and had been chosen as the random early starter on the date of the injury.

After punching in, she immediately walked over to a PITO unit, which is a vehicle unit one can attach a tub to. The unit has 3 wheels, 1 headlight, a brake and gas pedal and a horn. She testified her duties also include inspecting a PITO unit to ensure it is in proper working order. Petitioner confirmed the unit depicted in Px6a and 6b as the same or similar unit she used on 10/2/15. Petitioner testified employees are given hands-on and classroom training before getting a license. Employees are given licenses by Respondent to operate a PITO unit. She was first a license in 2011 but it expired 3 years later. Petitioner identified Px8, which was used for demonstrative purposes only, as her license issued by Respondent. She confirmed it was expired.

On the date in question, Petitioner testified she was aware her license was expired and had previously discussed this with supervisor Matt Delhotal. She testified Matt did not set anything up and told Petitioner that the instructor. She testified Matt was aware other employees were also operating PITO units with expired licenses.

She testified the PITO is used every day to carry packages from one part of the facility to another part of the facility. One can attach tubs as needed, up to 3. The tubs are used for packages over 75 pounds and packages considered irregular. She said anything under 75 pounds, push carts are used. Petitioner identified Px7 as depicting the bulk line, orange colored tubs used to pull packages and push carts. She testified this accurately depicted what a bulk line would have looked like on the morning in question.

On 10/2/15, Petitioner said she started work at 4:32 am and start time for that day was 5:30 am. She was performing bulk duties all 5 days worked. On cross, she agreed that although she clocked in at 4:32 am, she is not paid for work until 5:30 am. That day, she got onto the PITO, drove from across the break room and noticed carts she needed to set up her bulk line. She then used keys belonging to Carey Hall to use the PITO unit as she had never been given her own key. She was not aware borrowing keys was against policy or that

driving without a license is against policy. She stated that not all drivers have their own key and was told she could borrow keys.

She then drove up to the bulk line and noticed 2 additional tubs she needed. She explained usually 8 tubs on each side of the bulk line are required but that morning, she had only 6. I got back on unit and drove to look for tubs. In the first area located outside Outbound 1 Area she found no tubs. She continued to drive to see if other tubs were available. She testified tubs are not in any specific location but rather randomly located about the facility. She testified she must actively seek and look for carts.

Petitioner testified she then drove to the south side of the facility and she decided to purchase an order of fries because it was quick and convenient. She testified break times are allowed but it depends on how busy work is. She testified she has previously gone to the cafeteria to buy food while working, depending on how busy work is. She has eaten food while working and has observed others do the same. She testified she had never been reprimanded for going to the cafeteria to buy food prior to the incident in question.

She ordered the fries, returned to the PITO unit and drove toward entrance 2 to look for tubs but found none in that area. She then drove away, holding the fries in her left hand and operating the steering mechanism with the right. She attempted to make a left turn but the steering wheel got "stiff," causing her to make a sharp right turn, otherwise she would have ran into items located on the left. After she made the hard right turn, the PITO unit overturned, landing on her right leg. She testified she sustained injuries to the right leg. On cross, she testified this occurred between 4:40am and 4:42am. On cross, she disagreed that the unit flipped prior to the start of her shift. She agreed that at the time of the incident, she was not hauling tubs or packages. She further agreed that she was not instructed to drive that day but that she is also not told every day to do her job every day.

She testified she recalled her bones were broken and sticking out of her leg. Respondent's exhibit 3 depicts the actual event immediately following the PITO unit turning over. Rx3. Petitioner testified she was assisted by her co-workers and her supervisor, including Matt. An ambulance was called and Petitioner was transported to LaGrange Memorial Hospital.

Petitioner's Medical Treatment

Petitioner was taken by ambulance to LaGrange Hospital where she was diagnosed with an acute non-displaced fracture of the distal tibia and fibula and medial malleolus. Px3. Petitioner underwent and Dr. Erling Ho performed debridement of the wound, intramedullary rodding of the right tibia fracture and medial malleolus fracture and open reduction and internal fixation of the distal fibular fracture. Px3. Petitioner was in the hospital following surgery for several days and taken off of work indefinitely. Medical records noted the injury was work related. Petitioner followed up with Dr. Ho's offices, where medications were continued and Petitioner was ordered to remain off of work. There was discussion of transition from home exercise to outpatient physical therapy. Petitioner was given a walker to use in the interim. Petitioner received home nursing and therapy through Advocate Home Health for three weeks following the surgery. Px5. Petitioner is currently receiving orthopedic care from Dr. Ho at Orthopaedic Associates of Riverside. Px4. She is currently receiving out-patient therapy at the University of Chicago. Px4. Petitioner last followed up with Dr. Ho in January 2016 and was scheduled for follow up in March 2016. At that last visit, Petitioner was instructed to continue therapy with Universtiy of Chicago and to remain off of work.

Witness Testimony of Matt Delhotal

Matthew Delhotal ("Delhotal") testified on behalf of Respondent. He said he has been employed by Respondent for 16 years as full time supervisor. His duties include managing supervisors who in turn manage employees. On 10/2/15, he testified he was working and was returning from a meeting back into operations. Around 4:50 am, he was returning from meeting with Jason, Manuel and others. He testified he found Petitioner lying on her side. He saw a turned over PITO unit. He observed Petitioner's condition at that time and saw bones protruding through her skin. Rx3. He ran and called 911.

After the incident, he testified the entire area that works with PITO units was recertified and retrained. He then completed a write-up for this incident and he identified it as Rx1. On cross, he testified that only page 2 was his write up or summary. He testified he spoke with Shatara Patterson, a part-time supervisor, immediately after the incident. Delhotal said Patterson/Young told him she did not witness the accident. (T.68-69).

Delhotal testified Respondent records confirm Petitioner "badged in" at 3:06 am and her shift was scheduled to start at 5:30am. He did not know why she presented so early. Delhotal testified Petitioner flipped the PITO unit prior to her shift beginning. He testified that on the date in question, Petitioner was to work as a collection roller employee, whereby she would maintain packages from one belt to the next. This job did not involve driving a PITO unit.

Delhotal testified that he did not instruct Petitioner to drive the PITO unit on the date of her injury and had never seen her drive the unit previously. On cross, he stated he did not know Petitioner to be certified to use a PITO unit. When shown Petitioner's certification badge, used previously as demonstrative evidence, he testified on cross that she may have approached him for re-certification but that he never knew anyone to have expired certifications. Following the injury, Delhotal visited Petitioner at the hospital where he testified she told him the purpose of her using the PITO unit was to get fries.

Regarding random early starters, Delhotal testified that if employees are needed and available, then we ask them to set up areas for those who do not have a start time. Early starters do not use or operate PITO units unless certified. Petitioner may have asked him to be re-certified. Delhotal testified Petitioner has been a random early starter before.

On cross, Delhotal explained that a key card provides access inside the facility whereas the time card is swiped in and out and records time. He testified he was not aware Petitioner swiped in at 4:32am on the date in question but acknowledged he had previously seen Rx1, which showed Petitioner swiped in at Hub Com at 4:32am. When shown Px9, he agreed that Petitioner's time detail demonstrated fluctuating start and end times, depending upon need. For example, on 9/4/15, Petitioner swiped in at 4:05am but her start time would have been 5:30am. Delhotal testified it appeared she started early that day. On re-direct, Delhotal stated that even if Petitioner was a random early starter that day, she would have begun around 5:15am prior to the line start time.

Witness Testimony of Shatara Patterson/Young

Shatara Devon Young ("Patterson/Young") testified on behalf of Respondent. She said she was employed for 10 years and 11 months and that her current job title was that of part-time operations supervisor. His duties include supervising hourly employees and helping load packages onto trailers. On 10/2/15, Patterson/Young was coming through the building with a few minutes to spare to be at her job assignment. As she rushed past Outbound 1, she saw Petitioner come from direction of the primary, driving faster than normal and Petitioner tried to turn corner, hitting the pole and flipping over. Patterson/Young did not observe Petitioner

hauling tubs nor was anything attached to the PITO unit. Patterson/Young ran to Petitioner, offered aid and called 911. Following the incident, she completed a write-up. She identified her write up as part of Rx2. Patterson/Young testified she did not know Petitioner's start time and did not observe fries or food at the accident site. Patterson/Young further testified she knows who Delhotal is but that he did not interview her the day of the incident.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

The Arbitrator concludes that Petitioner testified in a credible and forthright matter regarding her work, the circumstances before, during and after her injuries, her medical treatment and her current condition of ill-being. The Arbitrator notes Petitioner presented with the aid of a walker to trial.

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

a. Arising Out of

An injury *arises out of* one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. *Parro v. Indus. Comm'n,* 167 Ill. 2d 385,393, 657 N.E. 2d 882 (1995). An injury sustained by an employee arises out of his employment if the employee at the time of the occurrence was performing acts he was instructed to perform by his employer, acts which he has a common law or statutory duty to perform while performing those duties for his employer or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equip. Co. v. Indus. Comm'n*, 78 Ill. 2d 567, 573, 403 N.E.2d 215 (1980). 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. There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Ill. Workers' Comp. Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523 (1st Dist. 2007).

The Arbitrator concludes Petitioner's accident arose out of her employment. There is a dispute as to whether Petitioner was working at the time of the accident. Evidence established that Petitioner was clocked in or "swiped in" as early as 4:32 am before the accident occurred. Rx1. Petitioner testified that she was early at work, having been selected as a random early starter and that part of those employment duties included using the PITO unit to gather tubs to the bulk line. Petitioner had been selected in the past as a random early starter. Petitioner said she could not recall who asked her to be a random early starter but records confirm she nonetheless began work at 4:32 am. Petitioner acknowledged on cross-examination that she is not paid for her work performed during this pre-shift or prep time. Despite Respondent's admission it does not pay its employees for this period of work performed for a benefit it clearly derived, this fact of non-payment does not equate to a claimant being off duty where the evidence demonstrates otherwise. Delhotal testified he did not know why Petitioner was at work early, that he did not ask her to be a random early starter and that he did not ask her to use a PITO unit. However, his testimony is contradicted by the fact that she began work before the start of the machines and Delhotal himself acknowledged that she had come in early to prep the bulk line. Rx1.

Thus, at the time of the accident, Petitioner was performing work for the employer as a random early starter to prep the bulk line; specifically looking for tubs to attach to the PITO unit to take to the bulk line.

These duties were being performed *after* she had already bought food. Petitioner also testified that she was forced to make a sharp turn when the steering wheel became stiff. These two facts together demonstrate employment-related risks undertaken by Petitioner at the time of her injuries, which occurred on Respondent's premises and using Respondent's equipment.

Respondent asserts that Petitioner's job duties on the date in question were that of a collection roller and therefore any risk associated with her accident was not related to the employment to which she was assigned to perform that day. Respondent relies on Delhotal's testimony in this regard. Petitioner credibly testified that she was hired to work both the collection roller area and bulk line area. Respondent does not dispute this. Petitioner explained that a collection roller usually starts at "start time" and those duties include sorting packages. That job is stationary and does not require the use of a PITO unit nor does it require one to gather tubs. The bulk line job, on the other hand, can require the use of a PITO unit and can require an employee to gather empty tubs to be placed at the bulk line for use once the start time begins. Petitioner's testimony is supported by Delhotal's testimony, who also testified bulk line workers use PITO units. Petitioner also testified that random early starters use PITO units to prep the bulk line. She had been a random early starter in the past and had used PITO units in the past. See also, Px9. Petitioner credibly testified that on the date in question, she was scheduled to work as a random early starter to prep the bulk line after which she was then scheduled to work her other duties as collection roller. Delhotal acknowledged this fact when he wrote "Cody comes in 10mins [sic] early to help pull off bulk prior to her going onto the collection rollers." Rx1. Even if Petitioner was, as Respondent suggests, scheduled only as a collection roller that day, Respondent knew of and allowed Petitioner to perform work for which it has previously admitted it does not pay its employees to do despite the benefit derived.

Finally, Respondent also asserts that Petitioner was in violation of a safety rule such that her actions constituted a personal risk for which her injuries cannot be said to have arisen out of her employment. In support thereof, Respondent presented evidence that Petitioner's certification to operate the PITO unit was expired at the time of the accident and had been so expired for over one year. Petitioner did not deny that her certification was expired and explained that she attempted on prior occasion to obtain re-certification, having asked Delhotal. She also testified that Delhotal was aware that others were operating PITO units without certification. Delhotal testified that he did not know anyone without certification operating a PITO unit and said that driving a PITO unit without certification was a disciplinary offense. He agreed that Petitioner may have approached him previously to become re-certified. The Arbitrator has weighed the competing testimonial evidence on this issue and finds Delhotal's testimony is not credible and is therefore entitled to less weight. Having had an opportunity to observe the witnesses, the Arbitrator notes Delhotal's testimony on this issue waffled and he did not appear certain. Petitioner, on the other hand, was unequivocal and express in her testimony that Delhotal knew PITO units were being operated by employees with expired certifications. Petitioner's testimony is supported by the fact that following her accident, Delhotal admitted that the very next thing he did was to re-certify everyone to operate PITO units. In the Arbitrator's view, it would appear most perplexing that Delhotal corrected a fact he claimed to know nothing about. The Arbitrator also notes that although Delhotal said operating a PITO unit on expired certification was a rule violation, Delhotal never disciplined Petitioner for this alleged violation at any point leading up to trial. See also, Rx1. Therefore, to the extent such a rule existed, Delhotal's testimony is not credible that it was actually enforced and evidence suggest Respondent allowed individuals to operate these units without current certification to its benefit. The Arbitrator rejects this argument and finds Petitioner's accident arose out of her employment.

a. In the course of

An injury occurs "in the course of" the employment when it occurs within the period of employment, at a place where the claimant may reasonably be in performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto.

As previously mentioned, Respondent asserts, in part, that Petitioner's accident was not in the course of her employment as she was not asked to be at work early, was not asked to be a random early starter nor asked to operate a PITO unit. Respondent also asserts violation of a safety rule such that Petitioner was not in the course of her employment. The Arbitrator rejects these arguments for the same reasons stated above; evidence shows Respondent was aware Petitioner was at work early to start as a random early starter and derived a benefit from that. Rx1. Further, evidence suggests Respondent allowed the rule violations to occur, derived a benefit from same, later attempted to correct the fact that its employees were not current in certification and did not enforce this rule against Petitioner. *Saunders v. Indus. Comm'n*, 301 Ill. App. 3d 643, 705 N.E.2d 103 (2d Dist. 1998).

Respondent also argues Petitioner was not engaged in an act of personal comfort as it was done in an unreasonable manner and therefore she was not in the course of her employment. It is well established that employees are allowed to engage in personal acts necessary to their health and personal comfort. If they are injured *while performing* these acts, their accident is not deemed to be outside the course of their employment. *Schipper v. State of Illinois*, 15 IWCC 0573 (Jul. 23, 2015) (Emphasis added). Evidence established that Petitioner had already swiped in and because she did not know if and when she would get a break, she decided to purchase fries. She testified they are allowed breaks but the Arbitrator notes the breaks do not appear to be consistent. The Arbitrator finds that Petitioner purchasing an order of French fries at Respondent's cafe constituted an act of personal comfort as contemplated under the rule. However, Respondent is correct that Petitioner was not engaged in any act of personal comfort, as the act ended and was otherwise completed when by the time of her accident. After buying fries, evidence established that Petitioner elated the PITO unit once again and began looking for tubs to attach to the PITO unit. She found none and decided to drive back to her work area. She was injured when the PITO's steering wheel became stiff, causing her to make a sharp turn at which time she was injured. In this regard, the purchasing of the French fries is nothing more than a red herring. She was not injured while purchasing the fries. The sequence of events demonstrates Petitioner was still in the course of her employment and her injuries occurred at a time and place she would reasonably be expected to be; that of using the PITO unit to collect tubs. For the foregoing reasons, the Arbitrator finds that Petitioner's accident arose out of and in the course of her employment with Respondent.

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

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same. Having resolved the disputed issue of accident in favor of Petitioner, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence she provided timely notice of the accident to Respondent.

There was conflicting testimonial evidence as to whether anyone actually witnessed the accident occur. Young, a part time supervisor on duty that day, testified she saw Petitioner driving faster than normal and that Petitioner tried to turn a corner, hit a pole and flipped over. Young testified she completed an incident report, introduced as Rx2. The Arbitrator notes that at the time Young drafted the document, she used the last name Patterson and these individuals are one in the same. Patterson/Young testified Delhotal never interviewed her. Delhotal's documentation, however, suggests that he did interview her. Rx1. Delhotal even testified he spoke with Patterson/Young, who told him she did not witness the accident. (T.68-69).

Patterson/Young's recollection that Petitioner struck a poll is also at odds with Petitioner's more credible testimony, who did not describe hitting a pole but rather stated that she attempted to turn left, the steering wheel locked or stiffened, forcing her to make a sharp right turn, causing the PITO to flip over.

In summary, for notice purposes, the Arbitrator is not persuaded that the accident was actually witnessed by anyone and therefore finds Delhotal's and Patterson/Young's testimony not credible in this regard. Having found no one witnessed the accident, the evidence still establishes that Respondent had actual notice based on Delhotal arriving at the scene, completing an investigation and then completing his incident report. Delhotal's testimony that Petitioner confessed to him at the emergency room that the used the PITO unit to purchase fries is also entitled to less weight in light of the Arbitrator's findings and conclusions of law on the foregoing issues.

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 and relies on same. Having resolved the foregoing disputed issues in favor of Petitioner, the Arbitrator further concludes that Petitioner has proven by a preponderance of the evidence that her current condition of ill-being for the right ankle is causally related to her work accident. Petitioner had no prior injuries or problems to the right ankle immediately before the accident. Petitioner testified she injured her right ankle when the PITO unit flipped over onto her right leg. Photographic and testimonial evidence supports such an injury occurring. Petitioner's medical treatment records further support an injury to the right ankle following the accident. Respondent presented no medical opinion contrary to the conclusion reached by the Arbitrator. Therefore, under a chain of events theory, the Arbitrator finds Petitioner's current condition of ill-being causally related to her work accident.

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

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same. Having resolved the foregoing disputed issues in favor of Petitioner, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that her medical treatment for the right ankle to date has been both reasonable and necessary and that Respondent has not yet paid all appropriate charges for same. Petitioner alleged outstanding medical bills for Adventist LaGrange Hospital, Orthopaedic Associates of Riverside and Advocate Home Health. Ax1. The Arbitrator notes the following unpaid medical bills:

Px3	Adventist LaGrange/Neil Greene	$58,971.32
Px4	Orthopaedic Associates of Riverside	$21,073.00
Px5	Advocate Home Health Service	$3,648.20
TOTAL		**$82,692.52**

Records confirm that the above outstanding medical bills correspond to treatment rendered in connection with Petitioner's right ankle injuries stated herein. The Arbitrator notes that Petitioner's medical records suggest payment by Blue Cross Blue Shield. At trial, it was not discussed whether such payments represent group medical payments for which a credit may be appropriate. Nevertheless, the Arbitrator finds that Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$82,692.52**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of for medical benefits that have been paid and

17IWCC0550

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.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same. Having resolved the foregoing disputed issues in favor of Petitioner, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits for the time period lost from work as a result of her injuries.

The medical evidence established that during the period sought, Petitioner was either off of work or on light duty disability per doctor order. Respondent presented no contrary evidence on this issue as its primary defense was based on accident. Thus, the unrebutted medical evidence demonstrates that Petitioner's condition of ill-being relative to the right ankle has not yet reached a state of permanency and that she has not otherwise been determined to be a maximum medical improvement. Respondent shall pay temporary total disability benefits of **$276.97** per week for **15-6/7th weeks** commencing **10/2/15** through **1/20/16** as provided in Section 8(b) of the Act because the injuries sustained caused the disabling condition of the Petitioner and such disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.

ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the findings of fact and conclusions of law as though fully set forth herein and relies on same. Having resolved the foregoing disputed issues in favor of Petitioner, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she is entitled to prospective medical care. Respondent shall pay for and authorize the medical treatment as recommended by Dr. Erling Ho. Px4.

Signature of Arbitrator

4-4-2016
Date

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 ROCK ISLAND	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christina Herron,

Petitioner,

vs.

17IWCC0579

NO: 15WC 20754

Kindred Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical, 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 July 28, 2016, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $32,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 25 2017
o072517
KWL/jrc
042

Michael J. Brennan

Thomas J. Tyrrell

DISSENT

I respectfully dissent from the decision of the majority. I would reverse the Arbitrator's Decision and find that under a neutral risk analysis, the Petitioner failed to meet her burden proving an accident occurred arising out of her employment. Petitioner, worked for Respondent as a registered nurse for one year prior to the subject incident. Petitioner testified around 2:00 in the afternoon she was squatting down in a patient's room emptying out a Foley catheter. When she stood up with the graduated cylinder in her hand, she felt a pop in her lower back that radiated pain down her right leg & up her right to lower mid-back. The cylinder contained approximately 250 milliliters, or 8 oz. of liquid.

The Appellate court has categorized the risks to which an employee may be exposed as: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." *Metro. Water Reclamation Dist. of Greater Chi. v. Ill. Workers' Comp. Comm'n,* 407 Ill. App. 3d 1010, 944 N.E.2d 800. ... employment-related risks are compensable while personal risks typically are not. Further, "[i]njuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan,* 407 Ill.App. 3d at 1014, 944 N.E.2d at 804.

The Arbitrator also found "Petitioner's job duties exposed her to this risk to a greater degree than the general public both qualitatively and quantitatively." (ArbDec. p. 5) The

Arbitrator never explained how he came to this conclusion and offered it without any further explanation or description of a quantitative analysis.

In a specially concurring opinion Presiding Justice Holdridge recently emphasized "a claimant may not obtain benefits for injuries caused by activities of everyday living (such as bending, reaching, or stooping), even if he was ordered or instructed to perform those activities as part of his job duties, unless the claimant's job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk." *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 41 quoting from *Adcock v. Illinois Workers' Compensation Comm'n,* 2015 IL App (2d) 130884WC.

Therefore, an analysis of the activity under the theory that the risk is incidental to employment should not be applicable in this case if we are to follow Justice Holdridge's analysis. The case falls under a neutral risk analysis and thus fails quantitatively and fails qualitatively. Petitioner never testified to the frequency and/or duration of squatting or that Foley catheter emptying was different from any of the everyday activities she testified she performs at home where she goes from squatting to standing with something in her hand. To pass muster qualitatively, Petitioner must prove some aspect of the employment which contributes to the risk. The act of squatting and standing back up is a movement consistent with normal daily activity and by itself is not an activity associated with a risk of employment even with 8 oz. of liquid in hand. Similar activities were described in *Adcock* and the Appellate court characterized "squatting" as an activity of daily living. For the reasons set forth I would reverse the Arbitrator's Decision and find that under a neutral risk analysis, the Petitioner failed to meet her burden proving an accident occurred arising out of her employment.

Kevin W. Lamborn

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

17IWCC0579

CHRISTINA HERRON
Employee/Petitioner

v.

KINDRED HOSPITAL
Employer/Respondent

Case # 15 WC 20754

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MICHAEL NOWAK**, Arbitrator of the Commission, in the city of **ROCK ISLAND**, on **04/05/2016**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **2/27/2015**, 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 year preceding the injury, Petitioner earned **$57,200.00**; the average weekly wage was **$1,100.00**.

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

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, **$1,236.45** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,236.45**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $733.33/week for 45 6/7 weeks, commencing 05/21/2015 through 04/05/2016, as provided in Section 8(b) of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Kube, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Michael K. Nowak, Arbitrator

6/24/16

Date

ICArbDec19(b)

JUL 28 2016

FINDINGS OF FACT

On February 27, 2015 Petitioner was employed by Respondent, Kindred Hospital, as a registered nurse. On that date she was assigned to medical/surgical duties. In the process of performing her duties she was emptying a Foley catheter bag for a patient. The bag was attached to the rail of the patient's hospital bed and hung below the mattress. She was required to squat down to reach the bag. Once she had done so she placed a graduated cylinder, used to measure urine output, on the floor. She then opened the drain clip on the catheter bag and allowed the contents to drain into the cylinder. After the bag had drained she closed the drain clip and arose from her squatting position holding the graduated cylinder. As she did so, she felt a pop in her back and experienced an immediate onset of pain in her lower back as well as pain shooting down into her right leg. The cylinder contained 250 milliliters of urine weighing approximately one half pound.

She notified her supervisor, who referred her to the Occupational Clinic at OSF, where she saw Dr. Braun. She gave a history of accident consistent with her testimony at Arbitration. (PX 1, p. 59-61). Dr. Braun treated Petitioner conservatively, initially prescribing pain medication and placing her on work restrictions. Additionally, Dr. Braun ordered an MRI of her lumbar spine. (PX 1). Respondent initially accommodated Petitioner's restrictions.

Petitioner underwent an MRI at the Peoria Imaging Center on March 18, 2015. The impression was a central posterior disc protrusion and posterior annular fissure at L5-S1contacting the dural sac and S1 nerve roots without mass effect on them. (PX 3, p. 25). Dr. Braun then referred Petitioner for therapy at Professional Therapy Services (PX 2). Finally, Dr. Braun referred Petitioner to the OSF Central Illinois Pain Center for an epidural steroid injection. Petitioner underwent this injection on April 30, 2015. The postoperative diagnosis on that date was "lumbar disc herniation L5-S1" (PX 3, p. 45). Despite these conservative measures Petitioner continued to have pain and discomfort in her low back and down into her right leg.

Petitioner was examined by Dr. Kern Singh on May 18, 2015 pursuant to §12. It was Dr. Singh's opinion that Petitioner had sustained a soft tissue muscular strain and that her leg complaints were non-anatomic in nature (RX 2). Following the examination Respondent refused to accommodate any light duty restrictions and all other benefits were denied.

Petitioner then sought medical attention from her family physician, Dr. Todd Lanser, at the Graham Medical Group. Petitioner first saw Dr. Lanser for these injuries on May 21, 2015. On that date she gave a history to Dr. Lanser consistent with her testimony at Arbitration. Dr. Lanser immediately removed Petitioner from work and set up a referral for her to see Dr. Richard Kube at the Prairie Spine and Pain Institute (PX 4, p. 53-65).

Petitioner was first seen at the Prairie Spine and Pain Institute on June 18, 2015. Petitioner was once again treated conservatively with epidural steroid injections and physical therapy. Additionally, Petitioner underwent an SI joint injection to rule out that area as the cause of her problems.

Dr. Kube testified by way of deposition. Dr. Kube opined that because Petitioner received no relief from the SI joint injection, the pain that she was experiencing in the right center and lower back corresponded with the L5-S1 disk (PX 6, p. 12-15). Given that the Petitioner had failed conservative treatment, Dr. Kube was then recommending a surgical procedure where the L5-S1 disk would be removed and fused at that level as well as

make additional room for the S1 nerve root on her right side. (*Id.*, at 15). Dr. Kube further testified that Petitioner should remain off work until the surgery could be performed. (*Id.*, at 16). When asked about the causal relationship between the accident and the right sided annular tear for which he was treating Petitioner, Dr. Kube testified "[b]ased upon the patient's history that was provided to me, the lack of significant history prior of any of these kinds of symptoms, and the contemporaneous onset of the symptoms that she had, it would be more likely than not that she would have an association of the symptoms she's having now with the incident that she described." (*Id.*, at 23). Dr. Kube opined that Petitioner's right sided complaints were consistent with the MRI findings as well as the physical examinations performed during her office visits. Dr. Kube also testified that he had detected no positive Waddell signs during any of his examinations of the Petitioner. He stated:

> she has complaints that correlate with exam findings that correlate with MRI findings, you know, I mean, that's -- those are all things that are kind of adding together. ...the notes indicate that she, you know, went to PT. She went there regularly. She participated in exercise. You know, there's not been any evidence of any drug seeking behaviors. There's not been anything I would consider a red flag in this person. And, like I say, I have a history - - a history and an exam and an imaging study all kind of pointing at the same spot, and so, you know, there's not really a reason for me to have any kind of big second guesses there. (*Id.*, at 79-80).

Dr. Singh also testified by way of deposition. Dr. Singh testified that he personally reviewed Petitioner's MRI films, which he interpreted to show an L5-S1 disc protrusion with annular tear. Although the MRI report reflected a left-sided disc bulge with encroachment on the left-sided nerve root, he did not agree with that finding. (RX 2). Dr. Singh diagnosed Petitioner with a lumbar strain as a result of the accident on February 27, 2015. He felt she had reached maximum medical improvement four weeks following the injury, was able to work full duty, and did not require any further treatment as a result of her injury. Dr. Singh believed that the Petitioner had non-anatomic pain complaints, as her complaints of pain did not correlate to findings on MRI or physical examination. (*Id.*). Dr. Singh opined that the only pathology of import shown on the MRI was a L4-5 disc bulge that caused compression on the left. However, that disc bulge would not explain her right-sided symptomology. (*Id.*, at 16-22). Dr. Singh further opined that neither the injections that were performed nor Dr. Kube's recommended decompression and fusion were reasonable and necessary treatment because there was no pathology at L5-S1 that would warrant this treatment. (*Id.*, at 27).

Petitioner testified at Arbitration that prior to February 27, 2015, she had never experienced the type of symptoms she had immediately after the accident. She further testified that the accident in question took place at approximately 2:00 p.m. on February 27, 2015. She stated that her shift that day began at 7:00 a.m. and that she was not suffering from any symptoms prior to the incident. Petitioner also testified that she has not suffered any other accidents or injuries to her low back since February 27, 2015. She continues to experience pain in her low back and right leg. Although Petitioner continues to perform a myriad of daily activities of normal life, she continues to have pain and discomfort in her low back and right leg while performing these activities.

CONCLUSIONS

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

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim, including proof that he suffered an accident which arose out of and in the course of his employment. 820 ILCS 305/2 (West 2008); *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013, 944 N.E.2d 800, 348 Ill. Dec. 559 (2011). Both elements must be present at the time of the claimant's injury 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).

It is clear that the incident in this case arose during the course of Petitioner's employment. The only legitimate issue for analysis is whether the claimant's injuries 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. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment: (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 317 Ill. Dec. 355 (2007) (citing *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d 149, 162, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000)).

Injuries resulting from a neutral risk do not arise out of the employment and are not compensable under the Act unless the employee was exposed to the risk to a greater degree than the general public. *Illinois Institute of Technology Research Institute*, 314 Ill. App. 3d at 163. The increased risk may be either qualitative, that is 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 general public. *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014.

In this case, Petitioner was injured when she was arising from a squatting position while holding a graduated cylinder after she had emptied a patient's Foley catheter bag. As she did so, she felt a pop in her back and experienced an immediate onset of pain in her lower back as well as pain shooting down into her right leg. The cylinder contained 250 milliliters of urine weighing approximately one half pound.

Nothing in the record suggests that Petitioner's injury was the result of a risk personal to the employee. The act of squatting down to empty a catheter bag while holding onto a graduated cylinder and then arising, being careful not to spill the contents of the cylinder, are risks associated with Petitioner's employment. While the risk of squatting and arising from a squatted position may be argued to be a risk to which the general public is exposed, the Arbitrator finds Petitioner's job duties exposed Petitioner to this risk to a greater degree than the general public both qualitatively and quantitatively.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner sustained injuries which arouse 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?

Issue (K): Is Petitioner entitled to any prospective medical care?

As indicated above both Petitioner's treating surgeon and Respondent's §12 examiner testified by way of deposition. Dr. Kube opined that Petitioner's symptoms corresponded with L5-S1 disk pathology. Given that the Petitioner had failed conservative treatment, Dr. Kube recommended a decompression and fusion at L5-S1. Dr. Kube opined Petitioner's condition was related to the accident. Dr. Kube explained why Petitioner's right sided complaints were consistent with the MRI findings as well as the physical examinations performed during her office visits. Dr. Singh was of the opinion that Petitioner's MRI films show an L5-S1 disc protrusion with annular tear. Dr. Singh diagnosed Petitioner with a lumbar strain from which she had reached maximum medical improvement four weeks following the injury. He felt she was able to work full duty, and did not require any further treatment as a result of her injury. Dr. Singh further opined that neither the injections that were performed nor Dr. Kube's recommended decompression and fusion were reasonable and necessary treatment because he felt that there was no pathology at L5-S1 that would warrant this treatment. (*Id.*, at 27).

The Arbitrator finds the testimony and opinions of Dr. Kube more persuasive than those of Dr. Singh in this case.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met her burden of establishing that her current condition of ill-being is causally related to the accident and that she is entitled to prospective medical care.

Respondent shall authorize and pay for the treatment recommended by Dr. Kube, as provided in Sections 8(a) and 8.2 of the Act.

Issue (L): What temporary benefits are in dispute?

Prior to Petitioner being seen by Dr. Singh, she had been placed on light duty by Dr. Braun at OSF Occupational Health, where she had been sent by Respondent. Respondent was able to accommodate these restrictions and Petitioner was paid partial benefits for the hours that she missed. Based upon Dr. Singh's opinions, Respondent discontinued Petitioner's benefits on May 20, 2015 and refused to accommodate any light duty restrictions.

On May 21, 2015, Petitioner began treating with Dr. Todd Lanser, her primary care physician. Dr. Lanser opined that Petitioner was not ready to return to full duty at work and referred Petitioner to Dr. Kube. Dr. Kube testified that he has continued to keep the Petitioner restricted from work and will continue to do so until after the surgical procedure he has recommended.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner is entitled to temporary total disability benefits from May 21, 2015 through April 5, 2016, the date of hearing. Respondent shall pay Petitioner temporary total disability benefits of $733.33/week for45 6/7weeks, commencing 5/21/15 through 4/5/16, as provided in Section 8(b) of the Act.

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

Gertrude Birkhead,
Petitioner,

vs.

Northrop Grumman Systems Corp.,
Respondent.

17IWCC0596

NO: 15 WC 21233

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, permanent disability, causal connection, evidentiary ruling and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 6, 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.

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.

SEP 29 2017

DATED:
o8/31/17
DLS/rm
046

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

17 IWCC0596

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Gertrude Birkhead
Employee/Petitioner

v.
Northrop Grumman Systems Corp.
Employer/Respondent

Case # 15 WC 21233

Consolidated cases: D/N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Molly Mason, Arbitrator of the Commission, in the city of Chicago, on 7/18/16. 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? [Petitioner waived TTD and Respondent waived credit for short-term disability payments. Arb Exh 1.]

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 _____

17IWCC0596

FINDINGS

On 5-27-15, 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.

Petitioner claims an accident of May 27, 2015. Respondent stipulated the accident occurred in the course of Petitioner's employment. For the reasons set forth in the attached decision, the Arbitrator finds Petitioner lacked credibility and failed to establish that the accident arose out of her employment. The Arbitrator views the issues of medical expenses and permanency as moot and makes no findings as to those issues. Compensation is denied.

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $114,972.00; the average weekly wage was $2,211.00.

On the date of accident, Petitioner was 68 years of age, married, with 0 children under 18.

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 $87,916.41 under Section 8(j) of the Act, as stipulated by the parties. Arb Exh 1.

ORDER

The Arbitrator, having found that Petitioner failed to establish her accident arose out of her employment, awards no benefits in this case. The Arbitrator declines to award Respondent credit for a $600 "no show" fee charged by Dr. Vinci, Respondent's Section 12 examiner.

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

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

Molly C Mason

Signature of arbitrator

Date 9/2/16

SEP - 6 2016

Gertrude Birkhead v. Northrop Grumman
15 WC 21233

17IWCC0596

Summary of Disputed Issues

Petitioner claims she injured her right ankle when she slipped on some kind of liquid and fell while exiting a bathroom stall at Respondent's facility on May 27, 2015. She seeks an award of medical expenses and permanency. Respondent concedes the accident occurred in the course of Petitioner's employment but maintains it did not arise out of the employment. Respondent seeks credit for a $600 "no show" fee charged by its Section 12 examiner.

Arbitrator's Findings of Fact

Petitioner testified she worked as a subcontract administrative purchaser for Respondent as of May 27, 2015, the date of her accident. On that date, she was working inside Respondent's facility, which she described as huge. She testified the facility is secure and not open to the public. Employees have to present badges to gain admittance.

Petitioner testified there are about twenty bathrooms inside Respondent's facility. She used the bathroom that was closest to her work station. On average, she used this bathroom three to five times per workday. The bathroom was large. It was equipped with about six to eight stalls and six to ten sinks. The floor of the bathroom was not normally wet.

Petitioner testified she typically worked between 6:30 and 4:00 each day. At about 9:30 on May 27, 2015, she slipped while exiting one of the stalls inside the bathroom. She testified she slipped because there was some kind of liquid on the floor. There were no signs inside the bathroom indicating the floor was wet.

Petitioner testified she fell after she slipped, hitting the stanchion inside the stall. She was in tremendous pain and could see that her right foot was 180 degrees "off angle." Paramedics arrived at the scene, applied a boot to her foot and transported her to the Emergency Room at Northwest Community Hospital. She was subsequently admitted to the hospital and underwent surgery on her right ankle the following day.

The paramedic run sheet is not in evidence.

The Emergency Room records from Northwest Community Hospital reflect that Petitioner arrived via ambulance at about 9:57 AM, having been given Fentanyl by paramedics while en route. The records also reflect that Petitioner's blood pressure was "90s/30s" on arrival. The history describes the accident as a "slip and fall in bathroom at work with deformity to right ankle." Petitioner acknowledged having been on a liquid fast for two days but denied passing out or losing consciousness. PX 1, p. 2. The examining physician described Petitioner's right ankle as "grossly deformed." He applied a splint to the ankle, ordered several X-rays and CT scans, along with pain medication and other studies, and later admitted

Petitioner to the hospital. Right ankle X-rays demonstrated a severely comminuted bimalleolar fracture/dislocation with comminuted fractures of the distal tibia and fibula.

Later the same morning, a physician's assistant recorded the following history:

> "Gertrude Birkhead is a 68 y.o. female who was admitted after sustaining an unwitnessed fall while at work this AM. She states that she had been in the bathroom due to abdominal cramping/pain but denies diarrhea or constipation. Over the last two days she has been partaking in the isogenics diet and has been fasting/performing a cleanse which involved consuming only vitamins and liquids x 48h. She denies feeling lightheaded or having palpitations prior to falling. She states she simply tripped. Denies LOC and hitting her head. She complains only of pain in her R ankle which is clearly disfigured.
>
> She received Fentanyl in the field for her ankle fracture and subsequently became hypotensive in the ED. FAST exam is currently negative."

PX 1, p. 14. The physician's assistant assessed Petitioner as having a right ankle fracture as well as "hypotension s/p fall." She indicated she suspected the latter was "related to dehydration from her recent fasting over the last 48h."

Petitioner saw Dr. Benuck, an orthopedic surgeon, on May 28, 2015. Dr. Benuck interpreted the post-reduction right ankle X-rays taken in the Emergency Room as showing a "reduced ankle with still some displacement of the mortise." He recommended an open reduction and internal fixation. He performed this surgery later the same day, inserting a locking plate and screws into Petitioner's ankle.

Petitioner was discharged from the hospital on May 30, 2015. She testified she was not able to move on her own at this point since she was in a cast and unable to bear any weight on her affected foot/ankle. The hospital contacted rehabilitation facilities and identified Alden Terrace as the facility closest to Petitioner's home. Petitioner testified she spent about two weeks at Alden Terrace. PX 8. She identified PX 7 as the bill she received from Alden Terrace. She testified she paid this bill.

Petitioner testified she followed up with Dr. Benuck thereafter and underwent physical therapy at his direction. On August 21, 2015, Dr. Benuck directed her to discontinue the CAM boot and transition to a cane and continue therapy. PX 2. On September 4, 2015, Petitioner complained to Dr. Benuck of persistent right ankle and foot pain as well as right knee pain that had started one week earlier, when she resumed full weight bearing. The doctor obtained right knee X-rays and injected Lidocaine into the knee. He prescribed six weeks of knee therapy and directed Petitioner to follow up with him as needed. On November 13, 2015, Dr. Benuck described Petitioner's right ankle as doing well but noted gastrocnemius weakness. He prescribed additional therapy and directed Petitioner to return to him in six months. He

obtained right ankle X-rays, which showed intact hardware and no widening of the mortise. PX 2. The Accelerated Rehabilitation physical therapy records (PX 3) reflect Petitioner was discharged from therapy on February 5, 2016, but was still complaining of pain and stiffness with rainy weather and when negotiating stairs and hills. The therapist recommended she continue home exercises.

Petitioner testified she was off work from May 27, 2015 until September 2, 2015. Dr. Benuck's chart includes a statement from the doctor dated July 8, 2016 reflecting Petitioner was unable to work during the aforementioned period due to her right ankle fracture. PX 2.

Petitioner testified she is currently 69 years old. She attended college for two years. She previously relied on good health to earn a living. Since the accident, she has experienced pain with every step she takes.

Under cross-examination, Petitioner testified her job duties included purchasing sub-assemblies, such as PC boards with components. Her job was sedentary in nature. She worked at a desk.

Petitioner acknowledged that, during the two days before the accident, she adhered to an "isogenics cleanse" diet, consisting of five protein shakes and several snack bars per day. She did not recall telling hospital personnel she was on this diet.

Petitioner acknowledged having hypertension and Type 2 diabetes before the accident. She testified these conditions were controlled by medication. After the accident, hospital personnel diagnosed her with dehydration and hypotension. It is her belief the hypotension was secondary to pain medication administered by the paramedics. She had a bad reaction to this medication.

Petitioner acknowledged that the bathroom where she fell was cleaned multiple times per day. She also acknowledged there was no defect in the bathroom floor. There is "no question" in her mind that she slipped on some kind of liquid but she does not know what kind of liquid was present. It could have been coffee, since co-workers were known to bring coffee cups inside the bathroom. It also could have been juice or a bodily fluid. She did not notice anything unusual when she entered the stall. The stall was not tiny. She entered on the right side of the stall and was exiting on the left side when she slipped.

Petitioner acknowledged she did not look at her clothes after she fell. She was in too much pain to do this.

Petitioner acknowledged providing a statement to Josh Ruedin, an insurance adjuster, on June 2, 2015. She was aware the statement was recorded. She gave permission for the recording. She did not, however, receive a copy of the statement.

The Arbitrator admitted the transcript of Petitioner's June 2, 2015 recorded statement (RX 1) into evidence over Petitioner's objection. The first page of the transcript reflects that Ruedin advised Petitioner the statement was being recorded and secured her permission for the recording. In the course of the statement, Petitioner indicated she began working for Respondent in 1968. She denied any prior workers' compensation claims against Respondent. RX 1, p. 3. She denied any history of other significant injuries. She acknowledged a history of arthritis, diabetes, hypertension, thyroid removal and gall bladder removal. RX 1, pp. 4-5. She described her job as sedentary and clerical in nature. RX 1, p. 8.

The following exchange occurred in connection with the claimed accident:

"Q: Could you tell me where you were when you were injured?

A: In the bathroom.

Q: OK. Thank you. All right. Um, so now in as much detail as you can provide, can you kind of explain to me what you were doing and how you were injured?

A: I was in the bathroom stall. I opened the door to exit the bathroom stall and one minute I was standing and the next second I was on the floor. So I just, I don't know. It went, it happened so fast I don't know. I don't know if there was water on the floor. I don't know what caused the, the slippage.

Q: OK. Um, all right. So you said you, you slipped, uh, so, uh, did, you didn't trip over anything?

A: No.

Q: OK. Um, and you're unsure if there was water or anything else on the floor?

A: Yeah, do not know.

Q: All right. OK. Um, OK. All right. Uh, and so, uh, just to make sure that I understand correctly and have it documented correctly, um, so you're really not sure what happened to, to cause you to fall, um, you know that you didn't trip on anything, you just know that you were standing, uh, then you fell. That correct?

A: I just slipped, yes. I did not lose consciousness. I didn't faint. I, just normal."

RX 1, pp. 8-9.

Petitioner testified she took voluntary retirement in November 2015, at which point she was 68 years old. She worked for Respondent for 47 years.

Petitioner testified she last saw Dr. Benuck in May 2016. [No records concerning this visit are in evidence.]

Petitioner testified she was not aware that Respondent scheduled an appointment for her to be examined by Dr. Vinci on June 1, 2016. She did not attend this appointment. Had she known of the appointment, she could have attended it, since she is not currently working.

Petitioner testified she resides with her husband. She denied that Northwest Community Hospital recommended she be discharged to home health care. She paid the rehabilitation facility, Alden Terrace, herself because her group carrier, Blue Cross/Blue Shield, refused to pay the bill. Blue Cross/Blue Shield took the position that her policy did not cover care at a rehabilitation facility because she did not require intravenous feedings.

Petitioner denied falling when she slipped in Respondent's hallway. She managed to catch herself on that occasion. She denied having a history of falling at the workplace.

On redirect, Petitioner reiterated she is unsure of the kind of liquid she slipped on. Other Respondent employees use the bathroom where her accident occurred.

Under re-cross, Petitioner reiterated she is unsure whether the liquid was coffee. At the time of the accident, a co-worker was in the bathroom but was in a stall that was several stalls away from her. No one was in her immediate vicinity.

Freddie Celletti testified on behalf of Respondent. Celletti testified he works for Respondent as a physical security specialist. He held the same job in May 2015. If an accident occurred at Respondent's facility, it fell to him or one of his co-workers to examine the accident scene. He was one of the first people to respond to Petitioner's accident. After he learned of the accident, he and a Securitas officer (employed by an outside contractor) went to the bathroom and encountered Petitioner, lying on the floor. Petitioner's feet were sticking outside of a stall. Petitioner's head was on the left side of the stall. Another female was inside the stall where Petitioner was lying. He looked for a hazard such as liquid or a wire but saw nothing. He observed no defects in the floor, no wires, no leaks and no broken fixtures. He exited the bathroom, leaving the Securitas officer and two women behind, so that he could meet the paramedics, who were due to arrive. After the paramedics took Petitioner away, he went back inside the bathroom. No one had entered the bathroom in the interim. He did not recall whether the bathroom door was closed. During his second visit, he again observed no liquid on the floor and no defects such as cracked floor tile.

Celletti testified that the bathrooms inside Respondent's facility are cleaned several times each day.

Celletti identified RX 2 and RX 3 as copies of photographs he took of the bathroom where the accident occurred. He initially testified he did not take these photographs on the day of the accident. The stall where he encountered Petitioner can be seen on the left side of the photograph marked as RX 2. RX 3 is a photograph of this stall. The photograph accurately depicts the condition of the stall after the accident. It shows no leakage and no defects.

Celletti identified RX 4 as an E-mail he sent to Shirley Pawlisz concerning his examination. In this E-mail, Celletti indicated he "did not notice any liquid or skid mark on the floor" when he responded to the women's restroom where Petitioner was lying, having fallen inside a stall. Celletti also indicated he returned to the restroom "for a second look" after Petitioner left with the paramedics and "still noticed no indication of a slip or cause for a slip in the stall."

Celletti testified that, apart from examining the scene, obtaining photographs and sending the E-mail, he was not involved in the investigation of Petitioner's accident. He also did not perform any work on the bathroom. His department does not perform that kind of function.

Under cross-examination, Celletti indicated he cannot recall when he took the two photographs. He does not know the name of the woman who was inside the stall with Petitioner after the accident. Other individuals at Respondent investigated Petitioner's accident. Shirley, who works in the nurse's office at Respondent, headed up the investigation. He was not inside the bathroom before Petitioner fell and did not witness the fall.

On redirect, Celletti distinguished between his role as a first responder and the role of an investigator. He saw no stains on the bathroom floor during either of his two visits.

Respondent also offered into evidence accident-related reports authored by Nicole Heine, R.N., BSN, and Shirley Pawlisz. Both of these reports are dated May 28, 2015. RX 5.

Arbitrator's Credibility Assessment

Petitioner's very lengthy tenure with Respondent weighs in her favor, credibility-wise, but her testimony concerning the cause of her fall is at odds with the recorded statement she provided to an adjuster. Petitioner testified there is "no question" in her mind she slipped on some kind of liquid but, when she talked with the adjuster, only six days after the accident, she admitted she did not know what caused her to slip. The adjuster specifically asked her whether there was water or some other liquid on the bathroom floor. She said she did not know. RX 1.

Freddie Celletti's testimony concerning the two inspections he conducted on the day of the accident was detailed and credible.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident arising out of her employment on May 27, 2015?

There is no dispute that Petitioner's accident occurred in the course of her employment. The issue is whether the accident arose out of the employment. Based on the foregoing credibility assessment, the other relevant evidence and controlling case law (First Cash Financial Services v. Industrial Commission, 367 Ill.App.3d 102 (1st Dist. 2006), the Arbitrator finds that Petitioner failed to meet her burden of proof on this issue. One Emergency Room history reflects that Petitioner slipped in a bathroom at work but the history contains no mention of Petitioner slipping on liquid. Another history describes Petitioner as tripping rather than slipping. The Emergency Room physician found it likely that Petitioner fell due to dehydration resulting from her restricted diet. When Petitioner provided a recorded statement, six days after the accident, she indicated she slipped but admitted she did not know what caused her to slip. She clearly stated she did not know whether there was water or anything else on the floor. At no point in time did Petitioner claim any other possible cause of her accident, such as a defect in the tile. At the hearing, she conceded that the bathroom is cleaned several times per day. Respondent's witness, Freddie Celletti, who twice inspected the bathroom shortly after the accident, credibly testified he saw no liquid on the floor of the stall where Petitioner fell. He also testified he saw no other potential slipping/tripping hazard.

The Arbitrator concludes there is no credible evidence showing that Petitioner slipped due to water or any other liquid on the floor of the employee bathroom. Although the bathroom was in a facility that was not open to the public, there is no credible evidence which would prompt the Arbitrator to conclude that Petitioner's use of the bathroom subjected her to an increased risk of injury.

Having found that Petitioner failed to prove her accident arose out of her employment, the Arbitrator declines to award benefits. Compensation is denied. The Arbitrator clarifies that the accident/incident reports offered by Respondent (RX 5) played no role in her assessment of Petitioner's credibility and denial of benefits.

Is Respondent entitled to a credit for its examiner's claimed $600 "no show" fee?

Respondent claims Petitioner failed to appear for a Section 12 examination with Dr. Vinci and that it is thus entitled to credit for a $600 "no show" fee charged by the doctor. RX 8. The Arbitrator declines to award Respondent credit for this fee. Section 12 of the Act does not contain any provision requiring a claimant who fails an examination to pay such a fee. The only sanction afforded by Section 12 is temporary suspension of compensation benefits until the examination occurs. No other section of the Act contemplates the kind of credit Respondent seeks. Furthermore, Respondent failed to establish it paid Dr. Vinci's fee and the Arbitrator has made no award against which a credit could lie. Also see Antonio Lee v. University of Illinois, 13 IWCC 692, a unanimous decision in which the Commission (Basurto, Gore and Latz) upheld the

Arbitrator's denial of an employer's claim for credit for a Section 12 examination cancellation fee against a permanency award.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Avalos,
Petitioner,

vs. NO: 12 WC 21007

Caldwell Letter Service, Inc.,
Respondent.

17IWCC0658

DECISION AND OPINION ON REVIEW

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

In so affirming, the Commission specifically finds Petitioner's testimony is more credible than that of Mr. Perry or Mr. Hogan in that Petitioner testified he was attacked without provocation from behind by Mr. Perry. T.50. Certainly, cases exist which indicate wholly unexplained attacks by co-workers are not compensable. See, *e.g. Thurber v. The Industrial Commission*, 49 Ill.2d 561, 564 (1971) ("The hazard of being suddenly attacked by a fellow employee for no known reason was neither incidental nor peculiar to defendant in error's employment, but was, instead, a risk incidental to the general public."); see also *Math Igler's Casino, Inc. v. The Industrial Commission*, 394 Ill. 330, 338 (1946) ("Manifestly, an award of compensation cannot rest upon sheer speculation that an injury inflicted by a fellow employee was connected with the work in which they were engaged."). It is questionable whether such cases are still controlling given the Supreme Court's ultimate ruling in *Rodriquez v. The Industrial Commission*, as well as its explanation of its holding in *Health & Hospitals Governing Com. v. The Industrial Commission*, 62 Ill.2d 28, 33 (1975)- "this court indicated that a 'neutral' assault of the general type is compensable without any further showing of a specific causal link between the employment and the assault." 95 Ill.2d 166, 174 (1983).

17IWCC0658

Notwithstanding the above, the matter of *Hurt v. The Industrial Commission*, 191 Ill.App.3d 733 (1989), is on point. In *Hurt*, the claimant was assaulted by a co-employee who was combative and emotionally unstable. The court reasoned the claimant proved the reason for the assault: specifically, the co-employee's combativeness and hostility. As the claimant was required to work in such an environment, "the risk of assault was one peculiar to his employment and not one shared by the world at large." *Id.* at 742.

In the present matter, Petitioner testified he witnessed Mr. Perry engage in several fights at work as well as arguments and screaming at others. T.52. Mr. Perry confirmed his propensity to engage in arguments and altercations. T.122. Mr. Perry's hostility and emotional instability lead to an unprovoked attack on Petitioner who was required to work in such an environment. Such attack arose out of and in the course of Petitioner's employment.

Considering the above, all other findings and awards of the Arbitrator are affirmed in their entirety.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 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 the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,000.00. 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: OCT 17 2017

Joshua D. Luskin

L. Elizabeth Coppoletti

Charles J. DeVriendt

o-10/11/17
jdl/mcp
68

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

Jose A. Avalos
Employee/Petitioner

v.

Caldwell Letter Service, Inc.
Employer/Respondent

Case # 12 WC 21007

Consolidated cases: _____

17IWCC0658

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **September 10, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 4, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **$26,049.40**; the average weekly wage was **$500.95**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

The Respondent shall pay the Petitioner compensation for **5%** loss of use of the person as a whole, or **25** weeks at a weekly PPD rate of **$300.57 / per week**.

Respondent shall pay Petitioner temporary total disability benefits of $333.97/week for 23 & 3/7th weeks, commencing 6/5/2012-11/15/2012, for a total of **$7,824.44** as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$22,546.83**, pursuant to the fee schedule or by prior agreement, whichever is less, as provided in Section 8(a) 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.

Deborah L. Simpson

Signature of Arbitrator

February 28, 2016
Date

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Avalos ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 12 WC 21007**
	)	
Caldwell Letter Service, Inc.,	)	**17IWCC0658**
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on June 4, 2012, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner gave the Respondent notice of the accident that is the subject matter of this case within the time limits stated in the Act. They further agree that in the year preceding the injury the Petitioner earned $26,049.40 and the Petitioner's average weekly wage was $500.95.

At issue in this hearing is as follows: (1) Did the Petitioner sustain accidental injuries that arose out of and in the course of the Petitioner's employment with the Respondent; (2) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (3) Were the medical services that were provided to the Petitioner reasonable and necessary and has the Respondent paid all appropriate charges for all reasonable and necessary medical services; (4) Is the Petitioner entitled to TTD; (5) What is the nature and extent of the injury; and (6) Should penalties or fees be imposed upon the Respondent.

STATEMENT OF FACTS

Petitioner worked for Respondent as a machine operator for approximately ten (10) years. (T40). On average, he worked five (5) days a week, eight (8) hours a day, from 7:00 AM to 3:00 PM. (T44). As a machine operator, he was responsible for setting up and programming a machine that created various paper products, including letters, envelopes, cards, and magazines. (T41). Petitioner testified that he was required to use rulers and tape measures to measure the length of the various paper materials he used to complete his projects. (T41-43; T71-72). His co-worker, and Respondent's plant manager and chief operating officer of business operations on 6/4/2012, Aaron Perry, confirmed that machine operators for Respondent used tape measures to perform their duties. (T22; T115).

Petitioner explained that after obtaining the measurements, he would input the information into the computer that ran the machine. (T43). Petitioner was also responsible for

gathering the materials he needed for each project. The materials would be located in nearby areas within Respondent's facility and Petitioner would collect what he needed, bring it to his work station, and set up the machine. (T43).

On June 4, 2012, Petitioner was in his usual state of good health and was not under any care or treatment for his neck, right arm, right shoulder, or back. Prior to June 4, 2012, Petitioner never missed work due to illness or injury. (T46; T53). He had never been diagnosed with cervical herniation or suffered from cervical radiculopathy before that day either. (T46).

At approximately 2:30 PM on June 4,2012, Petitioner had programmed the machine at his work station to begin its self-cleaning process. (T47). This process took about forty-five (45) minutes to an hour to complete. (T47). While the machine went through its cleaning process, Petitioner testified that he wanted to take measurements and prepare for a project he had the next day. He went to Mr. Perry's office to borrow a tape measure as was his custom. (T48-49; T75). Petitioner explained at trial that whenever he needed to use a tape measure, he would borrow one from his boss Will Perry, his son Aaron Perry or from Juvenal Escamilla, a supervisor. (T76).

At trial, Petitioner and Aaron Perry gave different descriptions of the layout of Aaron Perry's office that day as well as the sequence of events that occurred resulting in Petitioner being injured. Petitioner stated that as he entered Aaron Perry's office, he entered through the "dock side" door. (T142). The desk containing the tape measure was located on the right side, next to the door. (T86; T142-143). Mr. Perry's description was; that when you entered the dock side door, his desk was to the right with the cabinet of tools to the right of his desk. Mr. Perry testified that to the left side of the office, there was a conference table where Respondent's driver, Mike Hogan, was seated. (T123). Mr. Perry explained that there was also another desk with wheels next to his regular desk. (T124).

According to Petitioner, Mr. Perry was seated behind his desk that was facing the doorway. (T86-87). The drawer with the tape measure was about six to seven feet from Mr. Perry's desk. (T150). Mr. Perry was behind his desk and "[h]is computer is on the right side, facing in the room on the right side, and then against to the left wall they have a couple of chairs in there and that's about it and it's the door going for the production place." (T142).

Petitioner stated that when he went in to retrieve the tape measure, Mr. Perry was alone in his office and that he had Mr. Perry's permission to use the tape measure. (T48). Conversely, Mr. Perry on direct examination by Respondent's attorney stated that he was not alone in his office when Petitioner came in to borrow the tape measure. (T113). He stated that Mr. Hogan was with him. (T113). Petitioner testified that Mr. Hogan was not in the office "because he always takes the mail to the main office . . . downtown around 1:30." (T77-78). Petitioner testified further that he knew this, " Because he delivered mail all the time at the same time." (T135). According to Petitioner, Mr. Hogan would leave anytime from noon to one o'clock to drop off mail at the post office downtown. (T145). Mr. Hogan testified at the hearing that he went to the main post office downtown every day. (T135). Petitioner testified that Mr. Hogan was not in the building when the accident happened because he had finished a particular project around 2:30 PM for pick-up by Mr. Hogan and it had not yet been picked up. (T147).

Upon returning to Mr. Perry's office to put the tape measure back, Petitioner noticed that Mr. Perry was taking pictures of him with his cell phone. (T49-50). Mr. Perry was alone in his office. (T50). Mr. Perry did not respond when Petitioner asked why he was taking pictures with his cell phone. (T50).

On June 4, 2012, Petitioner stated he was five-feet, nine-inches (5'9") tall and weighed approximately one-hundred fifty (150) pounds. (T58). Mr. Perry testified that on the date of accident, he was five-feet, ten inches (5'10") and weighed approximately two-hundred forty (240) pounds. (T30). Mr. Perry admitted that he had a physical advantage over Petitioner. (T30).

After Petitioner put the tape measure back into the drawer, he walked back out of the office, with his back to Mr. Perry when, without warning, Petitioner was pushed face forward by Mr. Perry into a forklift directly in front of him, about ten (10) feet from the office door, striking his right arm. (T50-51; T89, T90). Petitioner testified that "he just come from behind me and attacked me and pushed me." (T50). According to Petitioner, Mr. Perry had not said anything to him and there had been no argument between them at the time he was attacked. (T51). Petitioner stated that Mr. Perry then grabbed his neck, pulled him to the ground, and began choking him. (T51). The altercation ended when another co-worker named Angelica helped pull Mr. Perry off Petitioner. (T87; T108).

The Petitioner called Aaron Perry as an adverse witness in Petitioner's case-in-chief. Mr. Perry testified to his version of events leading up to the confrontation. He stated that Petitioner wanted to borrow a tool to fix his motorcycle, which was on the Respondent's premises with Respondent's permission. (T23-24). At first, Mr. Perry testified that he did not remember the type of tool that Petitioner had requested. (T23). Mr. Perry did remember that Petitioner proceeded into Mr. Perry's office and grabbed the tool out of a drawer. He testified further that Petitioner pushed the rolling desk up and into his person making contact with his knee. At that point he got up and told the Petitioner to give the tool back, he grabbed the tool and a brief struggle ensued over the tool. Momentum carried them towards the office door and both fell down outside the door. (T24).

Mr. Perry testified that the rolling desk was next to his desk, the desk is on wheels and it came forward and hit me on the knee. According to Mr. Perry he then stood up, and told him again, you cannot borrow the tape measure ... "That's when I grabbed the tape measure. That's when the struggle ensued." (T116).

This was the first altercation between the two men in the ten (10) years that Petitioner worked for Respondent. There was no prior history of arguments or other problems between Petitioner and Mr. Perry. (T27; T52). According to Petitioner whenever he spoke with Mr. Perry it was about work and nothing personal. (T52). He also stated that he never spent time with Mr. Perry outside of work. (T53). Petitioner said that in the ten (10) years he worked for Respondent, he had never been disciplined or received any warning or suspension. (T44). According to Petitioner, Mr. Perry had a history of conflict, outbursts at work, and having a quick temper. (T52). Petitioner stated that he had witnessed a couple of fights and arguments involving Mr. Perry and other people at work, including Aaron Perry's own father, Will Perry. (T52).

Aaron Perry agreed that he had "several dozen" arguments or altercations with his father at the work place that involved yelling. (T122).

After the fight, Petitioner notified his boss Will Perry about the altercation. The Petitioner testified that Mr. Will Perry confronted his son Aaron about the situation. (T55; T58). Petitioner stated that he stayed for another five to ten minutes until his machine finished, then he went to shut down the machine and left. (T58)

When he was struck by Aaron Perry, Petitioner maintains that he did not have the tape measure anymore. (T91). He further denied that they had been struggling over the tape measure. (T91).

Mr. Perry stated that some of the personal tools that were normally kept in his office for use in Respondent's printing and direct mail business included a hammer, a couple of screw drivers, a wrench, and a tape measure. (T24-25).

Petitioner denied that he was working on or repairing his motorcycle on the date of the accident. (T79). He also stated that there was no need to use a tape measure to fix a motorcycle. (T54).

Mr. Perry testified that after the altercation, he was not hurt and did not seek any medical treatment. (T30). Mr. Perry testified that he appeared in criminal court in connection with the events of June 4, 2012. Mr. Hogan and Petitioner testified at that proceeding and after the testimony the case was dismissed. (T 118)

Mike Hogan testified that he worked for Respondent as a truck driver before finding alternate employment in September 2013. (T 127,128) Mr. Hogan knows Mr. Aaron Perry from his employment with Respondent. He is also familiar with Petitioner from his employment with Respondent. (T 129) Mr. Hogan's relationship with Petitioner was only professional. He never had any issues or disputes with Petitioner. (T 129)

On June 4, 2012, Mr. Hogan observed the Petitioner enter Mr. Perry's office and attempt to obtain Mr. Perry's tape measure around 3 p.m. (T 131) Mr. Hogan testified that Petitioner and Mr. Perry struggled for control of the tape measure with the Petitioner falling to the ground. (T 132) Mr. Hogan also confirmed he was summoned to a criminal court proceeding. He testified under oath during that proceeding. The case was dismissed following the proceeding in which he testified. (T 97,133)

Petitioner stated that his pain level immediately after the accident was an 8/10. (T92). That same day, his pain worsened after work, and he sought emergency treatment at Saint Anthony Hospital with complaints of pain in his neck, right forearm, right shoulder, and back. (PX1, T93). The emergency room records document the following history:

> [S]tates he was beaten by his boss's son at about 3 pm, states he was pushed against a wall and he hit his right forearm against the metal part of a forklift, states he was grabbed by the neck and pushed to the ground, states he was kicked in the back. (PX1).

Abrasions to the right shoulder, swelling and bruising to the right arm, as well as a laceration to the left leg were noted by the emergency room physician. (PX1). Range of motion of his right hand, wrist, and shoulder were noted to be painful. (PX1). The Chicago Police Department was called to the hospital so that Petitioner could complete a report. Petitioner told the police officer that he had been attacked by Mr. Perry over a tape measure. (T62).

Petitioner next sought treatment at Marque Medicos on June 6, 2012. On that date, Mr. Avalos complained of pain in his right forearm, right shoulder, neck, mid back, and right-sided lower rib cage area. The history noted on that date by Dr. Fernando Perez was consistent with the description given at the emergency room.

During his first visit with Dr. Perez, Petitioner stated that when he was in a comfortable position, his pain level was at 6/10; it rose to a 10/10 level at its worst. (PX2). Petitioner reported having pain performing any type of movements involving his injured body parts, he had trouble sitting and standing, and he also had difficulty sleeping due to his injuries. (PX2,) Dr. Perez noted tenderness to palpation throughout Mr. Avalos' right forearm, right shoulder. There was also tenderness to his cervical and thoracic spine, right-sided lower rib cage area, right arm, right elbow, and lumbar spine. Active range of motion was decreased in the cervical spine, right wrist, right elbow, right shoulder, and lumbar spine. The straight leg raise test, supraspinatus' press test, and Drawbar's tests were all positive on the right. Cervical compression test and rib compression test were also positive. (PX2)

Dr. Perez noted that Petitioner's present condition was directly related to his work injury of June 4, 2012. He then referred Petitioner to physical therapy three (3) times per week which included active therapeutic exercises and passive physical medicine modalities. He also referred him to Dr. Andrew Engel for pain management. Petitioner was taken off work at that time. (PX2)

On June 7,2012, Petitioner returned to Dr. Perez, at this time he was wearing an arm sling on his right arm. Dr. Perez noted that Petitioner continued to experience persistent pain and that his worse pain was concentrated in his right forearm, extending from his right wrist to his right elbow. (PX2). Dr. Perez ordered physical therapy for the right forearm, which Petitioner attended on June 8 and 12 of 2012.

Petitioner saw Dr. Engel for the first time on 6/12/2012, complaining of pain on both sides of his neck, right shoulder pain, right forearm pain, and numbness that radiated down his arm to his fourth and fifth fingers. (PX3). Petitioner noted that his pain level was a 6/10. Dr. Engel prescribed physical therapy and prescription medication – specifically Mobic, omeprazole, and Soma. He ordered Petitioner to remain off work until the pain substantially decreased. (PX3).

Petitioner commenced physical therapy for his right shoulder at Marque Medicos on June 15, 2012. His pain level for the right shoulder was 7/10. He also reported feeling numb in the shoulder region and tingling in his right fingers. The therapist noted, among other things,

limitation of motion in the right shoulder, decreased muscle strength, tenderness to pressure, and positive O'Brien and empty can tests. (PX2).

Dr. Engle referred Petitioner for an MRI of his cervical spine due to developing weakness in his right hand. (PX3). The MRI was completed on July 9, 2012 at Archer Open MRI. Dr. Engel agreed with the radiologist's findings that Petitioner had a right-sided C5-6 disc herniation causing neural foraminal stenosis. There was also a contained disc herniation at C6-7. (PX3). Dr. Engel diagnosed Petitioner with a cervical herniated disc, right shoulder pain, thoracic spine pain, and low back pain syndrome. He ordered additional physical therapy for the right shoulder and an EMG study. (PX3). Dr. Perez also agreed that an EMG was necessary to assess Petitioner's complaints of persistent weakness in his right hand and radiating pain extending from his neck into his right upper extremity. (PX2).

On July 10, 2012, Petitioner reported increased movement in his right shoulder and a pain level of 4/10. He also did not require the use of an arm sling anymore. (PX2).

Petitioner reported improvements in his condition on July 20, 2012. However, he continued to have complaints of weakness in his right hand and pain extending from his neck to his right upper extremity. Dr. Perez noted that Petitioner continued "to experience neck pain that is greater on the right side . . . right-sided mid back and low back pain." (PX2).

The EMG study completed on August 3, 2012 revealed evidence of a lesion on the median nerve of the wrist "resulting in decreased conduction velocities of the sensory fibers." (PX2, 8/3/2012 EMG Report).

On August 16, 2012, Dr. Engel noted that Petitioner had "essentially no right shoulder pain." (PX3). His right-sided neck pain and low back pain were 3/10 on the visual analog scale and his finger numbness had resolved. Dr. Engel stated in his progress report that Petitioner had improved dramatically in physical therapy for his right shoulder. Dr. Engel stopped physical therapy for the right shoulder as of August 20, 2012, and ordered that Petitioner begin therapy for his neck. (PX3). Petitioner underwent physical therapy for his cervical spine from August 21, 2012 through September 20, 2012. (PX2).

Petitioner was also allowed to return to work on August 17, 2012 with restrictions of no lifting greater than ten (10) pounds and to limit activities which caused him pain. (PX3). When he was finally released to return to light duty work, he testified that he attempted to return to work with Respondent, but that Respondent had fired him as of June 2012 and gave Petitioner his final paychecks. (T67). He was unable to find work within his restrictions and testified that he did not receive any temporary total disability benefits from June 5, 2012 to the date he was released full duty on November 15, 2012. (T67-68). Petitioner had no other source of income and he had a hard time paying bills. (T67).

On September 10, 2012, Dr. Perez noted that Petitioner continued to experience persistent pain in his neck area, greater on the right side, rating the pain at a 6/10 level. He also continued to experience pain in his low back, mid back, and right shoulder areas. (PX2).

On September 20, 2012, Dr. Engel noted that Mr. Avalos had no shoulder pain, and had minimal mid back, and low back pain. (PX3). His neck pain persisted and Petitioner reported that moving his head from side to side made the pain worse. During his examination, Dr. Engel noted pain to palpation in Petitioner's bilateral trapezius and splenius cervices musculature. At this point, Dr. Engel ordered an FCE to see if Petitioner would benefit from a work conditioning program as he had plateaued in his physical therapy exercises for his cervical spine. (PX3). He was also prescribed Dendracin cream.

On October 2, 2012, Petitioner underwent a functional capacity evaluation at Elite Physical Therapy. (PX4). The FCE, which was considered valid, stated that Petitioner, "demonstrated the physical capabilities to function at the Light Physical Demand Level, as defined by the U.S. Department of Labor, which is indicative of an occasional 2-hand lift/carry of 20 [pounds] from floor to chest level." (PX4). Following the FCE, Dr. Engel referred him to a work conditioning program at Elite Physical Therapy. (PX3). He also stopped the Dendracin prescription and switched Petitioner to over-the-counter medication. Petitioner's work restrictions were changed per the FCE to no lifting greater than 20 pounds and to limit activities which caused him pain. (PX3).

Petitioner was released full duty by Dr. Engel on November 15, 2012. (PX3). On that date, Dr. Engel noted that Petitioner had right-sided neck pain on occasion and that the physical therapy had greatly decreased his pain.

Petitioner testified that on occasion, he has pain in his right shoulder. With certain movements, he has pain up to 5/10. (T69). He also stated that due to his injury, he is unable to exercise because of pain. (T69).

The Respondent did not submit any utilization review (UR) report or independent medical evaluation (IME) report into evidence.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

In determining the level of permanent partial disability, for injuries that occur on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (820 ILCS 305/8.1b)

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v.*

Industrial Commission, 153 Ill. App. 3d 238, 242 (1987). The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at trial as follows:

Whether Petitioner sustained an injury that arose out of and in the course of his employment?

The Arbitrator finds that Petitioner did sustain an accidental injury that arose out of and in the course of employment. This determination is based upon the credible testimony of the Petitioner, which is supported by the medical records. The burden of proof in this case is a preponderance of the evidence, a lesser burden than that of the criminal courts which is beyond a reasonable doubt.

An injury is accidental within the meaning of the Workers' Compensation Act when it is traceable to a definite time, place, and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee. *Matthiessen & Hegeler Zinc Co. v. Indus. Bd.*, 284 Ill. 378 (1918).

In *Rodriguez v. Indus. Comm'n*, 95 Ill. 2d 166 (1982), our Supreme Court held that injuries as a result of an assault "in the workplace during work hours are compensable in Illinois if the assault arose in the course of a dispute involving the conduct of the work, provided that the claimant is not the aggressor." In rendering its decision, the Supreme Court relied on *Pekin Cooperage Co. v. Indus. Comm'n,* 285 Ill. 31 (1918). In *Pekin*, the Court explained that compensation awarded under the Act did not cover *all* accidental injuries which may be sustained by an employee while at work. *Id.*

> There must be some causal relation between the employment and the injury. It is not necessary that the injury be one which ought to have been foreseen or expected, but it must be one which after the event may be seen to have had its origin in the nature of the employment. *Id.*

The Court further stated in *Rodriguez* that "such injuries are not compensable as to either the aggressor or the victim where the dispute was purely personal between the two employees." *Rodriguez v. Indus. Comm'n*, 95 Ill. 2d 166 (1982).

The facts in the instant case show that the accident did not result from a personal dispute. Petitioner testified that this was the first altercation between he and Mr. Perry in the ten (10) years that Petitioner worked for Respondent. There was no prior history of arguments or other problems between them. (T27; T52). Petitioner testified that whenever he spoke with Mr. Perry

it was about work and nothing personal. (T52). He also stated that he never spent time with Mr. Perry outside of work. (T53).

Mr. Perry was known to have a quick temper and would argue with other people at work, including his own father, Will Perry. (T52). Aaron Perry admitted at the hearing that he had "several dozen" arguments or altercations with his father at the work place that involved yelling. (T122).

Next, no matter the different descriptions of the accident provided by Petitioner, Mr. Hogan and Mr. Perry, the assault occurred after Petitioner borrowed a tape measure from Mr. Perry. Both parties testified that tape measures were used by machine operators, including Petitioner, and were required in the performance of their duties. (T22; T41-43; T71-72; T115). Petitioner testified that he was attacked from behind and forced to the ground, the description of the injuries noted in the emergency room support the Petitioner's description of the events. The Arbitrator finds that Petitioner was not the aggressor in this altercation.

Respondent maintains that the Petitioner was off the clock, working on his motorcycle, his own personal business and not that of Respondent and therefore the injury was not in the course of his employment. Petitioner denied that he was off the clock or working on his motorcycle. He testified that he wanted to take measurements and prepare for a project he had the next day. He went to Mr. Perry's office to borrow a tape measure as was his custom. (T48-49; T75). No payroll records or time sheets were offered by the Respondent to support Respondent's theory and contradict or rebut the testimony of the Petitioner. Those records would certainly be in the custody and control of the Respondent.

The Arbitrator finds that Petitioner sustained a work accident on June 4, 2012 that arose out of and in the course of employment.

Whether Petitioner's current condition of ill-being is causally related to the injury?

The Arbitrator finds that Petitioner's current condition of ill-being, as diagnosed by his treating physicians, is causally related to the injury that occurred on June 4, 2012. The Arbitrator relies on the uncontradicted opinions and treating records of Dr. Fernando Perez and Dr. Andrew Engel in finding causal connection. There were no Utilization Review or Section 12 examination reports offered by the Respondent. The causation opinions of the treating doctors were admitted into evidence unchallenged. While Respondent did not agree with or adopt the opinions offered in those records, they did not offer any alternative opinions to consider.

It is well established law that proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. *Navistar Int'l Transp. Corp.*, 315 Ill. App. 3d 1197, 1206 (2000). Prior to the attack on June 4, 2012, Petitioner was not under any care or treatment for his neck, right arm, right shoulder, or back. (T46; T53). He had also testified that prior to that date, he had never been diagnosed with cervical herniation or suffered from cervical radiculopathy. (T46).

Petitioner's testimony at trial as to the chain of events and the mechanism of injury correlate with the body parts injured. The mechanism of injury as well as the complaints of pain

were not only documented within the medical records, but were consistent with Petitioner's testimony at trial.

Petitioner testified that Mr. Perry pushed him forcefully from behind and that the front of his body fell forward towards a forklift directly in front of him and he struck his right arm. (T50-51; T89, T90). Petitioner stated that Mr. Perry then grabbed his neck, pulled him to the ground, and began choking him. (T51). Abrasions to the right shoulder, swelling and bruising to the right arm, as well as a laceration to the left leg were noted by the emergency room physician. Two days after the injury, Petitioner sought treatment and complained of pain in his right forearm, right shoulder, neck, mid back, and right-sided lower rib cage area. Following his examination, Dr. Perez stated that Petitioner's present condition was directly related to his work injury of June 4, 2012.

Petitioner denied any other accidents or injuries to the same body parts after June 4, 2012 as well. Thus, taking into account the lack of prior history, the immediacy of his complaints, and Respondent's lack of defense as to causal connection, the Arbitrator finds that Petitioner's current condition of ill-being, as diagnosed by his treating physicians, is causally related to the injury that occurred on June 4, 2012. For the aforementioned reasons, the Arbitrator finds Petitioner satisfied his burden of proof and established causal connection.

Were the medical services that were provided to Petitioner reasonable and necessary?

The Arbitrator finds that medical services that were provided to Petitioner were reasonable, necessary, and causally related. Petitioner offered into evidence the outstanding medical bills of Petitioner as Exhibits 5-13 on September 10, 2015. (PX5-13). No evidence was offered indicating that the treatments were not reasonable or necessary, nor was any evidence produced indicating that the fees were not reasonable. Based on the record as a whole, the Arbitrator finds that Petitioner sustained his burden of proof that medical bills PX5 through PX 13 are reasonable and necessary medical care causally related to the accident of June 4, 2012. The Arbitrator orders Respondent to pay said outstanding charges in accordance with the fee schedule or by prior agreement whichever is less pursuant to Act.

The Arbitrator notes that Respondent failed to rely upon a utilization review to deny the reasonableness and necessity of the treatment rendered. Pursuant to Section 8.7(i)(3) of the Act, "An employer may only deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section." 820 ILCS 305 8.7(i)(3). This section of the Act is applicable to all treatment rendered on or after 9/1/2011. Once a Petitioner meets his or her burden of proof and establishes causal connection, if Respondent fails to offer a utilization review opinion into evidence denying treatment, then all treatment is therefore deemed reasonable and necessary.

Through the date of Arbitration, the following balances remained outstanding pursuant to the fee schedule:

1.	Saint Anthony Hospital	6/4/2012	$785.76

2.	Saint Anthony Hospital Physicians	6/4/2012	$180.58
3.	Chicago Imaging Associates	6/4/2012	$66.64
4.	Marque Medicos	6/6/12-9/20/12	$13,318.23
5.	Medicos Pain & Surgical Assoc.	6/12/12-11/15/12	$530.20
6.	Industrial Pharmacy	6/12/12-9/20/12	$1,647.36
7.	Specialized Radiology	7/9/12	$185.28
8.	Archer Open MRI	7/9/12	$1,147.44
9.	Elite Physical Therapy	10/2/12-11/6/12	$4,685.34
		Total	**$22,546.83**

The Arbitrator found accident and causal connection. The Arbitrator notes the absence of UR denying the necessity of treatment rendered and adopts the credible opinions of Petitioner's medical providers. Accordingly, for the reasons noted, the Arbitrator finds all medical treatment rendered through the date of arbitration to be reasonable, necessary, and causally related to the injury Petitioner sustained on June 4, 2012.

Is Petitioner is entitled to TTD?

Having established accident and causal connection, the Arbitrator finds Petitioner satisfied his burden of proof and is entitled to TTD benefits from 6/5/2012 through 11/15/2012 for a total of 23 3/7 weeks. Aside from denial of accident, Respondent offered no defense to negate Petitioner's claim to TTD.

During the time in question, Petitioner was either completely off work or capable of returning to work with restrictions. Petitioner testified that when he was finally released to return to light duty work, Respondent never provided light duty work. (T67). Petitioner was unable to find work within his restrictions and testified that from the date of accident of 6/4/2012 to the date he was released full duty on 11/15/2012, he received no TTD benefits, had no other source of income. (T67-68).

Taking into account an AWW of $500.95 and a TTD of rate of $333.97, Petitioner should have been paid $7,824.44 in TTD benefits during the relevant time period.

What is the nature and extent of the injury?

The Arbitrator adopts by reference all prior findings and conclusions into this Section without restating them herein. This claim arose after September 1, 2011, therefore the 5 factors for determining Permanent Partial Disability shall be applied here. The Arbitrator notes the five factors to determine Permanent Partial Disability are: 1) AMA Impairment Rating; 2) Occupation of the injured employee; 3) Age of the employee at the time of the injury; 4) Employee's future earning capacity; and 5) Evidence of disability corroborated by the treating medical records. No one factor shall be controlling but a written explanation is required if an award is greater than the AMA Impairment Rating. 820 ILCS 305/8.1b(b).

It is the claimant's burden to prove all aspects of his claim for benefits. This includes entitlement to Permanent Partial Disability.

1. ***AMA Impairment Rating***: Neither Petitioner nor Respondent presented an AMA Impairment Rating. Based on the failure to submit an AMA Impairment Rating the Arbitrator cannot consider this factor.

2. ***Occupation of the injured employee***: Petitioner was employed by Respondent as a machine operator for ten years. He was released to return to full duty work in November of 2012, about five months after the injury, although he was not taken back by the Respondent, as he had been fired before he was released to return. The Arbitrator gives some weight to this factor.

3. ***Age of the employee at the time of the injury***: Petitioner was 35 at the time of his accident. There is no evidence that Petitioner's age impacted his injury or created any permanent disability. No weight is given to this factor.

4. ***Employee's future earning capacity***: Petitioner testified that he when he had the restrictions on him before his release to full duty in November, he was unable to find work with the restrictions. No evidence was provided by Petitioner that his ability to earn an income or to work full time has been impacted by the injury since his full duty release. Petitioner did not testify to any diminution of his earnings since this accident. There is no evidence of disability due to this factor the Arbitrator gives some weight to this factor as well.

5. ***Evidence of disability corroborated by the treating medical records***: The Petitioner sustained an injury to his right shoulder, neck, thoracic spine and low back, including a herniated disk at C5-6 with cervical radiculopathy. The medical records document these injuries. Although Petitioner has reached MMI, and was released to return to work full duty in November of 2012, he testified that he continued to have pain in his neck and right shoulder. The Arbitrator gives significant weight to this factor.

Given the nature of the injury the Petitioner suffered to his right shoulder, his neck, his cervical and thoracic spine and his low back following the June 4, 2012, incident, he is entitled to have and receive from the Respondent compensation for **5%** loss of use of the person as a whole, or **25** weeks at a weekly PPD rate of **$300.57 / per week.**

Should penalties and attorneys' fees be awarded?

Section 19(l) penalties are appropriate if the Respondent fails, neglects, refuses, or unreasonably delays payment of benefits due. An employer withholding benefits has the burden of proving that its delay was reasonable. *Jacobo v. Illinois Workers' Comp. Comm'n*, 355 Ill. Dec. 358 (2011). In *McMahan v. Indus. Comm'n*, the Supreme Court held Section 19(l) penalties are "**mandatory** if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." 183 Ill. 2d 499 at 515 (1998). When the Respondent fails to meet its burden, the Petitioner is to be awarded thirty dollars ($30) per day, with a maximum award of ten thousand dollars ($10,000.00).

Under a more stringent standard, penalties under Section 19(k) and Section 16 are appropriate if the Respondent is guilty of delay or unfairness towards the employee in the payment of benefits, is unreasonable or vexatious in delaying payment of benefits, or engages in

frivolous defenses which do not present real controversy. Unlike Section 19(l) penalties, these penalties are not mandatory, they are discretionary and "intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." Mech. Devices v. Indus. Comm'n, 344 Ill. App. 3d 752.

In the case at bar, the Respondent denied benefits under a theory that the injury did not arise out of or in the course of the Petitioner's employment with Respondent. The Respondent claimed that the Petitioner had completed his work for the day and was off the clock, doing personal work on his motorcycle, which apparently they permitted him to do occasionally. There was also the matter of the criminal case, which apparently went to trial before a judge and was dismissed. The burden of proof in a criminal case is higher than that of a civil case, including cases before the IWCC which has a preponderance of the evidence standard rather than beyond a reasonable doubt. The criminal decision is not binding on the IWCC and has no effect on a decision on the merits at the commission. Respondent's reliance on these factors, although misguided does not amount to being vexatious or unreasonable.

Penalties and attorney's fees are denied.

ORDER OF THE ARBITRATOR

Given the nature of the injury the Petitioner suffered to his right shoulder, his neck, his cervical and thoracic spine and his low back following the June 4, 2012, incident, he is entitled to have and receive from the Respondent compensation for **5%** loss of use of the person as a whole, or **25** weeks at a weekly PPD rate of **$300.57 / per week.**

Respondent shall pay Petitioner temporary total disability benefits of $333.97/week for 23 & 3/7th weeks, commencing 6/5/2012-11/15/2012, for a total of **$7,824.44** as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of **$22,546.83**, as provided in Section 8(a) of the Act.

Penalties and attorney's fees are denied.

Deborah L. Simpson

Signature of Arbitrator

February 28, 2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steve Goodson,

Petitioner,

vs. NO: 12 WC 28983

17IWCC0640

Carlisle Syntec, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the decision of the Arbitrator to find that the appropriate date of manifestation for Petitioner's repetitive trauma injuries was April 16, 2012, or the date Dr. Sola noted that the recent NCV had confirmed the carpal tunnel syndrome diagnosis that both he and Dr. Goggin had previously suspected. The Commission notes that while Dr. Sola's assessment on February 27, 2012 was carpal tunnel syndrome, he expressed no opinion as to its possible relationship to Petitioner's employment. Indeed, radiographs of the right and left wrists performed on that date revealed degenerative changes and possible scapholunate ligamentous tears. As a result, Dr. Solo ordered nerve conduction studies to evaluate for carpal tunnel syndrome. It was not until the office visit on April 16, 2012 that Dr. Sola was able to provide Petitioner with a definitive diagnosis of bilateral carpal tunnel syndrome. Based on the above, and the evidence taken as a whole, the Commission finds that this is the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. (See *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 531, 505 N.E.2d 1026, 1029 (1987)).

Furthermore, the Commission finds Petitioner provided proper and adequate notice to the Respondent on April 23, 2012, or the date of the accident report. The Commission notes that while this report indicates that Petitioner claimed to have reported the injury to Ms. Woker on April 7, 2012, Ms. Woker herself was unable to confirm the date on which this conversation took place. In any event, this conversation would have clearly preceded the definitive diagnosis made

17IWCC0640

by Dr. Sola on April 16, 2012. More importantly, even if there was a defect in said notice, Respondent provided absolutely no evidence that it was somehow prejudiced by same. Accordingly, the Commission finds that Petitioner provided notice well within the requirements of §6(c) of the Act given a manifestation date of April 16, 2012.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 6/1/16 is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $705.17 per week for a period of 7-2/7 weeks, from 10/7/14 through 11/26/14, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $45,820.86 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $634.65 per week for 42.75 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 7.5% loss of use of the left hand and 15% loss of use of the right hand, respectively.

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

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

OCT 11 2017

DATED:
o:8/1517
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

17 IL 000640

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steve Goodson
Employee/Petitioner

v.

Carlisle Syntec, Inc.
Employer/Respondent

Case # **12** WC **28983**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Collinsville**, on **March 22, 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 **Two Provider Limit**

17IWCC0640

FINDINGS

On **February 27, 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 **$55,003.00**; the average weekly wage was **$1,057.75**.

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

The parties stipulated at the time of hearing that Respondent paid **$0** in TTD, **$0** in TPD, **$0** in maintenance, **$4,730.55** in non-occupational indemnity disability benefits, and **$0** in other benefits, for which credit may be allowed under Section 8(j) of the Act.

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

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

Respondent is entitled to a credit of **$2,825.88** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$705.17**/week for **7 2/7 weeks**, commencing October 7, 2014 through November 26, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay **$45,820.86** for medical services as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to the providers. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

Respondent shall pay Petitioner the sum of **$634.65/week** for a further period of **42.75 weeks**, as provided in Section 8(e) of the Act, because the injuries caused **7.5% loss of use of the left hand and 15% loss of use of the right hand.**

Respondent shall be given a credit in the amount of **$2,825.88** for medical bills that have been paid through its group medical plan under Section 8(j) of the Act.

Respondent shall be given a credit in the amount of **$0** in TTD, **$0** in TPD, **$0** in maintenance, **$4,730.55** in non-occupational indemnity disability benefits, and **$0** in other benefits, for which credit may be allowed under 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.

17IWCC0640

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.

Melinda M. Bruce-Sullivan
Signature of Arbitrator

5/26/16
Date

17IWCC0640

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steve Goodson
Employee/Petitioner

Case # 12 WC 28983

v.

Consolidated cases: N/A

Carlisle Syntec, Inc.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on February 27, 2012 he was employed by Carlisle SynTec, that he started working there on July 28, 1980 and that he still works there today. He testified that he has worked a number of different jobs, including the mill or calendar line for approximately 8 years when he first started. He testified that he then went to mixing and then returned to calendar. He testified that he worked the calendar line 5-6 days per week. He testified that on the calendar line, the operation of the mill operator was to keep a knife in his hand and roll rubber on the breakdown mills to make it flow and break. He testified that it started out as cold rubber and he then started warming it up. He testified that from that point, he sent it up to the surge mill. He testified that many times the rubber did not flow, so he would stand there with a knife and run it back and forth to get it to flow, and then he would send it to the next mill which would be the feed mill.

Petitioner testified that after five years, his wife wanted to know why he had a knot on his wrist. He testified that when you held a knife like that all day long in rubber it got to where after about five or six years he would stand there and have to pry his fingers open to get his knife out. He testified that he then learned to use his left hand as well. He testified that he would sometimes spend 8 hours on Saturdays doing nothing but cutting and slabbing, and that he learned to work left-handed for a long time.

Petitioner testified that in mixing, chemicals were used to make rubber sheeting that was approximately 4 feet wide and about 3/8" thick and that the mills were five feet long. He testified that during the first 8 years he had to get certified in another area to be a team leader, so he went to the mixer and had to have a second job there to make sure that he qualified to be a team leader. He testified that compounding involved standing there with scoops and scooping chemicals into batches of zinc, sulfur and the like. He testified that the scoops were aluminum, and that he used both hands to scoop. He testified that they now have compound blenders. He testified that they scooped the compounds out of tubs that were about waist-high, and that a full scoop could weigh in the range of 6-10 pounds. He testified that he had four "tours" in the mixer area and worked in this area for about 8 years. He testified that the process was now automated.

Petitioner testified that the straining job was also part of the calendar line, which involved remixing batches that were not good the first time through. He testified that with the straining job, he had to literally grab it, make a cut, grab with his hand, stick a knife in it, pick it up and carry it. He testified

that the rubber weighed 40-60 pounds. He testified that he did this job for about 10 years, and that he would often do this on overtime and weekends.

Petitioner testified that for the TPO line, they would have to reach in and lift out rolls and that he did so holding the roll with one hand and using the other hand to lift straight up. He demonstrated at the time of hearing placing both of his palms at shoulder height and making an upward motion. He testified that the original bar was approximately 160 pounds, and that he would do this maneuver approximately 70 times per day. He testified that he worked approximately two years in total on the TPO line.

Petitioner testified that since 2012, he went back to "B" shift. He testified that he currently works the tape line, that he has 18-20 people that run various machines and that he helps to check and make sure things are done right and assist, when necessary.

Petitioner testified that he first started noticing that he had numbness and tingling in his hands when he went to the weekend shift in 2009, but that it kept getting worse. He testified that he sought treatment in 2012 because he got to the point he could not sleep at night. He testified that it got to the point there when his grandkids would hit his fingers and it felt like electricity running through them. He testified that he waited between 2009 and 2012 to seek treatment because he waited until his hands got to the point that he could not sleep anymore. He denied ever having any kind of one-time specific accident or trauma to either of his hands.

Petitioner testified that Dr. Goggin was his primary care physician, and that he referred him to Dr. Sola. He testified that Dr. Sola ordered a nerve conduction study, and that he returned to see Dr. Sola after the study. He testified that he did not remember if Dr. Sola offered him a carpal tunnel release on his right wrist at that time, but testified that he did not have surgery with him. He testified that he filled out the accident report after he found out what was wrong and then talked to "Jan" and told her that he needed to get them fixed. He testified that he was then informed that his claim was denied.

Petitioner testified that that he then started treating with Dr. Mall, who have him injections into his right and left wrists. He testified that the injections made an improvement. He testified that he returned to work, but that he then ultimately returned to Dr. Mall about six months later because the pain had returned. He testified that he then underwent surgery on the right, but that his symptoms did not resolve after the surgery was performed. He testified that ultimately he had a second surgery on the right, after which he felt "perfect." He testified that he underwent a release on the left as well, and that the surgery went "great." He testified that other than not being as strong as it used to be, his hand worked great. He testified that he was ultimately released with restrictions due to his right hand, including restrictions of no continuous pulling or twisting with the right hand. He testified that after he was issued the restrictions, he returned to work for Respondent. He testified that his job when he went back to work was that of "ASBM" and that the job was easier for his hands and was pretty automated now.

Petitioner testified that he told Ms. Woker about his hand complaints, and that he did so on April 7th as shown on PX10. He testified that he believed that John Edd filled out the accident report, and that he was there when John filled it out.

Petitioner testified that currently, his right hand was "basically scissors," that he could hardly cut and that he did not have the strength in his thumb to do it. He testified that he cannot hold a knife in his hand very long, and that he does not have a lot of strength in his hand to lift things. He testified that he has difficulty with gripping and pulling things and that he cannot hold on very long. With respect to his left hand, Petitioner testified that he uses his left hand to perform tasks for his right. He denied having any limitations with his left hand. He testified, however, that he does not have as much strength in his left hand as before but is pain-free.

On cross-examination, Petitioner testified that he did not return to Dr. Mall after his last appointment in January of 2015 because he did not have any reason to go back. He denied being fully functional with his hands and wrists. He agreed that he still deer hunts, and that he typically sits on the ground. With respect to the reference in the chiropractic notes regarding hurting his back sitting in a deer stand too long, Petitioner testified that the deer stand consisted of a hay bale feeder sitting on the ground.

On cross-examination, Petitioner testified that when he first saw Dr. Mill the visit was not paid for through worker's compensation. He denied having made a date with Dr. Sola for surgery.

On cross-examination, Petitioner agreed that his testimony regarding using a knife to cut hot rubber occurred while he worked on the calendar line. He testified that he worked his first 10 years between the mixer and the calendar. He agreed that most of the activities that he described doing -- including compounding, straining, and the calendar line -- occurred within the first ten years of his work. He agreed that the rubber that he cut while on the calendar line was warm, and that when he cut into it it would be soft.

On cross-examination, Petitioner agreed that around the middle of 2010 he started working in the mixer department and that was when he started working on the weekends. He testified that the other jobs that he had described were done during the week in addition to overtime. He agreed that when he worked in mid-2010, he was still the mixer job and that it was a Saturday/Sunday job.

On cross-examination, Petitioner agreed that he developed a knot on his right wrist. He testified that he asked Dr. Mall what it was. He agreed that Dr. Goggin was his family physician and had been so for years. He agreed that in all of the times he had seen Dr. Goggin, he never told him about the knot on his wrist. He agreed that he testified that he never had a specific incident at Respondent where something injured his right or left wrist for which he needed medical attention.

On cross-examination, Petitioner testified that when he was having problems with his hands and wrists around 2009 or 2010, he told his ex-wife. He testified that he could not remember if he told a doctor. He agreed that if he was asked if his hands were sore, he would have told Dr. Goggin in February of 2010. When asked if he was told at the time of the February 20, 2012 visit with Dr. Goggin that he had carpal tunnel syndrome, Petitioner responded that that was why he went to the doctor in order to find out what was wrong with his wrists. He agreed that Dr. Goggin told him at that time that he had carpal tunnel syndrome. When asked if he believed it was work-related, Petitioner responded that it came from repetition over a lot of years.

On cross-examination, when asked about the pleading referencing giving notice to John Cohen on September 21, 2011, Petitioner responded that he did not know who John Cohen was and that nothing happened on September 21, 2011. With respect to the pleading referencing that he gave notice to Joe Edd, Petitioner responded that it was John Edd.

On cross-examination, Petitioner agreed that his signature appeared on the accident report that was completed by John Edd. He agreed that he met with John Edd to fill out the accident report on April 23rd. He agreed that he was doing a job that is less physically demanding now. He agreed that he was an alternate team leader on the ASBM line. He agreed that he spent working weekends in the mixing department.

On cross-examination, Petitioner agreed that he no longer smoked and that he stopped on January 1, 2016. He testified that before that, he smoked about 30 years. He agreed that he filled out the patient information sheet for Dr. Mall on June 18, 2013. When asked why he put the date the symptoms started

as March 11, 2012, Petitioner responded that that was the date he could not sleep anymore with the pain at night and knew something was wrong. He agreed that the reference in Dr. Mall's note that he only recently moved to the weekend shift was not correct as he was working the weekend shift since 2010. He agreed that it was not true that he changed his shifts to two 12-hour shifts due to the fact that he had been having problems with his wrists.

On cross-examination, Petitioner denied doing hunting, fishing and light gardening for years. He testified that he has always hunted and first started fishing as a child. When asked why he denied doing any hunting, fishing or outside activities with Dr. Kostman, Petitioner responded that at that time he was not doing any outside activities because he could not do them.

On cross-examination, Petitioner agreed that whenever he worked the weekends, his regularly scheduled weekend shift totaling 24 hours was paid for 36 hours. When asked why he told Dr. Mall that he worked 1,000 hours of overtime a year, Petitioner responded that he told Dr. Mall that he had worked as much as 1,000 hours of overtime in a year.

On cross-examination, Petitioner agreed that in the mixing department that he worked from 2010 until the end of 2013, there were four different stations and that the first job involving him working on a panel pushing buttons. He agreed that in compound he used a scoop to scoop compound from a bag, and that he would do so between batches. He testified that you generally started scooping and tried to get it all done before you went on break or lunch so that you have plenty ahead of time. He testified that depending on the shift and how they rotated, he would rotate to the weight loader job where he operated a vacuum hoist. He testified that he would pick up bags with a hoist, and that he would grab the side of it and squeeze it to activate it. He testified that he also sat at a baler and cut bales, which involving pressing in with his hands and wrists. He testified that where there were only four people, you tried to get as much done as you could within the first 2-4 hours in order to be set up for the rest of the day. He testified that the rest of the shift they would load. He testified that the batch operator job involved cutting samples, that samples would be cut every fifth batch, and that it took about five minutes to make a batch. He testified that the fourth job was the utility job, where they moved skids around with product to make sure that each machine had product that it needed to do the process.

On cross-examination, Petitioner agreed that when he saw Dr. Mall in 2013 he issued a work status report that allowed him to return to work in mid-July of 2013 and that he had an excellent benefit from the injections he was given. He agreed that the next time he saw Dr. Mall after was not until April of 2014, at which time he told him that the hand problems had gotten worse over the last few weeks. He agreed that Barb Casey was his current supervisor, and that he had a review in May of 2015. He agreed that he had a good review. When asked if he told Ms. Casey of any problems he was having from a physical standpoint of being unable to perform his job, Petitioner responded that they had already talked about the restrictions and that she already knew of them. He agreed that at the time of the May 2015 evaluation, he did not tell Ms. Casey of any problems he had doing his job.

On cross-examination when asked about his September 2015 visit with Dr. Goggin, Petitioner stated that he did not recall whether he examined his extremities but that if he presented for stomach issues, he would have been seen by Dr. Goggin's assistant. He testified that he was not there about his hands on that date, but rather his stomach. He denied telling them that he had problems with his hands. He admitted that he went deer hunting this year, and that he went three days. He testified that he used a shotgun. He denied hunting for anything besides deer. He denied continuing to garden, and he denied doing any woodworking. He testified that his car repair-related activities included putting a quart of oil in the truck. He testified that he has a riding lawn mower. He denied having any employment beyond Respondent. He testified that he quit smoking because he loves his grandkids and wants to "stick around"

a while. He denied having pled guilty or having been convicted of any crimes. He testified that the only prescription medication he takes is that of an inhaler for his asthma.

On redirect examination, Petitioner testified that when he cut the rubber there was some resistance to the rubber even though it was soft. He agreed that he was currently on permanent restrictions with regard to his right hand and that Respondent was accommodating those restrictions.

On further cross-examination, Petitioner agreed that recalled a January 2012 incident involving walking on floors that were waxed. He agreed that during that conversation with Mr. Knuf he did not mention any complaints with his hands or wrists.

John Edd was called to testify at the time of arbitration as a witness on behalf of Respondent. He testified that he is employed by Carlisle SynTec and has worked there since December 13, 1979. He testified that he is an operations supervisor, and is familiar with Petitioner. He testified that he was somewhat familiar with Petitioner's work for Respondent.

Mr. Edd testified that the bid sheet was prepared around the time that Petitioner bid into the weekend shift, and that RX1 on page 1 showed him working Saturdays and Sundays for 12.5 hours per shift. He agreed that Petitioner was working overtime and that his regularly scheduled shifts were Saturday and Sunday.

Mr. Edd agreed that there were four areas in the mixing department, which included a panel operator, a weigh loader, a batch operator and a utility person. He agreed that he heard Petitioner's testimony. He testified that when you worked the mixer panel you were the person in charge of the mixing operation and that about every three minutes you would charge a batch of material to the mixer. He testified that the weigh loader made sure that the panel operator had the material to feed into the machine, and that they loaded the bales, polymer and sacks of clay onto the charge belt by use of a vacuum hoist. He testified that to operate the bagging system, one had to use their hands. He testified that there was a vice that you opened and closed with your hands that turned the suction on to the vacuum hose, and that the weigh loader would be lifting the bags every three minutes.

Mr. Edd testified that there were times when the panel operator would use a scoop to scoop compound into either a bag or sometimes onto the charge conveyor itself, and that you could probably only pick up about 1.5 pounds of material with the scoop. When asked how often the panel operator would be using the scoop, he responded that you had to put the same amount of chemicals into each batch which could be anywhere from 11-13 pounds, and that if you compounded it as each batch it would be every three minutes but oftentimes they would make up compounds in between the batches in order to be ahead so they would be able to continue the mixing process without delay.

Mr. Edd testified that the batch operator conveyed the material after it had been mixed onto a festoon and that the festoon was an area where there were a series of fans that blew onto the material as it came out of the dip tank to dry it off and cool it down so they could stack it without it sticking and being wet. He testified that cutting batches with a knife involved cutting a sample approximately 2"x 4" off the edge of the slab, and that it was then taken so the lab could test it for the cure rate. He testified that technically they sampled every batch. He testified that samples would be cut approximately every 1.5 minutes.

Mr. Edd testified that the utility job involved removing the completed skids from the festoon index and also being responsible for staging. He testified that the skids of stock were moved with a forklift. He testified that the four positions in the mixer job were rotated in the course of a shift, and that

he thought that every crew had their own rotation system. He testified that he thought the majority of the crews rotated every four hours, but there were crews that rotated every two hours.

On cross-examination, Mr. Edd agreed that it was his handwriting on the accident report where it said that it was reported April 7, 2012.

On redirect examination, Mr. Edd agreed that the information on the document was taken from Petitioner and that it was what Petitioner told him. He agreed that he received the information on April 23, 2012 and was the date the report was completed.

The Application for Adjustment of Claim was entered into evidence at the time of arbitration as Arbitrator's Exhibit 2. The Application alleged a date of accident of February 27, 2012, that the accident occurred through "repetitive production work" and that Petitioner sustained injury to his right and left hands. The Application was signed by Petitioner on July 1, 2012. (AX2).

The medical records of Dr. Goggin were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. Petitioner was seen on February 20, 2012 at which time the chief complaint was noted to be hand pain. It was noted that both hands hurt, and that the right was worse and was associated with thenar numbness. The impression was that of right hand pain likely mixed origin but likely carpal tunnel syndrome. Petitioner was referred to Dr. Sola and recommended to undergo x-rays of the hands. (PX1).

The medical records of Illinois SW Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. Petitioner was seen on February 27, 2012 for a chief complaint of numbness and tingling in the bilateral hands and bilateral wrist pain. It was noted that Petitioner complained of numbness and tingling for well over a year, that the right was worse than the left and that it had progressed to where he had almost constant tingling in the radial three digits of the right hand. It was noted that Petitioner also complained of discomfort in the hand over the past year and a half, and that anything striking the tips of the digits caused pain in the palm of the hand. The assessment was that of carpal tunnel syndrome, and Petitioner was recommended to undergo nerve conduction testing. It was noted that Dr. Sola thought his pain was likely related to the degenerative changes in the wrist. (PX2).

The records of Illinois SW Orthopedics reflect that Petitioner was seen on April 16, 2012 for reevaluation of both hands, and no change in symptoms was noted. It was noted that the nerve conduction test was consistent with carpal tunnel syndrome, and that the assessment was that of carpal tunnel syndrome and bilateral hand pain. It was noted that Petitioner's hand pain was isolated specifically over the metacarpal head volarly on the long digit on both hands, which Dr. Sola though likely represented a tenosynovitis without developing a trigger digit. A cortisone injection was recommended. It was noted that Petitioner had fairly persistent symptoms of carpal tunnel syndrome on the right side, and that the left side was somewhat intermittent. It was noted that Petitioner wanted to proceed with surgery. (PX2).

The medical records of Greenville Regional Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. Petitioner underwent x-rays of the left wrist on February 27, 2012, which were interpreted as revealing (1) degenerative changes of the radiocarpal, distal radial ulnar and carpal metacarpal joints; (2) widening of the distance between the scaphoid and the lunate usually associated with scapholunate dissociation and scapholunate ligamentous tear; (3) ulna negative variance; (4) if the patient was involved in wrist trauma and pain persists, consider repeating the study in 5-7 days; (5) mild wrist edema correlated with recent trauma; (6) incidental visualization of degenerative changes within the metacarpal phalangeal joints at the margins of the exam; (7) small rounded bony fragment dorsal aspect of the carpal region. Petitioner also underwent x-rays of the right wrist on February 27,

2012, which were interpreted as revealing (1) severe osteoarthritis of the radiocarpal joint with total loss of the joint space, and sclerosis and marginal osteophytosis; degenerative changes also present between the first, second and third metcarpal phalangeal joints; (2) ulnar positive variance; (3) widening of the scapholunate distance likely related to scapholunate disassociation and ligamentous tear; (4) deformity of the scaphoid; correlate with history of prior fracture and trauma; (5) if the patient was involved in wrist trauma and pain persists, consider repeating the study in 5-7 days; (6) there is a bony fragment dorsal aspect of the carpal region suggestive of a fracture of indeterminate age or etiology; MRI or CT would be helpful for further characterization. (PX3).

The records of Greenville Regional Hospital also reflect that Petitioner also underwent a nerve conduction study on March 13, 2012, which was interpreted as revealing an abnormal neurophysiologic examination, with evidence of a sensory motor median entrapment neuropathy seen at the level of the flexor retinaculum bilaterally. (PX3).

The medical records of Regeneration Orthopedics/Dr. Mall were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. Petitioner was seen on June 18, 2013, at which time it was noted that Petitioner had been working 33 years at a rubber manufacturing job and had had multiple jobs over the years. Petitioner stated that his initial nine years was on the calendar mill line in which he used scissors and knives to cut rubber, and that he developed a knot on his right wrist and subsequently had to start using his left wrist to cut with the knives rather than the right side. It was noted that Petitioner had moved to compounding using hand scoops, and that the job was now automated but when he did this, he had to do it by hand. It was noted that Petitioner had held other jobs including a molding-type job where he was putting props and taking rubber off; that he had had to pull rubber, use tape guns, lift bars overhead, etc. and had subsequently changed his shifts to two 12-hour shifts due to the fact that he had been having such problems with his wrist. Petitioner stated that he was laughed at while at work sometimes because he dropped scissors and other objects because of numbness in his right hand and some occasional numbness in the left hand. Petitioner stated that his right hand was pretty much numb all the time. It was also noted that Petitioner had pain in the wrist which was increased with activity but the numbness was present a lot of the time, and that Petitioner had previously been working 40-hour workweeks plus 1,000 hours of overtime per year. The assessment was that of (1) bilateral carpal tunnel syndrome; (2) right greater than left radiocarpal arthritis. The note also contained a causation opinion indicating that while Dr. Mall could not be 100% certain that the carpal tunnel syndrome was caused by his work, it definitely was an aggravating factor and likely contributed significantly to the development of carpal tunnel syndrome. It was noted that the wrist arthritis was likely secondary to a ligament injury that could have occurred at work and was caused by a work injury, but at the very least it was being aggravated by his current working environment in which he did a lot of heavy repetitive maneuvering causing him to do wrist flexion and extension maneuvers. With respect to treatment recommendations, Petitioner was recommended to undergo carpal tunnel injections to see what percentage of his pain was coming from the carpal tunnel versus his wrist arthritis, and he underwent such injections on that date. (PX4).

The records of Regeneration Orthopedics/Dr. Mall reflect that Petitioner was seen on July 16, 2013, at which time it was noted that Petitioner stated that after the injections he got significant relief and that his pain was continuing to improve as well as his symptoms of numbness and tingling. It was noted that he no longer had symptoms while driving his car or when he woke up first thing in the morning, but it was noted that he was dropping things. It was also noted that Petitioner was having reduced but still some continued tingling in the median nerve distribution. The assessment was that of bilateral carpal tunnel syndrome, and Dr. Mall thought that Petitioner would benefit from carpal tunnel release should his symptoms come back. A work slip was issued on that date, indicating that Petitioner could return to work in July 17, 2013 full duty. (PX4).

The records of Regeneration Orthopedics/Dr. Mall reflect that Petitioner was seen on April 11, 2014, at which time he reported right side more than left side numbness in his hands which was worse over the last few weeks. It was noted that Petitioner had been given injections in his bilateral carpal tunnels that gave him significant benefits and improvement that lasted for a good amount of time, but that it had returned. The assessment was that of bilateral carpal tunnel syndrome and Petitioner was recommended to undergo surgery. (PX4).

The records of Regeneration Orthopedics/Dr. Mall reflect that Petitioner was seen on November 19, 2014 for follow-up after right carpal tunnel release and median nerve exploration. The assessment was that of healing wound, status post procedure. Petitioner was recommended to continue doing his packing, and it was noted that he was to return in one week at which time it was anticipated that he may be allowed to return to work in a limited duty capacity. An off work slip was issued on that date as well. Petitioner was next seen on November 26, 2014, at which time he continued to state that the pain in his wrists was better, and that he still had some numbness in his hand. It was noted that Petitioner also had some muscle atrophy in the thenar eminence, which was present pre-operatively. The assessment was that of status post median nerve decompression and exploration. Petitioner was recommended to return to work full duty, and a work slip was issued on that date allowing him to return to full duty effective November 27, 2014. (PX4).

The records of Regeneration Orthopedics/Dr. Mall reflect that Petitioner was seen on January 7, 2015 for follow-up right carpal tunnel syndrome ad bilateral knee osteoarthritis. It was noted that the right carpal tunnel was related to a work injury, and that the bilateral knee osteoarthritis was through his private insurance. It was noted that Petitioner continued to have some numbness in his median distribution and that it was somewhat better than it was immediately following the other right carpal tunnel release and before the surgeries, but it was still fairly numb. Petitioner was recommended to undergo physical therapy to work on regaining his full range of motion in the hand and to improve some swelling. It was noted that Petitioner had had carpal tunnel syndrome for some time with dramatic numbness in his hand, and that some may be permanent and not respond to the procedure. It was also noted that Petitioner had undergone a second nerve exploration to fully evaluate the nerve, and that there were no areas of compression noted well up into the wrist. A work slip was issued on that date, placing Petitioner under light duty restrictions effective January 8, 2015 of no continuous pulling or cutting with the right hand. (PX4).

The records of Regeneration Orthopedics/Dr. Mall reflect that Petitioner was seen on November 3, 2014 for follow-up of bilateral carpal tunnel syndrome. It was noted that Petitioner's left side felt "great," and that the right side continued to feel some numbness in the median distribution. The physical examination performed revealed some weakness with his thenar muscles in the right thumb, and the assessment was that of continued median nerve dysfunction, status post carpal tunnel release. It was noted that Petitioner would require an exploration of his median nerve, as it appeared that the median nerve was still being compressed or was somewhat injured. It was noted that on the left side, Petitioner had an excellent result. It was also noted that Petitioner stated that the right side was much worse than the left side initially. (PX4).

The medical records of St. Luke's CDI were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Petitioner underwent x-rays of the right and left wrists pm June 18, 2013, which were interpreted as revealing (1) severe right and mild left osteoarthritis of the wrists; (2) scapholunate widening on the right consistent with a scapholunate ligament tear and proximal migration of the capitates is noted consistent with SLAC wrist; this is noted to a lesser degree on the left. (PX5).

The IME Report of Dr. Kostman was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The report dated May 27, 2014 noted that Petitioner described that he was a senior

production operator at a rubber processing plant and had been working at the plant for 34 years. Petitioner described that his job changed over the years, and that he initially was working on a mill line,as he described, cutting rubber with a wooden-handled knife. Petitioner noticed that his right hand along the radial styloid location developed swelling and pain, and then he switched to his left hand approximately 7 years after he started work. Petitioner described, after 9 years of work, switching to a compound mixing type of job where he lifted a plastic scoop of compound and lifted an 8-15 pound container approximately 40 hours a week. It was noted that Petitioner switched between the two jobs of cutting and mixing and occasionally would pick up 50-pound bales of rubber. Petitioner further described his symptoms worsening in 2007-2009 on a line that involved lifting from 160-200 pounds, which were not automated. Petitioner indicated that he now works on an automatic sheet building machine that he watches for defects, which involves pushing buttons. Petitioner described his first symptoms of hand numbness in 2009 and his first symptoms of wrist pain in 1985. Petitioner described bilateral wrist pain and numbness over the last 10 years. (PX6).

The report noted that Dr. Kostman opined that Petitioner's right and left wrist pain was secondary to scapholunate ligament insufficiency and secondary osteoarthritis of the wrists, and that he did not believe that his work activities were the direct cause of the symptoms. It was noted that the diagnosis was that of carpal tunnel syndrome bilateral hands, and that although Petitioner's activities in the past had involved cutting and heavy lifting activities, he described that he had transitioned his work to automated lines and therefore did not believe that his work activities as currently described were consistent with the cause of Petitioner's bilateral carpal tunnel syndrome. Dr. Kostman indicated that he believed that advanced osteoarthritis secondary to SLAC wrists can be aggravated by his work activities as described when he started work at Carlisle, however he did not believe that his current work activities would aggravate or accelerate his underlying condition of bilateral SLAC wrists and osteoarthritis. He further indicated that he believed that Petitioner's work activities as described when he started work at Carlisle could aggravate his carpal tunnel syndrome, however he did not believe his current activities aggravated his carpal tunnel syndrome. He indicated that he did not believe additional medical treatment was causally related to his work duties at Carlisle, and that he was at maximum medical improvement as related to his work activities. (PX6).

The deposition of Dr. Kostman was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. Dr. Kostman testified that he is board-certified in orthopedics, and that he only treats extremity injuries and not the spine. He testified that he has performed carpal tunnel surgeries in the past, and has treated scapholunate ligament insufficiency and osteoarthritis of the wrist in the past. (PX7).

Dr. Kostman testified that with respect to the physical examination performed, Petitioner was noted to have some tenderness to palpation involving his right wrist along the radial aspect, both along the volar and dorsal surface; that he was noted to have some mild swelling to the same area; that his left wrist demonstrated tenderness involving the scapholunate interval dorsally and along the radiocarpal joint dorsally; that he demonstrated decreased sensation to light touch involving the left hand along the volar surface of the thumb, index and long fingers, and that on the right side he had decreased sensation to light touch involving the volar surface of the thumb, index, long, ring and little fingers. He testified that sharp testing demonstrated some increased sensitivity in the right both along the medial and ulnar nerve distribution of the right hand on the palmar surface and decreased sensation in the left along the median nerve distribution of the hand including the thumb, index and long finger of the hand in addition to some decreased sensation along the radial forearm and deltoid distribution proximally on the left. (PX7).

Dr. Kostman testified that other than Dr. Dawdy's examination on October 7, 1992, he did not note Petitioner making any complaints in his hands or wrists to a medical provider prior to February of 2012. He testified that the x-rays performed at his office revealed that the right side demonstrated advanced radiocarpal degenerative arthritis, scapholunate joint widening on the right consistent with end-

stage SLAC wrist and degenerative joint disease, and that the left wrist demonstrated mild to moderate radiocarpal degenerative changes, scapholunate interval widening and probable SLAC wrist. He testified that his reading of the x-rays were consistent with the x-rays that Petitioner underwent on February 27, 2012. He testified that it was possible for patients that have degenerative arthritis in their wrist to develop carpal tunnel syndrome or have an aggravation of carpal tunnel syndrome because of some wrist/joint swelling due to arthritis, and that you could have some compromise of the space available in the carpal canal for the median nerve. He testified that it was not, however, a one-to-one correlation. (PX7).

Dr. Kostman testified that the x-rays demonstrated a long-standing condition involving both wrists, both involving an old ligament injury and development of osteoarthritis involving the wrist joint. He testified that his experience was that the conditions were related to an old, prior injury but that Petitioner did not relate any old injury. He testified that the first complaint of bilateral wrist or hand complaints to a medical provider was Dr. Goggin on February 20, 2012, and that Dr. Goggin noted at that time that Petitioner was working part-time. He testified that based on his review of the medical records, the left and right wrist complaints first manifested on that date. When asked if he agreed with Dr. Sola's opinion in the records from February 27, 2012 that the pain in Petitioner's wrist was related to the degenerative changes in his wrist, Dr. Kostman responded that considering his two diagnoses, he believed that it would make sense that he had more symptoms secondary to arthritis of the wrist joint. (PX7).

Dr. Kostman testified that his impression was that Petitioner's right and left wrist pain was secondary to scapholunate ligament insufficiency and secondary arthritis of the wrist, and that he had a diagnosis of carpal tunnel syndrome of the bilateral hands. He testified that he did not believe that Petitioner's work activities were the direct cause of his symptoms involving his right and left wrist pain secondary to scapholunate insufficiency arthritis, and that he did not believe that his work activities as currently described were consistent with the cause of Petitioner's bilateral carpal tunnel syndrome. He testified that Petitioner described currently working on an automated line where he inspected product and pushed buttons, and that he did not believe that that activity for either of those conditions would be a significant contributor either by way of causation or aggravation. He further testified that Petitioner's initial employment described more heavy activities with cutting of rubber and lifting, and that these activities could aggravate those symptoms related to either of those conditions. (PX7).

Dr. Kostman testified that he believed that some of Petitioner's past work activities could have aggravated or accelerated his conditions in his bilateral hands and wrists, and that his understanding of Petitioner's job duties in 2012 when the symptoms manifested he was working more of a supervisory role where he was punching some buttons and not doing the type of work that he previously noted in the history provided. He testified that when the conditions manifested in 2012, they had nothing to do with his work at Carlisle. He testified that it was possible that smoking could aggravate or worsen symptoms as related to carpal tunnel syndrome, and that swelling secondary to arthritis can put pressure on the carpal canal and can aggravate carpal tunnel syndrome with getting less available space for the median nerve in the carpal canal. (PX7).

Dr. Kostman agreed that he took a history from Petitioner that he had pain in his hands since 1985 and had numbness since 2009. He testified that scapholunate advanced collapse was typically related to an initial trauma of some sort and not repetitive activities, and that the diagnosis was most commonly related to an initial event of trauma which was not related in any fashion to him during the exam. He further testified that carpal tunnel syndrome as a diagnosis was most commonly idiopathic, but that there had been studies that heavy use of vibratory tools could be related but that Petitioner's particular activities in 2012 did not, in his opinion, appear related. He also testified that Petitioner's past work activities may have aggravated his conditions but he had no record of that. (PX7).

On cross-examination, Dr. Kostman testified that he could not recall having treated or examined any other employees from Carlisle Syntec. He testified that he believed that Petitioner had bilateral carpal tunnel syndrome and that he needed to have surgery provided that he failed conservative treatment. He testified that Petitioner was a bilateral carpal tunnel release surgical candidate, and that conservative management could include a period of splinting or corticosteroid injection. (PX7).

When asked if he believed that Petitioner's work cutting rubber 40 hours per week was any factor at all in the diagnoses of carpal tunnel syndrome and the need for bilateral carpal tunnel releases, on cross-examination Dr. Kostman responded that it would depend on his examination at that time. He testified that he did not think that it would change the overall outcome of the condition, but that it could aggravate the condition. He testified that the problem was that he did not see an exam from that point in time nor were there any EMG/nerve conduction studies from that point in time, so he thought the question was difficult to answer for those reasons. He agreed that in his report the work activities when Petitioner started would include cutting rubber 40 hours per week, lifting scoops and mixing sulphur or zinc and lifting 8-15 pound containers 40 hours a week, and working on the TPO line that involved lifting form 160-200 pounds. He testified that the activities were not a factor, however, in his scapholunate ligament insufficiency. (PX12).

On cross-examination, Dr. Kostman agreed that he saw patients who came into him who he ultimately diagnosed with carpal tunnel syndrome who had lived with their complaints for a period of time. He agreed that carpal tunnel syndrome was a condition that could worsen over time. He agreed that it was impossible within a reasonable degree of medical certainty to tell the exact onset of Petitioner's bilateral carpal tunnel syndrome. He agreed that it was not possible for a practitioner to see Petitioner and stated that he or she knew exactly when the osteoarthritis started. (PX7).

On cross-examination, Dr. Kostman testified that when he used the term "manifestation" he was talking from a medical standpoint rather than a legal one. He agreed that the work activities of cutting rubber, scooping, lifting, and the TPO line could have aggravated the SLAC wrist and could have aggravated the carpal tunnel syndrome conditions. (PX7).

On redirect, Dr. Kostman agreed that he did not review any medical records nothing that Petitioner was having any bilateral hand or wrist complaints while he was cutting rubber, mixing, or working the TPO line when he was carrying 160-200 pounds. He agreed that his opinion was that these types of activities could possibly aggravate his wrist or hand conditions. (PX7).

On further cross-examination, Dr. Kostman testified that he did not have any independent knowledge about what Petitioner was experiencing from a pain standpoint when he was doing these jobs in the past. (PX7).

The medical records of Timberlake Surgery Center were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. Petitioner underwent a right carpal tunnel release on October 7, 2014 with a pre- and post-operative diagnosis of right carpal tunnel syndrome. Petitioner underwent a left carpal tunnel release on October 23, 2014 with a pre- and post-operative diagnosis of left carpal tunnel syndrome. Petitioner also underwent a carpal tunnel release and median nerve exploration on November 4, 2014 for a pre-operative diagnosis of median nerve dysfunction and a post-operative diagnosis of residual band of flexor retinaculum and scar tissue, intact median nerve. (PX8).

The medical records of Hometown Chiropractic were entered into evidence at the time of arbitration as Petitioner's Exhibit 9. Petitioner was seen on February 3, 2015 for issues related to the low back, and he was also experiencing moderate pain in the right hand and numbness in the first through third finger on the right. It was noted that he had Petitioner had surgery last October and was still having

pain into his right hand, and that he was given physical therapy orders which would be addressed at the clinic. Petitioner underwent "soft tissue muscle work" on that date. Petitioner was also seen on February 6, 2015; February 9, 2015; and February 11, 2015, at which time he underwent "soft tissue muscle work" again. Petitioner was next seen on July 13, 2015, at which time he stated that his hands were constantly numb due to his carpal tunnel syndrome and that it was something he was used to. Petitioner was also seen on November 23, 2015 due to sharp pain his lower back and that he had been sitting in a deer stand in a twisted position for several hours on November 22, 2015. He was further seen on November 25, 2015 for complaints of dull pain in the lower back. (PX9).

The accident report was entered into evidence at the time of arbitration as Petitioner's Exhibit 10. The report reflects that the accident was reported on April 7, 2012, and that Petitioner reported to Jan Woker that he was going through the test for carpal tunnel, that Petitioner went back to the doctor during the week of April 9th and that he confirmed that Petitioner suffers from carpal tunnel syndrome. The primary factor responsible for the accident was noted to be that of progressive use of the hands/wrists while working in the factory over the last 30 years. The date of the report was April 23, 2012 and was signed by Petitioner on that date. (PX10).

The medical bills exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 11.

The deposition of Dr. Mall was entered into evidence at the time of arbitration as Petitioner's Exhibit 12. Dr. Mall testified that he is an orthopedic surgeon, and that he is board-certified in orthopedic surgery and independent medical examinations. (PX12).

Dr. Mall testified that he first saw Petitioner on June 18, 2013, at which time the chief complaints was noted to be bilateral wrist pain and numbness. He testified that Petitioner told him about what he did for a living, which included using knives to cut rubber, using large scissors, and using hand scoops, and that his new job was rather automated and he was not having to do nearly as much of his pushing, pulling, lifting and grabbing-types of jobs as he was previously, and that the number of hours he had been working had been reduced over the last few years as well. He testified that on examination, Petitioner had some mild limitation in range of motion of the wrist moreso on the right than on the left, that he had some mild pain to palpation of the wrist moreso on the right than the left side, and that he had positive provocative signs for carpal tunnel at both wrists as well. (PX12).

Dr. Mall testified he performed injections on that date, and that Petitioner had carpal tunnel syndrome and SLAC wrist arthritis. He testified that people can have pain and even numbness symptoms related to arthritis, and that the reason to do the injections was to help differentiate the diagnosis into what was the source of his major complaint. He testified that when Petitioner returned on July 17, 2013, he reported significant relief from the injections, and that he was still dropping objects but had reduced symptoms. He testified that he felt the majority of Petitioner's symptoms were coming from his carpal tunnel syndrome rather than from his arthritis. He agreed that he sent Petitioner back to work full duty and recommended that he continue conservative care, and that if the pain returned he would recommend a release. (PX12).

Dr. Mall testified that Petitioner returned on April 11, 2014, at which time he indicated that his numbness and symptoms had returned. He testified that Petitioner had failed conservative treatment and that he recommended carpal tunnel releases. He testified that he ultimately performed a right carpal tunnel release on October 7, 2014. He testified that he took Petitioner off work on October 7, 2014. He testified that when Petitioner was seen post-operatively on October 20, 2014, he had some residual symptoms. He testified that Petitioner's left hand was still causing him problems for which he

recommended a left carpal tunnel release, and that it was performed on October 23, 2014 with no issues afterwards. He testified that he took Petitioner off work after the left surgery was performed. (PX12).

Dr. Mall testified that when he saw Petitioner on November 3, 2014, he reported that the left side felt great but that the right side continued to feel some numbness. He testified that as Petitioner had some decreased two-point discrimination in the median distribution he was concerned about the nerve, as well as the weakness into the thenar muscles which were controlled by the median nerve. He testified that he thought it required another procedure with the median nerve. He testified that there were two potential reasons for the nerve to still not be working well after a carpal tunnel surgery, that the nerve was injured during surgery or that the nerve was still being compressed by a band of tissue. He testified that this was something that can happen and was not unusual. He testified that when the second procedure on the right carpal tunnel was performed, there was a persistent band of the flexor retinaculum or transverse carpal ligament that was still present and that the nerve appeared to be compressed at that area. He testified that there was no evidence of any injury to the nerve. (PX12).

Dr. Mall testified that he was of the opinion that the second surgery on November 4, 2014 was reasonable and necessary. He testified that if someone were having persistent pain and symptoms, it needed to be addressed and that if it was not addressed, there could be worsening of symptoms. He testified that in this case Petitioner's nerve conduction seemed to be a little bit worse after surgery, so he thought that the added swelling from the surgery probably made it worse and the fact that the band was not completely cut worsened his symptoms for a period until the second surgery was performed. (PX12).

Dr. Mall testified that when Petitioner returned on November 11, 2014, he had some very mild wound issues, but that his symptoms had been improving in terms of the numbness. He testified that it was very common to see wound issues, and that it was nothing that was concerning. He testified that he had Petitioner off work on November 11th as well. He testified that Petitioner was seen on November 14th in order to keep an eye on the incision, at which time he again kept Petitioner off work. He testified that his concern about sending Petitioner back to work at that point was mostly the open wound area and the need to keep it clean and make sure no infection ensued. (PX12).

Dr. Mall testified that Petitioner was next seen on November 19th, at which time his wound looked better. He testified that Petitioner was then seen on November 26th, at which time the wound was pretty much completely healed. He testified that Petitioner was still having some pain in his wrist, but it was unlikely that they were going to make him completely pain-free given his arthritis diagnosis. He testified that he believed that Petitioner was well enough to go back to work. (PX12).

Dr. Mall testified that he next saw Petitioner on January 7, 2015 for a new, unrelated body part and that he also saw him in relation to the carpal tunnel syndrome as well. He testified that Petitioner reported that he had very mild tingling and numbness in his right side and a little bit of numbness in his median distribution but otherwise was fairly happy with his results and had improvement in his pre-operative status. He testified that he recommended physical therapy at the time of this visit, which he believed was reasonable and necessary given the presence of residual symptoms. He further testified that he placed Petitioner under permanent restrictions relating to the right hand and wrist given Petitioner's persistent symptoms and that there were some things that he had been doing at work that he felt he was having a hard time doing. He testified that Petitioner felt that pulling and cutting with his right hand was limited, so he felt it was a reasonable permanent restriction for him. He testified that without these activities, Petitioner could pretty much work a full duty job so he thought Petitioner would be able to work longer and be more active. (PX12).

When posed with a hypothetical question pertaining the Petitioner's job duties and asked whether this type of work history was a factor in his diagnosis of bilateral carpal tunnel syndrome, Dr. Mall

responded that Petitioner described repetitive gripping and grabbing of objects, which he considered to be contributing to the cause of carpal tunnel syndrome or at least the aggravation of carpal tunnel syndrome. He further testified that this type of work history was a factor in the treatment he rendered to Petitioner. (PX12).

Dr. Mall testified that he disagreed with Dr. Kostman's testimony that Petitioner's right and left wrist pain was secondary to scapholunate ligament insufficiency and secondary arthritis of his wrist given the injections that were performed and that the vast majority of his symptoms were coming from carpal tunnel syndrome rather than arthritis in his wrist, but he agreed with Dr. Kostman's testimony that Petitioner had a diagnosis of carpal tunnel syndrome, bilateral hands. He testified that he made the diagnosis of scapholunate deficiency and arthritis associated with that as well, but he did not feel that that was the major source of his symptoms. He testified that it was not concerning to him that at some point Petitioner stopped doing the long run of repetitive work and by his own admission did less repetitive work now. (PX12).

On cross-examination, Dr. Mall testified that he did about two carpal tunnel surgeries per week out of 10 surgeries performed, and that he currently performed about 100 carpal tunnel surgeries per year. When asked why the Regeneration Orthopedics website did not state anything about hand, wrist or carpal tunnel syndrome for body parts or conditions that they treat, Dr. Mall responded that he had not adjusted the website since he started back in 2012. (PX12).

On cross-examination, Dr. Mall testified that he did not know if Dr. Goggin ever referred a patient to him. He testified that he saw people from attorneys all the time, so he would not disagree if Petitioner had heard of his group through his attorney. He admitted that Petitioner's attorney did refer patients on occasion. When asked if Petitioner had ever told him that he had treated with Dr. Sola for his carpal tunnel syndrome back in 2012, Dr. Mall responded that he may have but he did not have it recorded so he would have to say no since it was not written down. (PX12).

On cross-examination, Dr. Mall testified that some of the risk factors for carpal tunnel included activity-related factors including repetitive gripping and grabbing of objects and typing in a non-ergonomic position, as well as physiological issues like thyroid issues, obesity, vitamin deficiencies and arthritis. He agreed that Petitioner was in the obese 2 category, which used to be referred to as morbidly obese. He agreed that being morbidly obese could be a risk factor for developing carpal tunnel syndrome. (PX12).

On cross-examination, Dr. Mall agreed that Petitioner reported at the June 18, 2013 visit that he recently moved to the weekend shift, where he worked two 12-hour shifts. He agreed that Petitioner stated that he had numbness and pain complaints in his wrist for a number of years preceding the transition to the weekend shift, and that he reported that his numbness and pain preceded his change in jobs. He testified that Petitioner did not give him the exact date of when he started having the numbness. (PX12).

When asked on cross-examination how an accurate history of a person's symptoms for carpal tunnel syndrome for when they began factored into an opinion on causation, Dr. Mall responded that he had to look at what they were doing, when the symptoms occurred and also what they were doing before the symptoms occurred because carpal tunnel did not typically occur in an acute fashion. He testified that carpal tunnel could be seen with an acute wrist fracture, but that the new acute trauma may have brought out some of the symptoms so the pre-symptom history was important as were other risk factors. (PX12).

On cross-examination, Dr. Mall testified that Petitioner reported that his new job was more automated, and that these job duties were not relevant to his causation opinion. He testified that he did

not review any of Petitioner's medical records or radiographs prior to June 18, 2013 and that it was based on the history provided by Petitioner. He agreed that he could not pinpoint exactly when Petitioner's work activities became aggravating factors and that he was relying solely on Petitioner's history. He testified that Petitioner did not give him any kind of a history of a ligament injury to his wrist at work, but that sometimes the ligament injury could be something that as more of a degenerative process that occurred with repetitive activities as well. He agreed that one can have a degenerative tear of the scapholunate ligament over time, but it was more commonly seen as an acute trauma injury. (PX12).

On cross-examination, Dr. Mall agreed that the last time that he saw Petitioner was on January 7, 2015 at which time he recommended physical therapy to improve Petitioner's range of motion and swelling in his hands. He testified that he called for eccentric strengthening of wrist flexors, range of motion stretching of the wrist and elbow and modalities as needed. He testified that he received physical therapy records from Phoenix Physical Therapy dated December 2, 2014, but this was for his knee pain, and that he did not see anything for his carpal tunnel. He testified that he did not have a problem with the therapy being done by a chiropractor as long as the things that he asked for were being done. After reviewing the records of Hometown Chiropractic, Dr. Mall testified that he did not know what chiropractic manipulations of the wrist and adjustments of the wrist were, but this was not what he ordered. He testified that the notation on January 7, 2015 that Petitioner was not at maximum medical improvement pertained to his wrist, and that he felt that Petitioner could probably get some improvement from the physical therapy. He agreed that he could not make that determination based on the information he received at the time of the deposition. (PX12).

The Time & Attendance – Detail Report and Job Bid were entered into evidence at the time of arbitration as Respondent's Exhibit 1. The medical records of Illinois SW Orthopedics, Ltd. were entered into evidence at the time of arbitration as Respondent's Exhibit 2. The records were duplicative of those as contained in Petitioner's Exhibit 2. (RX2).

The medical records of Dr. Andrew Goggin were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records reflect that Petitioner was seen on April 7, 2005, at which time Petitioner denied any edema or sores in the extremities. Petitioner was seen for unrelated issues on April 14, 2005, May 4, 2005, June 22, 2005, January 16, 2007, April 27, 2007, February 7, 2008, January 29, 2009, January 22, 2010, February 16, 2010, February 19, 2010, May 19, 2010, January 26, 2011, and March 10, 2011. (RX3).

The records of Dr. Andrew Goggin reflect that Petitioner was seen on February 20, 2012, at which time he reported that both hands hurt, and that the right was worse and associated with thenar numbness. The impression was that of generalized arthritis and right hand pain, likely mixed origin but likely carpal tunnel syndrome. Petitioner was referred to Dr. Sola and ordered to undergo x-rays of the hands. (RX3).

The records of Dr. Andrew Goggin reflect that Petitioner was seen for unrelated issues on May 2, 2012, May 3, 2012, August 8, 2012, January 17, 2013, March 15, 2013, May 30, 2014, March 13, 2015and September 2, 2015. (RX3).

The Carlisle Syntec medical records of Dr. Dawdy dated October 7, 1992 were entered into evidence at the time of arbitration as Respondent's Exhibit 4. Petitioner was seen on that date for a physical examination. It was noted that Petitioner had a fracture of the left tibia a number of years ago and had no problems with that, and that he had occasional aching proximal to the left wrist. The assessment referenced, among other things, mild left tenosynovitis. (RX4).

The Sign Up Sheet for Weekend Shift dated April 28, 2010 was entered into evidence at the time of arbitration as Respondent's Exhibit 5. An Inter-Office Memo dated January 20, 2012 was entered into evidence at the time of arbitration as Respondent's Exhibit 6. The memo pertained to walking onto freshly waxed floors and signage-related issues. (RX6).

Documentation pertaining to Cigna payments were entered into evidence at the time of arbitration as Respondent's Exhibit 7. The pay stubs for short-term disability benefits issued to Petitioner were entered into evidence at the time of arbitration as Respondent's Exhibit 8.

The Petition for an Immediate Hearing dated September 8, 2014 was entered into evidence at the time of arbitration as Respondent's Exhibit 9. The Petition alleged that notice of the accident was given both orally and in writing to John Cohen on September 21, 2011, and that the accident date was that of February 27, 2012. Also included within the exhibit was a Request for Hearing for December 14, 2015, which alleged that notice was given to Joe Edd on April 23, 2012 and that the date of accident was that of February 27, 2012. (RX9).

The transcript of the evidence deposition of Dr. Kostman was entered into evidence at the time of arbitration as Respondent's Exhibit 10, but was duplicative of Petitioner's Exhibit 7. The medical records of Hometown Chiropractic were entered into evidence at the time of arbitration as Respondent's Exhibit 11, but were duplicative of those as contained in Petitioner's Exhibit 9.

The e-mail exchange pertaining to the stipulation between the parties as to the testimony of Jan Woker was entered into evidence at the time of arbitration as Respondent's Exhibit 12. The parties stipulated that Jan Woker is the manager for Human Resources for Carlisle and was so in 2012; that her office is located at the Carlisle facility in Greenville, Illinois; that Petitioner mentioned to her sometime in 2012 some sort of problem that he was having with his hands or wrists and that this discussion occurred at the Carlisle facility in Greenville, Illinois; that Woker cannot recall the exact date of the discussion with Petitioner, but does know it was before he completed the accident report on April 23, 2012; and that when Petitioner mentioned this problem, she advised him to complete an accident report. (RX12).

CONCLUSIONS OF LAW

With respect to disputed issues (C) and (F), given the commonality of facts and evidence relative to both issues, the Arbitrator addresses those jointly.

The Arbitrator finds that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on February 27, 2012, and that his current condition of ill-being is causally related to his work activities for Respondent.

In so concluding that Petitioner's carpal tunnel syndrome in his bilateral hands is related to his work activities, the Arbitrator finds it to be significant that both Dr. Mall and Dr. Kostman have opined that Petitioner's earlier work activities for Respondent were sufficient to either cause or aggravate the carpal tunnel syndrome and/or SLAC wrist conditions. Related thereto, the Arbitrator notes that Dr. Kostman agreed that the work activities of cutting rubber, scooping, lifting, and the TPO line could have aggravated the SLAC wrist and could have aggravated the carpal tunnel syndrome conditions. (PX7; RX10). The Arbitrator further notes that on cross-examination, Dr. Kostman agreed that he saw patients who came into him who he ultimately diagnosed with carpal tunnel syndrome who had lived with their complaints for a period of time and that carpal tunnel syndrome was a condition that could worsen over time. (*Id.*). As a result thereof, the Arbitrator finds that Dr. Kostman's concessions, when combined with

the favorable causation opinion testimony proffered by Dr. Mall, necessarily results in Petitioner having met his burden of proof in this case.

In accordance with the opinions of Dr. Mall, the Arbitrator finds that Petitioner's job duties are sufficiently repetitive or cumulative to support a finding of causation for the carpal tunnel syndrome condition. Petitioner's job description and his own testimony demonstrated that his job duties performed up until the time at which he began working weekends in 2010 were forceful and required frequent gripping. The Arbitrator notes that Petitioner testified that he waited between 2009 and 2012 to seek treatment because he waited until his hands got to the point that he could not sleep anymore, and the Arbitrator points out that Petitioner appeared to testify in a credible and forthright manner at the time of arbitration. As a result thereof, the Arbitrator finds that the job duties as described and demonstrated by Petitioner at the time of arbitration -- which involved gripping and grasping of objects and tools-- were sufficient to cause or aggravate carpal tunnel syndrome.

Based upon the foregoing and the record as a whole, the Arbitrator concludes that Petitioner has met his burden of proving that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on February 27, 2012, and that his current condition of ill-being is causally related to his work activities.

With respect to disputed issue (E) pertaining to notice, the Arbitrator notes that the accident report, which was entered into evidence at the time of arbitration as Petitioner's Exhibit 10, reflects that the accident was reported on April 7, 2012, and that Petitioner reported to Jan Woker that he was going through the test for carpal tunnel, that Petitioner went back to the doctor during the week of April 9th and that he confirmed that Petitioner suffers from carpal tunnel syndrome. The date of the report was April 23, 2012 and was signed by Petitioner on that date. (PX10). On cross-examination, Mr. Edd agreed that it was his handwriting on the accident report where it said that it was reported April 7, 2012. Ms. Woker via the stipulation indicated that Petitioner mentioned to her sometime in 2012 some sort of problem that he was having with his hands or wrists and that this discussion occurred at the Carlisle facility in Greenville, Illinois and that she could not recall the exact date of the discussion with Petitioner, but knew it was before he completed the accident report on April 23, 2012. (RX12). As the carpal tunnel syndrome diagnosis was definitively made by Dr. Sola at the time of the February 27, 2012 office visit, the Arbitrator finds that timely notice of the accident was given to Respondent.

With respect to disputed issue (J) pertaining to necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment to his bilateral hands was reasonable, necessary, and causally related to his work accident of February 27, 2012. As a result, the Arbitrator finds that Respondent shall pay all reasonable and necessary medical services as set forth in Petitioner's Exhibit 11 ***solely with respect to the left and right hands/wrists***, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from October 7, 2014 through November 26, 2014. (AX1). Related thereto, the Arbitrator notes that on October 7, 2014, Petitioner underwent the first surgery on the right hand, that on October 23, 2014 Petitioner underwent the left carpal tunnel release, and that on November 4, 2014 Petitioner underwent the right carpal tunnel release and median nerve exploration procedure. (PX8). The Arbitrator notes that on November 3, 2014, Dr. Mall issued a Work Status Report taking Petitioner completely off work with noted surgery dates of October 7, 2014 and October 23, 2014; that on November 19, 2014, Dr. Mall issued a Work Status Report keeping Petitioner

off work with noted surgery dates of October 7, 2014 and October 23, 2014; and that on November 26, 2014, Dr. Mall issued another Work Status Report allowing Petitioner to return to full duty effective November 27, 2014. (PX4). The Arbitrator further notes that Dr. Mall testified that he took Petitioner off work on October 7, 2014; that when Petitioner was seen post-operatively on October 20, 2014, he had some residual symptoms; that Petitioner's left hand was still causing him problems for which he recommended a left carpal tunnel release; and that he took Petitioner off work after the left surgery was performed. (PX12). Therefore, the Arbitrator finds that Respondent shall pay temporary total disability benefits for a period of 7 2/7 weeks, commencing October 7, 2014 through November 26, 2014, given the Arbitrator's findings with respect to disputed issues (C) and (F).

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that no AMA rating was offered by either party in this matter. As a result thereof, the Arbitrator gives no weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner continues to be employed by Respondent and testified that his permanent restrictions are being accommodated by Respondent. The Arbitrator finds that the nature and demands of his position will likely have minimal affect on his permanent partial disability and, as such, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 56 years old on his date of accident. Given the somewhat advanced age of Petitioner and the fact that his treating physician, Dr. Mall, gave him permanent restrictions of no continuous pulling or cutting with the right hand, the Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that there was no evidence proffered at arbitration to demonstrate that this work accident has impaired or otherwise affected his future earnings capacity. The Arbitrator places no weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he cannot hold a knife in his right hand very long, and that he does not have a lot of strength in his hand to lift things. He testified that he has difficulty with gripping and pulling things and that he cannot hold on very long. With respect to his left hand, Petitioner testified that he uses his left hand to perform tasks for his right. He denied having any limitations with his left hand. He testified, however, that he does not have as much strength in his left hand as before but is pain-free. At his final office visit with Dr. Mall on January 7, 2015, it was noted that Petitioner continued to have some numbness in his median distribution and that it was somewhat better than it was immediately following the other right carpal tunnel release and before the surgeries, but it was still fairly numb. Dr. Mall recommended that Petitioner undergo physical therapy to work on regaining his full range of motion in the hand and to improve some swelling. Dr. Mall further noted that Petitioner had had carpal tunnel syndrome for some time with dramatic numbness in his hand, and that some may be permanent and not respond to the procedure. (PX4). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and purported limitations, were somewhat corroborated by his treating records at

the conclusion of his treatment with Dr. Mall. The Arbitrator accordingly places lesser weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 7.5% loss of use of the left hand and 15% loss of use of the right hand under Section 8(e) of the Act.

With respect to disputed issue (O) pertaining to the two provider limit, the Arbitrator notes the record in this case suggests that Petitioner's first choice of physician was his primary care physician, Dr. Goggin. The record is undisputed that Dr. Goggin referred Petitioner to Dr. Sola who, as a result thereof, necessarily would fall into the first referral chain. There appeared to be a dispute as to whether Petitioner was referred to or chose to be seen by Dr. Mall. Even construing the evidence against Petitioner on this issue and assuming that Petitioner's second choice of physician was, in fact, Dr. Mall, the Arbitrator notes that Dr. Mall at the time of the January 7, 2015 visit recommended that Petitioner undergo physical therapy to work on regaining his full range of motion in the hand and to improve some swelling. (PX4). The medical records of Hometown Chiropractic reflect that when Petitioner was seen on February 3, 2015 for issues related to the low back, he was also experiencing moderate pain in the right hand and numbness in the first through third finger on the right and that he was given physical therapy orders which would be addressed at the clinic. (PX9). That said, the Arbitrator finds that Petitioner's treatment solely for the bilateral wrists as performed at Hometown Chiropractic was within the second referral chain. As such, the Arbitrator finds that Petitioner did not exceed his choice of physicians.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Juan Mota,
Petitioner,
Vs.

17IWCC0627

NO: 13 WC 11310

Greco & Sons, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner 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 February 6, 2017 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $46,024.00. 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.

OCT 10 2017

DATED:
KWL/vf
O-10/3/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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STATE OF ILLINOIS)
)SS.
COUNTY OF DU PAGE)

- ☐ 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
NATURE AND EXTENT ONLY

17IWCC0627

JUAN MOTA
Employee/Petitioner

v.

GRECO & SONS, INC.
Employer/Respondent

Case # 13 WC 11310

Consolidated cases: 14 WC 38080

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Wheaton**, on **1/20/17**. By stipulation, the parties agree:

On the date of accident, **2/8/13**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**45,240.00**, and the average weekly wage was $**870.00**.

At the time of injury, Petitioner was **52** years of age, ***married*** with **0** dependent children.

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

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**534.00**/week for a further period of **86** weeks, as provided in Section **8(e)12** of the Act, because the injuries sustained caused **40% loss of use of the right leg** .

Respondent shall pay Petitioner compensation that has accrued from **2/8/13** through **present**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

2/2/17
Date

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner sustained and injury to his right leg, which resulted in a displaced fracture of the right tibia and fibula which he underwent a displaced fracture of the tibia for which he underwent surgery on February 9, 2013 consisting of a locked intramedullary rodding of the tibia. (PX. 1, pg. 19, 40). Subsequently, he underwent physical therapy and work hardening he was released full duty on October 8, 2013. (PX. 2, pg. 7). Pursuant to Section 8.1b of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered are as follows: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. Applying this standard to this claim, the Arbitrator makes the following findings listed below.

(i) Impairment. Respondent offered the AMA rating by Dr. Palacci who treated Petitioner with a zero percent PPI rating. Dr. Palacci classified Petitioner with a proximal tibia shaft fracture, nondisplaced, with no sufficient objective abnormal findings at MMI. However, Dr. Palacci's diagnosis of nondisplaced fracture is not accurate and inconsistent with Dr. Goldberg's diagnosis of a displaced tibia fracture hence requiring the rodding. The PPI range for a displaced tibial shaft fracture is from 14% to 100% impairment of the lower extremity per the AMA Guides. Accordingly, the Arbitrator gives little weight to the impairment rating.

(ii) Occupation. Petitioner continues to work for the Respondent at full duty capacity as a driver which requires that he walk up and down ramps and stairs unloading items. Petitioner's job is physical and the Arbitrator finds that the injury to Petitioner's leg is relatively more incapacitating than if Petitioner's job required no physical work. The Arbitrator gives great weight this factor.

(iii) Age. Petitioner is 56 years old. The Arbitrator finds that Petitioner is an older individual and therefore gives this factor some weight.

(iv) Future Earning Capacity. The injury has not affected Petitioner's earning capacity. He testified he is earning the same if not more than he was prior to the injury. The Arbitrator gives this factor no weight.

(v) Evidence of Disability. Petitioner testified that he continues to notice pain in his knee when walking on uneven surfaces including ramps and stairs. He primarily notices this pain in the knee where the hardware was inserted in his right leg. Following his discharge in October of 2012, Petitioner returned to Dr. Goldberg with continued complaints on February 25, 2014, again on March 11, 2014. (PX. 2, pgs. 2-6). The Arbitrator gives great weight to this factor.

Considering all of the factors required under Section 8.1(b), as well as the Petitioner's trial testimony and the medical evidence, the Arbitrator finds that the Petitioner has suffered the permanent and partial loss of use of the right leg to the extent of 40% thereof due to his injury.