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CLINTON TAYLOR, PETITIONER, v. MT. VERNON POLICE DEPARTMENT, RESPONDENT.

NO: 12WC 43325

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 946; 2014 Ill. Wrk. Comp. LEXIS 1020

November 6, 2014

JUDGES: Mario Basurto; David L. Gore; Stephen Mathis

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Lee finding Petitioner sustained an accidental injury arising out of and in the course of his employment on October 16, 2012. As a result Petitioner was temporarily totally disabled from November 27, 2013 (sic) through March 25, 2013 minus a credit of 7.20 weeks for a total of 9.66 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to the medical expenses contained in Petitioner's group exhibit and permanently lost 15/20% (sic) of the use of his right leg under Section 8(e) of the Act. The Issues on Review are whether Petitioner sustained an accidental injury on October 16, 2012, whether there is a causal connection between the alleged October 16, 2012 work accident and Petitioner's present condition of ill-being, and if so, the amount of necessary medical expenses and the nature and extent of Petitioner's permanent disability. The Commission, upon reviewing the entire record, reverses the Arbitrator's decision and finds while Petitioner proved he sustained an accidental injury on October 16, 2012, he failed to prove a causal connection exists between the alleged October 16, [*2] 2012 work accident and Petitioner's present condition of ill-being, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 36 year old police sergeant, testified that on October 16, 2012, he was arresting a subject who was resisting arrest and trying to flee. He forced the subject to the ground. Petitioner testified that his own knees struck the asphalt/concrete parking lot many times during the altercation Petitioner identified an incident report and a court finding in which the subject was found guilty of resisting a peace officer. Petitioner testified that prior to October 16, 2012 he did not have any right knee injuries, treatment or claims. Following the altercation, he experienced soreness in his knees and arms. He thought he was going to get better, but he said obviously he had a severe injury he did not know about.

2. Petitioner testified that a few days after the altercation he was working on his commode at his own personal residence. After working on it, his knees started swelling and this caused pain. At the December 20, 2013 Arbitration hearing, Petitioner demonstrated his actions on the day he fixed the commode. [*3] He was down on both knees, was flexed forward with his head tilted in an upward manner. During this job he was up and down three to four times for no more than ten to twenty seconds at a time. He was kneeling on a carpeted floor and believes he was wearing jeans at the time. Petitioner testified that prior

to performing this job his knee was giving him problems. It continued to bother him and he sought treatment from Dr. Mall.

3. Ryan McKee testified he is a corporal for Respondent's police department. He was present on October of last year when the incident occurred in which Petitioner was required to restrain an individual. They were at the Alternative School responding to a fight call. They handled the initial fight. Then they had a run-in with another student. Petitioner tried to restrain another student while the student was resisting arrest. Petitioner took the student to the ground and they both fell to the concrete. Petitioner's knees were on the concrete. He probably restrained the suspect for 15-20 seconds. Ryan McKee testified he is married to Amanda McKee and she is a nurse practitioner. To the best of his knowledge, the police report is accurate. He is not aware of any [*4] problems Petitioner had with his right knee before the incident in October.

4. Both Petitioner and Officer McKee agreed that as police officers they had special training in documenting events and police reports. They agreed that accurate reporting is important to their profession and that, for the most part, the histories taken closer to the event are more accurate than the histories taken at a later date. Petitioner testified he initially thought that the knee pain would go away. He has gotten hurt many times on the job in the last fourteen years and he thought he would get better as he had in the past. Officer McKee testified he did not document any event where Petitioner fell on his knee. He does not have an explanation as to why he did not put down that Petitioner struck his knees on the asphalt/concrete.

5. Petitioner identified an October 16, 2012 incident report he completed. He reported that as Corporal McKee and I were leaving the alternative school a student was standing just outside the door and he was blocking the door from being opening. I walked up to the student and told him to step back inside while 1 grabbing his arm to escort him back into the school. The student [*5] immediately tensed up and tried to resist while jerking around aggressively. I had to take him to the ground. Once on the ground the student continued to resist and he would not put his hands behind his back. Corporal McKee helped me handcuff the student. After this incident was over 1 had pain in my left forearm and hand. I had red marks with a small scratch and a small amount of blood on my forearm. Petitioner noted that his injuries were photographed and attached to the report. The Commission notes that no photographs were submitted into the arbitration transcript.

6. Petitioner testified that Nurse McKee is a family friend. She came to the house a few times. During these visits he would complain about his knee.

7. On November 16, 2012, exactly a month after the October 16, 2012 altercation, Petitioner completed an accident report. He reported that on October 16, 2012 he was attempting to arrest a subject. The subject resisted arrest and he had to take the subject to the ground and fight with him on the ground. He reported he tore the patrellar (sic) tendon in his right knee. The Commission notes Petitioner listed a diagnosis prior to seeking medical treatment.

8. On November [*6] 19, 2012, Petitioner was seen at Orthopedic of Southern Illinois by Nurse Practitioner Amanda McKee. Mrs. McKee noted that Petitioner's chief complaint was right knee pain. He rated the pain as being a 3 out of a 10 point scales and he reported that he has been experiencing the pain over the past two weeks. Initially he reported that he did not experience any injury or trauma. He next reported he has been wrestling round with a co-worker and he was unsure if that caused the injury. He also reported he was doing work on his knees while replacing a toilet and that may also be causing pain. He was unable to straighten the leg all the way. She diagnosed him as having acute right knee pain, patellar tendinitis or a patellar tendon or quadriceps rupture. She also noted that a meniscus tear needed to be ruled out and she ordered a right knee MRI.

9. The November 19, 2012 right knee MRI showed Petitioner had a partial tear of the proximal aspect of the patellar tendon, beginning at its origin from the patella with peritendinous fluid and edema. The tear measures up to 6 mm AP and 8 mm medial-lateral just distal to the patella. There is also pre-existing pa-

tellar tendinosis with mild to moderate [*7] tendon thickening, deep infrapatellar bursitis, moderate knee joint effusion but no evidence of a meniscus tear.

10. On November 20, 2012 Petitioner followed up at Orthopedic of Southern Illinois and this time he saw Dr. Freehill. The doctor noted that Petitioner reports having experienced right knee pain dating back to October 16, 2012. He works as a police officer and he was involved in an altercation at work where he was wrestling a perpetrator down to the ground. Apparently when he wrestled the guy down to the ground, he landed directly on his right anterior knee. He was also kneeling to handcuff the guy. He did not have immediate pain but he noted he was sore in the anterior right knee. A couple of days later he was replacing something on the toilet and he has increased pain and swelling about the anterior knee. He did not turn this into the workers' compensation department. He reports he has been limping for the last month. After reviewing the right knee MRI, Dr. Freehill diagnosed a right knee partial patellar tendon tear. He noted that it is a small area and he recommended conservative management consisting of a hinged knee brace, physical therapy, and pain medication. He [*8] noted Petitioner can perform his regular work but he should be careful if his knee buckled. He was told to return in one month.

11. On November 21, 2012, Petitioner starting receiving physical therapy at Mulvaney Rehabilitation Services. There he reported that he had injured his right knee on October 16, 2012 when he got into an altercation with someone that he was trying to apprehend.

12. On November 26, 2012 Petitioner completed an accident report in which he listed the date of accident as October 16, 2012. He noted that he did not immediately report the incident to supervisor because he did not know at the time that he was seriously injured. He reported he attempted to arrest a subject who was resisting arrest. He had to take the subject to the ground and while on ground the subject continued to resist. Corporal McKee assisted him and they were able to get the subject into handcuffs. The ground was concrete. His left forearm and hand were injured in the fight but they have since healed.

13. On November 26, 2012 a supervisor's accident investigation report was completed by Captain Hudson. The date of the incident was listed as October 16, 2012. It was noted that there was a combative [*9] arrestee. Officers were called to a fight. The initial incident was under control. Sergeant Taylor and Corporal McKee stayed behind to maintain the peace. Then a 16 year old male student created a disturbance. Sergeant Taylor was escorting the student back into the school to keep the peace. The unruly student physically resisted. Sergeant Taylor used muscling techniques to control the student and to take the student to the concrete, which is what caused Sergeant Taylor's injury. Corporal Ryan McKee witnessed the event. Captain Hudson also memorialized the same in a memo to Chief Mendenall on the same day.

14. On December 5, 2012 Petitioner completed a new patient intake form for Regional Orthopedics Clinic. He listed October 16, 2012 as the date of the incident. He noted that the injury was work related and occurred while arresting a suspect and falling to the ground. On December 6, 23012 Petitioner completed an Application for Adjustment of Claim in which he listed the date of accident as October 16, 2012 and stated he injured his right knee/leg while arresting a combative subject.

15. On December 12, 2012. Petitioner started treating at Regional Orthopedics with Dr. Mall. The [*10] doctor noted that Petitioner was working as police officer when he was involved in an altercation on October 16, 2012 in which she (sic) had to wrestle a 15 year old and hand cuff him. After the altercation, Petitioner noticed several lacerations, scrapes on his arm as well as some soreness in his arms and legs and in various parts of his body. As these injuries became less relevant, he began noticing right knee pain. He believes several co-workers noticed him limping. Since then he has been having swelling in the knee and this prompted him to see an orthopedic doctor. Dr. Mall opined that based on the fact that patient had had no prior knee pain and assuming the history he provided is factually correct, and I have no reason to believe it is not correct, he believes that Petitioner's symptoms are causally related to his injury that occurred on October 16, 2012. He further stated that Petitioner's delay in reporting this is likely secondary to the multiple injuries that he suffered at that time and this simply became more sore as Petitioner became more active following the injury. It also became more relevant and more apparent as his other injuries cleared up. Since this did not affect [*11] the entire patellar tendon, it is reasonable that he did

not have significant deficits initially as the remainder of the patellar tendon was functioning. Therefore, this is less a functional problem than a pain related problem. The doctor recommended Petitioner undergo surgery consisting of a knee arthroscopy and patellar insertion debridement through the scope, patellar tendon trephination, and a small open debridement and reattachment of the patellar tendon defect centrally.

16. On January 3, 2013, Petitioner underwent surgery. The post operative diagnosed was a right knee patellar tendon tear and right knee patellar tendonitis.

17. On March 25, 2013, Dr. Mall remarked Petitioner is doing great and at this point he believes it is safe for Petitioner to proceed with a four week trial return to work. He noted that if Petitioner does well with this then we will proceed to find Petitioner has reached maximum medical improvement. On April 24, 2013, Dr. Mall released Petitioner to full duty and found that he had reached maximum medical improvement.

18. On November 20, 2013, Dr. Mall was deposed. He testified he is an orthopedic surgeon who has sports medicine fellowship training. The [*12] operative findings matched the MRI and the clinical results. Dr. Mall was asked whether the act of kneeling for a period of 5-10 minutes on a concrete surface would likely cause the defect that was seen surgically and he answered it would not have caused the defect. Dr. Mall opined that the MRI demonstrated pretty clearly that there is some acute inflammation in the knee, that there was a defect in the patellar tendon associated with that and that his clinical symptoms correlated exactly with where that defect was located. So clearly in my opinion his symptoms were directly related to that defect in the patellar tendon. Based on my discussion with the Petitioner, he was not having any knee problems before this. He does not have any reason to think that Petitioner was lying to him when he reported that his injury occurred when he was attempting to handcuff and take down this 15 year old suspect and he developed knee pain as a result of this incident. He mentioned that he had some scratches and other problems that could have easily been more painful for him at the initial point and as those started to resolve the knee pain became more and more evident to him. Although he did state that [*13] he had knee pain immediately after the injury as well, it may not have been as much of a problem for him until the other things sort of resolved and started to heal themselves. If one has a complete patellar tendon rupture, then they would not be able to function immediately after an injury. However, Petitioner had at most a tear of 25% of the tendon. So clearly, there were plenty of tendon fibers that would allow the patient to have the ability to extend his knee and would not present like a typical acute patellar tendon rupture. The patient would have had pain related to that area and pain with certain activities. Petitioner reported that he limped occasionally and that some of his other fellow officers were able to pick up on that, which I would expect potentially was worse as the pain got worse. Petitioner has done fantastic since the surgery. Once he got his full knee strength back, he did great. He went back to full duty work. He was last seen on April 24, 2013 at which time he had reached maximum medical improvement. Dr. Mall testified that it would not be unreasonable after having knee surgery to have a little bit of discomfort when running, especially if Petitioner has even [*14] a mild amount of quadriceps weakness which might exacerbate the knee. The alleged event at work was on October 16, 2012 and Petitioner first sought treatment on November 19th from Nurse McKee. He is not sure if he ever saw her notes. He does not recall recording in his notes that Petitioner was working on a toilet but he does remember having that conversation with him. Specifically, he said he has some pain when kneeling for a short time. He has never heard of someone having a patellar tendon injury from kneeling even for ten to twenty hours. He opined that kneeling can aggravate a lot of knee conditions and it can probably aggravate a patellar tendon rupture. There are lots of things that made Petitioner's knees symptomatic. It was not just kneeling.

19. Dr. Nogalski, a board certified orthopedic surgeon, was deposed on September 30, 2013. He evaluated Petitioner on April 3, 2013. Dr. Nogalski testified that contemporaneous histories are better than histories that are obtained after the fact. In the contemporaneous medical records there was no history like the present history. After a few days, a story can change. In this case, we are getting reports based upon people's statement [*15] that were made a month later. So not only is there an issue about timing but there is also an issue about revision, based on the discussion between people so that there is even another source of error or potential inaccuracies. Dr. Nogalski opined that police men are some of the

best/most accurate historians because it is incumbent up on them to report an accurate history that is contemporaneous with the event since their reports are often relied upon with respect to criminal prosecution and tort issues. They know very well that they need to be detailed and complete. Petitioner indicated he was involved in an altercation while working as a police officer. He arrested a 15 year old student. He was trying to restrict the student and he was slammed down to the ground. He recalls having pain in his knee. He took some pictures of his arm which was scratched up and this resulted in aggravated battery charge. Right after that happened he stated he had some soreness. He told me that he was more occupied with the scratches on his arm then his knee. Although he believed his knee was sore. Three to four days later, he had to kneel down to change some seals around his toilet bowl. After that, [*16] he noticed his knee swelled up and he started having problems walking and getting in and out of the car. He went to see a nurse practitioner who is the wife of one of his co-workers. His first report was to Nurse McKee. In her notes there was a chief complaint of right knee pain which he rated as a 3 out of 10 on a 10 point scale for the past two week. He reported there was no injury or trauma. He also reported that he has been wrestling a co-worker and he was unsure of what caused the injury. He further reported he was doing work on his knee while replacing a toilet and that this may also be causing pain. Dr Nogalski opined that Petitioner's condition was not related to his employment. He does not believe his employment caused, aggravated or accelerated the right knee condition that ultimately required surgery. First of all, if someone tears their tendon they know they have tom it because they cannot put weight on it and walk on it. They cannot perform straight leg raising as Petitioner did with Nurse McKee. This condition is going to be one where you know it is there from the beginning. Here, Petitioner did not have the symptoms around the time of the claimed injury. He even volunteered [*17] to Nurse McKee that there were several possibilities as to how this occurred. A month's time elapsed prior to there being a specific complaint of pain formally given to a medical provider. It appears he was scratched from the incident but he did not have any clear, contemporaneous statements that that he struck his knee or injured his knee specifically at the time of the claimed October 16, 2012 altercation.

20. Petitioner testified that Dr. Mall placed him at maximum medical improvement on April 24, 2013. He released him back to work three weeks prior to his final release date to see if his knee was up to it. He has not seen Dr. Mall or any other medical professionals for his knee since April 24, 2013. He was released back to full duty because his job would not allow for restrictions. Currently, he has a lack of strength in his right knee. He feels it when he is bending and squatting down and standing up. After walking for a half an hour, his knee gets sore. Occasionally, he takes over-the-counter Aleve for his knee pain. When he squats down sometimes it is harder to stand up or he has to shift his position a little bit to stand. He resigned from Respondent's employment on October [*18] 14, 2013. Currently he is working as a part-time detective for another police department. He also owns his own hunting and fishing guide business and he owns a concealed carry business.

The Commission finds that Petitioner's contemporaneous records are not consistent with one another and they do not support Petitioner's claim that he injured his right knee in the October 16, 2012 altercation. The most contemporaneous report is the October 16, 2012 incident report which is made on the day of the event. The incident report contains an extreme amount of detail regarding the altercation. Among other things, it addressed the physical condition of the Petitioner post altercation with references/photos taken of Petitioner's injured arm/hand and scratches, but it makes absolutely no reference to and had no photos whatsoever of Petitioner's right knee. One whole month elapses before a second report is made. The second report is the Form 45, which is dated approximately one month later and which again addresses the altercation, but oddly enough it contains a diagnosis of a torn patrellar (sic) tendon in Petitioner's right knee prior to Petitioner seeking any medical care. Petitioner does [*19] speak about being familiar with Nurse McKee, who is the wife of fellow Officer Ryan McKee. He says she came by the house a few times during which he complained of his right knee. Interestingly enough, when he sees Nurse McKee in a formal medical setting three days after he completes the Form 45 report he does not mention the altercation but instead talks about wrestling with a co-worker and being on his knees while fixing a toilet. He dates the onset of the knee pain only two weeks before and he indicates that it is without injury or trauma. All of the medical records subsequent to right knee MRI correspond to the altercation. Petitioner claims that he did not know his right knee was that bad. He thought it was going to get better. Otherwise, he would have mentioned it earlier.

While it is true that Dr. Mall provides a positive causation opinion regarding Petitioner's right knee and the altercation, his opinion is only as good as the foundation upon which it based upon. Dr. Mall relied on Petitioner's history that

he developed right knee pain following the altercation. He speculates that the only after the pain dissipated from the scratches and other problems that the knee pain became [*20] more evident to Petitioner. Dr. Mall also testified he is not sure if he ever saw Nurse McKee's notes. Based on the medical records, the Commission finds that the evidence does not support Dr. Mali's opinion. Conversely, while Dr. Nogalski may have overstated the fact that Petitioner would be immediately incapacitated with such a tear, he makes a valid point that the contemporaneous records should be weighed heavier than those further removed. As noted above, the Commission does not find that the Petitioner's contemporaneous records are consistent with one another and they do not support Petitioner's claim that he injured his right knee in the October 16, 2012 altercation. Given the totality of the evidence, the Commission places more weight on Dr. Nogalski's causation opinion than Dr. Mall's causation opinion and finds Petitioner failed to prove his right knee condition arose out of and in the course of the October 16, 2012 altercation. Notably, Petitioner's extremely detailed incident report authored the day of the incident and the contemporaneous medical report given to Nurse McKee do not support Petitioner's claim that his right knee condition resulted from a work accident on [*21] October 16, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove a causal relationship exists between the accident of October 16, 2012 and Petitioner's current condition of ill-being, his claim for compensation is denied.

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

DATED: NOV 06 2014

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDICompensabilityCourse of EmploymentPersonal ComfortWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

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SUSAN ROUTT, Petitioner, vs. WAL-MART STORES, INC., Respondent

NO. 12WC 26412

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 1051; 2014 Ill. Wrk. Comp. LEXIS 1089

December 5, 2014

JUDGES: Ruth W. White; Charles J. DeVriedt; Daniel R. Donohoo

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of "Application Dismissal" and being advised of the facts and law, reverses the Arbitrator's grant of Respondent's Motion to Dismiss and reinstates the Application for Adjustment of Claim in the above case.

The issue in this case is whether a dismissal for want of prosecution (DWP) precludes the filing of a new Application for Adjustment of Claim within the statute of limitations. Petitioner filed his first Application on February 8, 2011 (11 WC 4612), alleging a date of accident of November 9, 2010. This case was dismissed by Arbitrator Carlson on December 23, 2011. Petitioner filed a motion to reinstate on June 29, 2012, which was denied by Arbitrator Carlson. On August 2, 2012, Petitioner filed a second Application alleging the same date of accident. Respondent filed a motion to dismiss this second application alleging that this claim was barred because the dismissal of the first Application acted as a ruling on the merits of the case. This motion was granted by Arbitrator Flores on August 2, 2013. [*2] Petitioner filed a Petition for Review on August 7, 2013.

We first address Respondent's argument that the Commission no longer has jurisdiction to hear this Review because Petitioner failed to file an authenticated transcript by the return date on review. We note that Petitioner filed a Motion to Extend Time to File Transcript on November 22, 2013 claiming that her attorney did not receive the transcript until November 21, 2013 even though the return date on review was November 15th. On December 9, 2013, Commissioner DeVriendt granted Petitioner's motion. We find that the Commission still has jurisdiction to hear this Review.

Regarding Petitioner's second Application, we find that it is not barred by the dismissal of the first Application. The second Application was filed timely within the statute of limitations and we follow the Commission decision of *Johnson v. IDOT. 6 IWCC 991* (11/14/06) and the Supreme Court case of Chicago Rawhide Mfg. Co. v. IC. 35 III. 2d 595 (1966).

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Application for adjustment of Claim is hereby reinstated.

December 05, 2014

1 of 43 DOCUMENTS

MANUEL MENDOZA, Petitioner, vs. HEATMASTERS, INC., Respondent

NO. 11WC 27410

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 1052; 2014 Ill. Wrk. Comp. LEXIS 1090

December 5, 2014

JUDGES: Thomas J. Tyrell, Michael J. Brennan, Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

With regard to the issues of TTD, permanency and Section 19(1) penalties, the Commission affirms the decision of the Arbitrator. With regard to the issues of Section 19(k) penalties and Section 16 attorney fees, the Commission modifies the Arbitrator's decision and finds Petitioner is entitled to penalties and fees pursuant to these sections of the Act, for the reasons noted below.

Petitioner presented evidence at hearing in support of his argument that Respondent unreasonably and/or vexatiously delayed payment of statutory amputation benefits, medical expenses and TTD. Respondent presented evidence in opposition to this argument.

Dr. Ostric issued a report on October 18, 2011 indicating the fact that there [*2] was bone loss to Petitioner's index finger. The Petitioner was examined at that time, but the report appears to be in the form of a narrative. Respondent introduced evidence (Respondent's Exhibits 6, 7 and 8) indicating that evidence of bone loss was requested on October 17, 2011, that a phone call was made requesting same on January 25, 2012, and that the report was forwarded to Respondent on January 27, 2012. Petitioner's Exhibit 11 indicates the statutory amputation benefit payment was made on January 30, 2012. Thus, it appears this benefit was paid within 3 days of receipt of the only report in evidence confirming bone loss. As the records in evidence prior to October 18, 2011 do not make clear that there was loss of bone due to Petitioner's accident, the Commission finds there was no unreasonable or vexatious delay in payment of the statutory amputation benefit.

The delay in payment of various medical expenses related to this case is another matter.

Petitioner's Exhibit 2 indicates Petitioner emailed Respondent's claim handler, Darrell Cohn, on April 8, 2011 inquiring about the payment of a bill from Resurrection Hospital, noting the provider had contacted him indicating it was [*3] awaiting Mr. Cohn's response regarding payment. In his April 14, 2011 email response, Mr. Cohn responds: "1 just got off the phone with Debra at Resurrection and we are in the process of settling this bill. On June 7, 2011 Petitioner again wrote to Cohn indicating that Resurrection Hospital had again contacted him, indicating that Respondent was refusing to pay the bills. Cohn responded that Petitioner should notify Resurrection, if they called him again, that he had made a $ 1,000 payment, and that "more is on the way". Two months later, Petitioner forwarded the email corre-

spondence with Mr. Cohn to his employer, and the employer forwarded them to Mr. Cohn, who replied that he was again "working on" the bills.

The records in Petitioner's Exhibit 6 indicate the following correspondence, fax confirmations and bills were sent by Petitioner's attorney, as indicated:

July 22, 2011 - Lakeshore Anesthesia, Ltd. ($ 770.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

July 28, 2011 - Lakeshore Anesthesia, Ltd. ($ 770.00), Advanced Occupational Medicine Specialists ($ 6,586.00) and Our Lady Resurrection Medical Center ($ 7,475.75) [*4] sent by Petitioner's attorney to Darrell Colin. The letter indicates that the provider invoices were included.

August 4, 2011 - Our Lady of the Resurrection (totaling $ 655.19) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 24, 2011 - Advanced Occupational Medicine Specialists ($ 6,586.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 24, 2011 - Our Lady of the Resurrection ($ 1,454.00, $ 4,927.75 and $ 101.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

August 30, 2011 - Our Lady of the Resurrection ($ 4,837.63 & $ 1,464.00) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

September 1, 2011 - Our Lady of the Resurrection (54,837.63) sent by Petitioner's attorney to Darrell Cohn. The letter indicates that the provider invoice was included.

September 8, 2011 - Lakeshore Anesthesia, Ltd. ($ 770.00), Advanced Occupational Medicine Specialists ($ 6,586.00) and Our Lady Resurrection Medical Center ($ 7,475.75) sent by Petitioner's [*5] attorney to Respondent's attorney and to Darrell Colin. Both letters indicate that the provider invoices were included.

November 7, 2011, February 2, 2012 and September 24, 2012 - Midwest Plastic & Reconstructive Surgery bill ($ 9,532.00 and/or $ 9,552.00) sent by Petitioner's attorney to Respondent's attorney and to Darrell Cohn. Both letters indicate that the provider invoices were included.

Each letter requests that the Respondent either place the bills in line for payment, or to notify the Petitioner within 7 days as to the Respondent's basis for failing to do so.

Respondent's Exhibit 11 indicates that the Respondent paid $ 3,643.46 to Midwest Plastic & Reconstructive Surgery on September 28, 2012. This was almost 10 months after Petitioner's attorney first forwarded the bill from this provider on November 7, 2011. Respondent's Exhibit 13 reflects the Respondent paid $ 5,694.75 to Advanced Occupational Medicine Specialists on August 19, 2011. Petitioner's Exhibits indicate the bill was first sent to Respondent by Petitioner's attorney on July 28, 2011. Respondent's Exhibit 13 reflects the Respondent paid $ 715.26 to Lakeshore Anesthesia, Ltd. on January 19, 2011. Petitioner's [*6] Exhibits indicate the bill was first sent to Respondent by Petitioner's attorney on July 22, 2011. Respondent's Exhibit 13 reflects the Respondent paid $ 6,643.46 to Midwest Plastic & Reconstructive Surgery on September 28, 2012. This was also about 10 months after Petitioner's attorney first forwarded the bill from this provider on November 7, 2011. Respondent's Exhibit 13 reflects the Respondent paid $ 4,589.09 to Resurrection Hospital on August 19, 2011. As noted above, Petitioner's Exhibit 2 indicates Respondent was made aware of this bill by Petitioner in April 2011, The Petitioner's attorney first sent the bill to Respondent on July 28, 2011. Two other payments of $ 1,000.00 were noted in Respondent's Exhibit 14, but the majority of the check stub is not visible with regard to these two payments, so it is unclear for certain when they were paid or to which provider or providers.

Based on a review of the above noted evidence, the Commission finds that the Respondent unreasonably delayed payment of the medical bills from Midwest Plastic & Reconstructive Surgery and Resurrection Hospital, and thus is subject to penalties on these bills pursuant to Section 19(k) and attorney [*7] fees pursuant to Section 16. The Commission further finds that the Midwest Plastic & Reconstructive Surgery bill totaled $ 9,532.00, and the Resurrection bill totaled $ 7,475.75. The total amount subject to penalties and attorney fees is thus $ 17,007.75. As such, the Petitioner is entitled to Section 19(k) penalties (50% of the amount subject to penalties) totaling $ 8,503.87 and Section 16 attorney fees (20% of the Section 19(k) penalties) totaling $ 1,700.77.

While the Arbitrator noted that the records of Petitioner emailing Respondent's claim handler do not indicate that the actual bills were attached, the email responses from the handler, Mr. Cohn, clearly indicate that he was well aware of the bills. The Commission does not see how Respondent can argue that it had no knowledge of the bill when the claim handler specifically notes he spoke to the provider's representative. In a case where accident and causation were undisputed, the Respondent should have either made sure that all outstanding bills were paid, or that the provider seeking payment would no longer contact Petitioner. At a minimum, the Respondent should have provided the Petitioner, or his counsel once he became represented, [*8] the specific reason(s) why the bills were not being paid in a timely manner.

While Respondent's response to Petitioner's penalty petition indicates that all bills were paid within 60 days of receipt, the Commission first notes that Section 8.2 of the Act requires payment within 30 days, as long as the claim contains substantially all the required data elements necessary to adjudicate the bills. If the Respondent did not have these data elements, or if the bills were not being paid timely for any other reason, it was the Respondent's responsibility to provide the reason or reasons to the Petitioner in writing. Here, the evidence indicates the Respondent failed to do so, instead offering vague explanations to the Petitioner in the face of repeated contacts to the Petitioner from medical providers. The claim representative's statements that he was "working on them" or "in the process of settling" them explains nothing about the reason for the delay, and does not assist in preventing collection efforts by the providers against the Petitioner. We find this to be significantly unreasonable, and therefore find Petitioner is entitled to Section I9(k) penalties and Section 16 attorney fees [*9] with regard to the medical expenses that were not paid in a timely fashion.

One of the arguments Respondent appears to be making is that, based on its ongoing negotiations with medical providers, it should not be required to make payments on behalf of Petitioner in an undisputed case. We strongly disagree. In the case at bar, the claimant was receiving collection notices and phone calls from the provider seeking payment. This was evidenced by the Petitioner's testimony, and Petitioner's Exhibits 2 and 6. This shows the claimant clearly notified the Respondent's carrier that he was being repeatedly contacted by medical providers seeking payment. Again, this case was undisputed with regard to compensability, thus the only dispute Respondent could have had was with regard to the reasonableness and necessity of the treatment, or the reasonableness of the charges themselves.

Respondent has not indicated any reasonable argument to the Commission that it had a basis to dispute the reasonableness or necessity of the treatment provided to Petitioner. With the institution and applicability of the medical fee schedule to workers compensation medical charges incurred after February 1, 2006 (pursuant [*10] to Section 8.2 of the Act), it is hard to understand the basis for any argument Respondent may have had to the reasonableness of the charges themselves. The fee schedule dictates what is to be paid to a provider by a Respondent or its carrier within the workers compensation scheme based on medical treatment/procedure codes, regardless of what is charged by the provider or providers. The Respondent had not indicated any specific basis for the delay in payment of medical expenses.

While a Respondent has every right to seek a better bargain versus the fee schedule allowance with the providers in paying such benefits, doing so while such providers are actively seeking collection against the Petitioner in an undisputed case is unreasonable. In our view, in an undisputed accident and causation case, a claimant should not be required to fieId collection calls from a provider due to the employer "working on" or being "in the process of settling" bills with providers. As soon as the employer's carrier was notified that the collection activity was occurring, the bill balance needed to be resolved or the carrier should have ensured that the collection activity came to an end. If the employer [*11] and/or its carrier are reasonably disputing whether a compensable accident occurred, or whether a medical bill is causally related, it is within their rights to dispute and negotiate the bill. Here, at a minimum, the Respondent could have paid the provider at least what it believed was owed on the bill and continue to negotiate the remaining balance. Here, there is no evidence which justifies the Respondent's piecemeal approach to payment of the medical expenses, especially since Respondent had knowledge that the providers were harassing the Petitioner for payment.

As noted above, the Commission also affirms the Arbitrator's award of maximum Section 19(1) penalties of $ 10,000.00 based on the failure to promptly pay TTD, We agree that the Respondent provided no valid explanation for its delay in fully paying the full amount due to Petitioner after it became aware of the exact period of disablement. We agree that such delay was unreasonable and without good and just cause, but such delay did not rise to the level of Section 19(k) penalties or Section 16 attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision is modified as noted above.

IT IS FURTHER [*12] ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 296.61 per week for a period of 2-1/7 weeks, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 466.13 per week for a period of 21.5 weeks, as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 50% of the left index finger.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 8,503.87 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 10,000.00 as provided in § 19(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $ 1,700.77 as provided in § 16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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 [*13] 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 $ 20,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

December 05, 2015

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of Chicago, on **February 19 and 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
K. What temporary benefits are in dispute?

TTD
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon Respondent?
O. Other **Penalties; Attorneys Fees; All Benefits Paid Late**

FINDINGS

On **January** 26, 2010, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer [*14] 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 **$ 23,135.84;** the average weekly wage was **$ 444.92.**

On the date of accident, Petitioner was **26** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of $ **522.56** for TTD, $ 0 for TPD, $ **0** for maintenance, and $ **10,021.80** for other benefits, for a total credit of $ **10,544.36**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 296.61/week for 2 and 1 /7th weeks, commencing January 27, 2010 through [*15] February 10, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 27,

2010 through February 19, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $ 522.56 for temporary total disability benefits that have been paid..

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $ 466.13/week for 21.5 weeks, because the injuries sustained caused the Petitioner 50% loss of use of the left index finger, as provided in Section 8(e) of the Act.

Respondent shall be given credit for the $ 10,021.80 payment made to Petitioner.

Penalties & Fees

As explained in the Arbitration Decision Addendum, the Arbitrator awards $ 10,000.00 in penalties pursuant to Section 19(1), and denies penalties and fees under Sections 19(k) or 16 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.

[*16] **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.

FINDINGS OF FACT

The only issues in dispute are whether Respondent timely paid Petitioner's medical bills, temporary total disability benefits and statutory amputation benefits, whether Respondent underpaid Petitioner's temporary total disability benefits, the nature and extent of Petitioner's injury, and whether penalties and attorney's fees should be awarded pursuant to Sections 16, 19(k) and 19(1) of the Act. Arbitrator's Exhibit ("AX") 1. The parties have stipulated to all other issues. *Id.*

Accident and Medical Treatment

Petitioner sustained an undisputed work-related injury on January 26, 2010 while working for Respondent. AX1. He testified that he smashed his left index finger against a beam, a piece of his finger was cut off, and it was bleeding a lot. On cross-examination, Petitioner testified that the top of his finger was chopped [*17] off and that the bone was cracked, but still there. Shortly after his accident, Petitioner testified that a co-worker took him to Our Lady of Resurrection Medical Center ("Resurrection"). *See also* Petitioner's Exhibit ("PX") 3.

A physician's assistant progress note dated January 26, 2010 at 11:50 a.m. reflects that Petitioner had an "[a]vulsion at left 2nd finger, nail completely missing, bone exposed." PX3 at 113. An injection and pain medication was administered. *Id.* The attending physician's note reflects that Petitioner had a "partial amputation." *Id.* Petitioner was referred to Dr. Ostric for follow-up care and surgery the following day and placed off work until he was cleared by the hand surgeon. PX3 at 113, 115.

In a note dated January 26, 2010, Petitioner supervisor, Juan Prieto ("Mr. Prieto"), corresponded with an insurance adjuster at Respondent's insured relating his understanding of Petitioner's accident. RX1. Mr. Prieto's letter refers to Petitioner's nail loss and fingertip fracture, but it does not reference his understanding that Petitioner sustained any bone loss. *Id.*

On January 27, 2010, Dr. Ostric noted "[t]his gentleman sustained an avulsion injury [*18] to the left index finger at work which resulted in a soft tissue amputation at the tip." PX3 at 109. He further noted "the tip of the bone was fractured [illegible] nail plate was avulsed." *Id.* Dr. Ostric recommended surgery to be performed as soon as possible including a nail bed repair with eponychial splint, excisional debridement, and hypothenar full thickness graft. *Id.*

On January 28, 2010, Petitioner underwent surgery. PX3 at 89-90. Specifically, Dr. Ostric performed the following: (1) excisional debridement past the margins of the wound of the left index finger; (2) application of full thickness skin graft from the left hypothenar area to close the fingertip wound; and (3) reconstruction repair of nail bed with suture of the graft and placement of an eponychial nail splint. *Id.* Pre- and postoperatively, Dr. Ostric diagnosed Petitioner with left index fingertip amputation through soft tissue and bone. *Id.* The surgery occurred without complication and Dr. Ostric kept Petitioner off work until his postoperative evaluation. *Id* PX5 at 20.

On February 1, 2010, Petitioner returned for a postoperative visit reporting significant pain and remained off work per [*19] Dr. Ostric's orders. PX3 at 61; PX5 at 16. The parties stipulated that Petitioner was off work from January 27, 2010 through February 10, 2010. AX1.

Petitioner underwent ongoing treatment with Dr. Ostric from February 10, 2010 through April 7, 2010. PX3 at 33,40,43, 50; PX5. Dr. Ostric monitored Petitioner's recovery status post left index fingertip amputation, ordered continued physical therapy/outpatient therapy, and restricted Petitioner to light duty (one-handed) work. *Id,* PX5 at 13-14. Petitioner underwent physical therapy at Advanced Occupational Medicine Specialists from February 26, 2010 through May 3, 2010. PX4.

On May 5, 2010, Dr. Ostric placed Petitioner at maximum medical improvement. PX3 at 26; PX5 at 5-6. Petitioner was returned to full duty work. *Id,* PX9.

On October 18, 2011, Petitioner returned to Dr. Ostric for a "long follow-up visit" at which time Dr. Ostric noted that he was doing well and tolerating full duty work although he had some pain with heavy lifting and had to adjust appropriately. PX5 at 2,4. In a letter of die same date addressed "To Whom It May Concern," Dr. Ostric noted that Petitioner "suffered a left index fingertip amputation, full amputation, [*20] which includes loss of the bone from his distal phalanx." PX5 at 2.

Regarding current condition, Petitioner testified that he notices that his finger is sensitive to touch, painful with sensation of hot or coId water, painful in coId weather, and he occasionally experiences a shooting pain.

Medical Bills & Payment Information

Petitioner corresponded with Respondent's insurance adjuster, Mr. Cohn at Metropolitan Associates, on September 29, 2010 regarding unpaid, and unidentified, medical bills from Resurrection. PX2 at 1-2, 6. Mr. Cohn responded that Petitioner's anesthesia bill was paid and that they were "working on the others, including this one." *Id.*

Petitioner emailed Mr. Cohn again on April 8, 2011 regarding unpaid, and unidentified, medical bills from Resurrection. PX2 at 3-4. Mr. Cohn responded on April 14, 2011 that he was in contact with someone at Resurrection and "in the process of settling this bill." *Id.* Petitioner also emailed his email correspondence with Mr. Cohn to Steve Weiland ("Mr. Weiland") at stevew[at]heatmasters.com on June 15, 2011. PX2 at 5-6. Mr. Weiland appears to have had his email for-

warded to or read by Marlene Dose ("Ms. Dose") at mdose[at]heatmasters.com [*21] who forwarded the string of emails to Mr. Cohn again. *Id.* He replied that "[w]e're working on these bills." *Id.*

Petitioner's counsel faxed correspondence to Respondent's counsel requesting payment of various invoices as follows:

- July 22, 2011 - $ 770.00 from Lakeshore Anesthesia. PX6 at 34-36.

- July 28, 2011 - $ 14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Our Lady of Resurrection Medical Center. PX6 at 31-33.

- August 4, 2011 - $ 655.19 from Resurrection. PX6 at 29-30.

- August 24, 2011 - $ 6,586.00 from Advanced Occupational Med Specialists. PX6 at 25-26.

- August 24, 2011 - $ 6,482.75 from Resurrection. PX6 at 27-28.

- August 30, 2011 - $ 6,301.63 from Resurrection. PX6 at 22-24.

- September 1, 2011 - $ 4,837.63 from Resurrection. PX6 at 20-21.

- September 8, 2011 - $ 14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Resurrection with invoices. PX6 at 14-19; RX3.

- November 7, 2011 - $ 9,552.00 from Midwest Plastic and Rec surgery. PX6 at 9-13. A balance sheet with ICD and CPT codes is included. *Id;* PX13. Petitioner's counsel requested the same on February 2, 2012 and September 24, 2012. PX6 at 1-8; [*22] RX10.

The Resurrection and Lakeshore Anesthesia invoices referenced in these letters were not attached to the faxes, but they were submitted into evidence in Petitioner's Exhibits 7-8. The remaining provider invoices referenced in these letters were not attached to the faxes or submitted into evidence unless otherwise noted herein.

Respondent issued checks to Petitioner as follows:

- March 5, 2010 check for $ 522.56 for "TTD (missed 1/26-2/10/10)." PX12.

- January 30, 2012 check for $ 10,021.80 for "bone loss." PX11.

Respondent issued payments to Petitioner's medical providers as follows:

- January 19, 2011 check for $ 715.26 to Lakeshore Anesthesia for a February 8, 2010 bill for "886.1 TRAUMATIC AMPUTATION OF OQ". RX13 at 2.

- Two undated checks for $ 1,000.00 each to Resurrection for two February 17, 2010 bills. RX13 at 4. It appears that these checks were issued sometime around June 15, 2011. PX2.

- August 19, 2011 check for $ 5,694.75 to Advanced Occupational Medicine for a May 3, 2010 bill. RX13 at 1.

- August 29, 2011 check for $ 4,589.09 to Resurrection for an August 26, 2011 bill. RX13 at 4.

- September 28, 2012 check for $ 3,643.46 to Midwest Plastic and Reconstructive [*23] Surgery for multiple undated bills. RX11; RX13 at 3.

On August 29, 2011, Petitioner's counsel made a settlement demand to Mr. Cohn noting that bone was exposed, but with no indication of bone loss. RX2. Respondent's counsel entered his appearance on Respondent's behalf on September 1, 2011. RX14. On September 8, 2011, Petitioner's counsel made a settlement demand to Respondent's counsel indicating bone amputation. PX15. On September 12, 2011, Respondent rejected Petitioner's settlement demand and counter-offered. RX5. Respondent also noted that medical bills forwarded on September 8, 2011 n1 had been paid. *Id.*

On October 5, 2011, the parties' attorneys discussed settlement in Petitioner's claim of bone loss. RX6. Respondent's counsel noted that he had not received records evidencing Petitioner's claimed bone loss. *Id.*

On January 25, 2012, Respondent's counsel noted his conversation with Petitioner's counsel wherein the latter stated that he would send over records showing bone loss. [*24] RX7.

On January 27, 2012, Petitioner's counsel faxed copies of Petitioner's medical records from Midwest Plastic and Reconstructive Surgery indicating that Petitioner had bone loss. RX8.

ISSUES AND CONCLUSIONS

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

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

The parties have stipulated that Petitioner is entitled to temporary total disability benefits commencing on January 27, 2010 through February 10, 2010 for 2 and l/7m weeks. The parties also stipulated that Petitioner's average weekly wage is $ 444.92 resulting in a temporary total disability rate of $ 296.61. Respondent paid $ 522.56 to Petitioner in temporary total disability benefits. Thus, the Arbitrator finds that Respondent underpaid Petitioner in the amount of $ 113.08.

In [*25] **support of the Arbitrator's decision relating to Issue fLV. the nature and extent of Petitioner's injury, the Arbitrator finds the following:**

The parties have stipulated that Petitioner received a 50% statutory loss payment for the index finger totaling $ 10,021.80 at the rate of $ 466.13. The record reflects that Petitioner underwent surgery for a fracture including a non-specific partial amputation of the distal phalange of his index finger and a full thickness skin graft, followed by a course of physical and occupational therapy. Petitioner has been working full duty since May 5, 2010, has had no medical treatment for the index finger since that time, and he has residual sensitivity to temperature and weather. As explained in the penalties and fees analysis below, the Arbitrator does not find that Petitioner sustained an amputation pursuant to the Act and has been compensated for his permanent partial disability. Thus, the Arbitrator finds that Petitioner is not entitled to any further permanent partial disability benefits.

In support of the Arbitrator's decision relating to Issues fM and (Oh whether Petitioner's benefits and medical bills were timely paid and whether [*26] **penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:**

Petitioner claims that Respondent unreasonably delayed in paying the following compensation meriting penalties pursuant to Sections 19(k) and 19(1) of the Act and an award of attorney fees under Section 16 of the Act: (1) temporary total disability benefits; (2) statutory amputation benefits; and (3) medical expenses from various providers. The Arbitrator finds that penalties pursuant to Section 19(1) should be imposed and declines to award penalties and fees under Sections 19(k) or 16 of the Act.

Section 19(k) of the Act provides in pertinent part:

> In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this [*27] Act, shall be considered unreasonable delay. *820 ILCS 305/19(k)* (Lexis 2010).

Section 19(1) provides in pertinent part:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the em-

> ployer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $ 30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $ 10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(1)* (Lexis 2010).

[*28] Section 16 of the Act provides for an award of attorney fees where an employer, its agent, or insurance carrier "has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee. . . or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." *820 ILCS 305/16* (Lexis 2010).

First, the Arbitrator addresses Respondent's underpayment of Petitioner's temporary total disability benefits. Respondent failed to timely pay any of Petitioner temporary total disability benefits resulting from his undisputed accident for an undisputed period of disablement. The error was corrected by Respondent approximately three weeks later on March 5, 2010. Respondent asserts that it was not aware of when Petitioner's period of disability began until February 11, 2010. [*29] The Arbitrator finds that the evidence does not support such a conclusion.

Petitioner's supervisor, Mr. Prieto, sent a fax to Mr. Cohn, the insurance adjuster, on January 26, 2010 at 3:36 p.m. including Petitioner's off work note from Resurrection of the same date. PX10 at 37-42. On February 4, 2010, Mr. Prieto sent another two-page fax to Mr. Cohn noting "an update on Mr. Mendoza," but only the fax confirmation cover page is included. PX10 at 43. "When a party fails to produce evidence within its control, the presumption arises that the evidence would be adverse to that party." *Reo Movers* v. *Industrial Comm.*, 226 III. App. 3d 216, 223, *589 N.E.2d 704 (1992).* Thus, it is unknown what update Mr. Prieto provided to Mr. Cohn on February 4, 2010 and the Arbitrator finds that this information would be adverse to Respondent's assertion that it was unaware of Petitioner's disablement at the time. Moreover, Respondent was aware that Petitioner continued to be off work after his surgery on January 28, 2010 through February 10, 2010 despite a fax from Mr. Prieto to Mr. Cohn stating "Here is Mr. Mendoza's return to work release[,]" when the attached doctor's [*30] form stated that Petitioner continued to be off work through February 10, 2010 and that he would require occupational therapy. PX10 at 44-46. Petitioner returned to work on February 11, 2010, however, and the medical records reflect he was placed on light duty through May 5, 2010.

Respondent also failed to pay Petitioner the full amount of temporary total disability at any time after March 5, 2010. Again, the record reflects that the parties stipulated to accident, notice, causal connection, average weekly wage, Petitioner's medical bills (as negotiated or pursuant to the fee schedule), and Petitioner's period of temporary total disability. Respondent provided no explanation whatsoever for its delay in underpaying Petitioner's temporary total disability benefits once, as it argues, it became aware of the exact period of Petitioner's temporary total disablement. Based on all of the foregoing, the Arbitrator finds that Respondent or its insurance carrier failed, neglected or unreasonably delayed, without good and just cause, to pay Petitioner's benefits under Section 8(b) of the Act. Thus, the Arbitrator awards additional compensation in the sum of $ 30 per day for each day that the [*31] benefits under Section 8(b) were withheld after March 5, 2010 not to exceed $ 10,000.

Second, the Arbitrator addresses Respondent's payment of Petitioner's medical bills. Petitioner asserts that Respondent failed to timely pay his Section 8(a) medical benefits. Respondent contends, essentially, that no penalties or fees should be imposed because Petitioner's emails to Mr. Cohn requesting payment of medical bills did not include invoices and Petitioner's counsel's correspondence to Mr. Cohn and Respondent's counsel did not attach invoices rendering it unable to "adjudicate" the bills with the providers. The Arbitrator views the evidence differently.

Whether he knew it or not, Petitioner made a written demand to Mr. Cohn pursuant to Section 19(1) of the Act for payment of benefits under Section 8(a) triggering Respondent's duty to explain the reason for its delay. Petitioner was not represented at the time that he began corresponding with Mr. Cohn on September 29, 2010 approximately 8 months after his undisputed accident at work and nothing requires a claimant to have legal representation to obtain benefits due to him under the Act. Mr. Cohn's email responses amount to representations [*32] that the bills would be paid and he

intimated that he was negotiating some or all of the bills directly with the medical providers. No explanation was provided by Respondent regarding why it only began paying Petitioner's medical bills on January 19, 2011 given Petitioner's inquiry in September of 2010 and Mr. Cohn's representations that he somehow received and was negotiating the bills. Moreover, Respondent only paid one February 8, 2010 bill from Lakeshore Anesthesia almost one year later on January 19, 2011 and two February 17, 2010 bills from Resurrection for $ 1,000 each sometime in June of 2011, Even after Petitioner obtained legal counsel in July of 2011, Respondent failed to begin paying the bulk of Petitioner's medical bills until August 19, 2011 when it issued a check to Advanced Occupational Medicine for $ 5,694.75 for a May 3, 2010 bill and then to Resurrection for $ 4,589.09 for an August 26, 2011 bill. Thereafter, Respondent failed to pay any medical bills until September 28, 2012 when it issued a check for $ 3,643.46 to Midwest Plastic and Reconstructive Surgery for multiple undated bills. The Arbitrator also notes, however, that the record is unclear as to the [*33] first date that Respondent or its insurance carrier received any of Petitioner's medical bills.

Based on all of the foregoing, the Arbitrator finds that Respondent or its insurance carrier failed, neglected or unreasonably delayed, without good and just cause, to pay Petitioner's benefits under Section 8(a) of the Act. Thus, the Arbitrator awards additional compensation in the sum of $ 30 per day for each day that the benefits under Section 8(a) were withheId after September 29, 2010 not to exceed $ 10,000 in conjunction with the Section 19(1) compensation awarded for Respondent's late payment of Petitioner's Section 8(b) benefits.

Third, the Arbitrator addresses Respondent's payment to Petitioner of statutory amputation benefits. The parties stipulated that Respondent paid Petitioner $ 10,021.80 for statutory "amputation" benefits on January 30, 2012. AX1. Petitioner asserts that Petitioner should have received this payment immediately on February 11, 2010. Respondent contends that Petitioner did not sustain an amputation as defined by the Act. The Arbitrator agrees and references the Appellate Court's decision in *Greene WeIding and Hardware v. Illinois Workers' Compensation Comm,* [*34] as instructive given Respondent's alleged delay in payment of statutory amputation benefits and medical expenses. 396 III. App. 3d 754, *919 N.E.2d 1129 (2009).*

Respondent was aware that Petitioner sustained amputation to some extent given that its own exhibit reflects a February 8, 2010 bill for anesthetics provided during a "TRAUMATIC AMPUTATION" procedure. However, the amount of bone loss sustained by Petitioner in the distal phalange of the index finger is not specified in his medical records, was minimally apparent (although it was apparent) when viewed by the Arbitrator at trial, and it does not rise to the level of an amputation requiring immediate payment as defined by the Act. Moreover, the written communication between Petitioner and Respondent, and later Petitioner's counsel and Mr. Cohn or Respondent's counsel, is muddied. Neither Petitioner nor Petitioner's counsel indicated to Respondent that Petitioner sustained any, or sufficient, bone loss such that he would be entitled a statutory amputation loss payment until a settlement demand letter dated September 8, 2011 that was preceded by an August 29, 2011 settlement demand to the insurance carrier [*35] noting that bone was exposed, but with no indication of any bone loss. In comparison, the claimant in *Greene WeIding* underwent an undisputed total amputation of the right ring finger and partial amputation of the right middle finger. 396 III. App. 3d at 755.

Penalties and fees may be awarded where the delay of payment is deliberate, resulted from bad faith or improper purpose. *McMahan* v. *Industrial Comm.*, 183 III. 2d 499, 515, *702 N.E.2d 545, 553 (1998); Mechanical Devices v. Industrial Comm.* ,344 III.App.3d 752, 764, *800 N.E.2d 819, 829 (2003).* Section 19(k) penalties and Section 16 attorneys' fees require a higher standard of proof than Section 19(1) penalties. *McMahan*, 183 III. 2d at 514515, *702 N.E.2d at 553; Mechanical Devices,* 344 III.App.3d at 764, *800 N.E.2d at 829-830.* Moreover, Section 16 attorneys' fees are not recoverable in the absence of a Section 19(k) penalties award. *Gallentine v. Industrial Comm.*, 201 III.App.3d 880, 890, *559 N.E.2d 526, 533 (1990).*

Based on all of the foregoing, the Arbitrator finds [*36] that Respondent had a reasonable dispute as to whether Petitioner's undisputed accident resulted in any amputation as defined by the Act and that its conduct was not unreasonable, vexatious and/or in bad faith. Thus, the Arbitrator denies Petitioner's claim for penalties and fees under Sections 19(k) or 16 of the Act.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

n1 $ 14,831.75 from Lakeshore Anesthesia, Advanced Occupational Med Specialists, and Our Lady of Resurrection Medical Center. PX6 at 14-19; RX3.

1 of 100 DOCUMENTS

DOUGLAS KOZEL, Petitioner, vs. OWENS & MINOR, INC, Respondent

NO. 12WC 16190

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 1050; 2014 Ill. Wrk. Comp. LEXIS 1088

December 5, 2014

JUDGES: Ruth W. White; Charles J. DeVriedt; Daniel R. Donohoo

OPINION: [*1]

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 benefit/wage rate, temporary total disability, nature and extent, penalties, and attorney's fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner is entitled to additional temporary total disability (TTD) benefits for the period from April 27, 2010 through August 26, 2010. Even though he was returned to full duty on January 26, 2010, Petitioner was never released by Dr. Cummins at maximum medical improvement (MMI). On that date, Dr. Cummins noted that Petitioner still had stiffness in his shoulder and he wanted to follow Petitioner for the next three to six months to see how things progressed with a home exercise program. Dr. Cummins specifically heId off declaring Petitioner at MMI because of the possibility he would require a revision shoulder arthroscopy. On April 27, 2010, Dr. Cummins noted that Petitioner [*2] continued to have limited motion due to stiffness and that Petitioner complained of an inability to perform his activities of daily living with his right arm. Based on Petitioner's failure to improve nine months following his surgery, Dr. Cummins recommended an MRI and revision arthroscopy.

The evidence shows that the insurance company was aware of Dr. Cummins' request for authorization for surgery shortly after this visit. It was not approved right away and, instead, Respondent sent Petitioner for a Section 12 examination with Dr. Breslow in August before ultimately approving the surgery that was done in October 2010. Although Dr. Cummins did not explicitly change Petitioner's work restrictions on April 27th, we find that this is most likely due to the fact that Petitioner was not working at the time. Petitioner was also not represented by an attorney at that time. Based on the above, we find that the evidence clearly shows that Petitioner was not at MMI and needed additional treatment Therefore, he is entitled to TTD from April through August 26, 2010, the date of his examination with Dr. Breslow.

Regarding the calculation of Petitioner's wage differential under Section 8(d)1, we [*3] find that Petitioner has proven that he is capable of earning $ 8.25 per hour. That is the amount he earned during his seasonal job with Banner Daycare in 2012 and also what he is currently earning in his 32-hour-per-week, part-time position at Wal-Mart, a job which he found through the efforts of Petitioner's vocational rehabilitation counselor, Kari Stefsath. Petitioner's earnings are consistent with Ms. Stefsath's testimony that Petitioner was capable of earning between $ 8, 25 and $ 10 per hour. Respondent's vocational counselor, Lisa Gallant, testified that Petitioner could find suitable jobs earning between $ 9 and $ 14 per hour. However, we find that many of the jobs listed by Ms. Gallant's labor market survey are outside of Petitioner's qualifications and skill level, considering his below-average cognitive abilities. We also find that Petitioner's wage differential should be based on the 32 hours per week he is currently working. Although Petitioner is not physi-

cally incapable of working 40 hours per week, there is no guarantee that his hours at Wal-Mart will be increased and it would be speculative to base a wage differential on a full, 40-hour week. We also note that Ms. [*4] Gallant agreed that it was appropriate for Petitioner to accept the part-time position at Walmart earning $ 8.25 per hour. Based on the above, we find that Petitioner is capable of earning $ 264.00 per week ($ 8.25 per hour x 32 hours). His pre-injury earnings were stipulated to be $ 912.46 per week. His wage differential benefit under Section 8(d)1, beginning May 2, 2013, is $ 432.31 ($ 912.46 - $ 264.00 = 648.46 x 2/3).

We note that, in the beginning, Respondent paid all of Petitioner's medical expenses and TTD. It even eventually accepted the second surgery and paid TTD for a couple of months after Petitioner stopped treating regularly with Dr. Cummins in March 2011. Petitioner is not asking for penalties on the disputed period of TTD in 2010 prior to his second surgery. However, Respondent did terminate TTD on May 25, 2011 without notifying Petitioner in writing as to why. Petitioner testified that he spoke with the adjustor and told him he was looking for a job, so there was some contact. However, we note that Petitioner was unrepresented at that time, which explains his lack of knowledge regarding his rights to demand vocational rehabilitation and maintenance. It wasn't until [*5] Petitioner hired an attorney in May 2012 that he was given a $ 20,000 check for past TTD but that was only paid through January 11, 2012. The remaining 4/7 weeks of TTD (through April 15, 2012) wasn't paid until almost ten months later on February 1, 2013.

We find that Respondent had no basis for not paying TTD and/or maintenance during this period. There was no dispute about Petitioner's restrictions. Petitioner had been laid off by Respondent in 2009 and he was unemployed. Respondent should have initiated vocational rehabilitation in May 2011 instead of simply cutting off TTD and leaving an unrepresented Petitioner on his own. We note that when Petitioner's attorney demanded the retroactive TTD, Respondent did pay a large portion of it within a couple of months. Rx 4 indicates that Petitioner's attorney agreed to accept the $ 20,000 on June 22, 2012 and return the case to the call instead of proceeding to trial at that time. However, there doesn't seem to be any basis for Respondent to have withheld the additional TTD (through April 15, 2012) until February 1, 2013, Respondent failed to provide any evidence to rebut a finding that these delayed payments were unreasonable and vexatious. [*6] We therefore award Section 19(k) penalties and Section 16 attorney's fees for Respondent's unreasonable and vexatious failure to timely pay TTD for the period from January 11, 2012 through April 15, 2012.

We also Find that Respondent's failure to pay temporary partial disability (TPD) from April 16, 2012 through August 10, 2012, was unreasonable and vexatious. Although the Arbitrator found that the earning records from Banner Daycare were inconsistent regarding the regular and overtime hours and "utilized an inaccurate conversion of the minutes worked into decimals and computed partial weeks seven and twenty-four as full weeks" (Dec. at 7), even if there were minor disputes over the exact dollar amount of TPD, Respondent still should have paid what *it* thought the amount should be and worked out any differences later at hearing. We therefore award Section 19(k) penalties and Section 16 attorney's fees for Respondent's unreasonable and vexatious failure to timely pay TPD for the period from April 16, 2012 through August 10, 2012,

We also affirm the Arbitrator's award of $ 10,000.00 in Section 19(1) penalties but we reverse the award of $ 2,000 in attorney's fees that are based on [*7] the Section 19(1) penalties because attorney's fees are only applicable for Section 19(k) awards.

Based on the above, we award the following penalties and attorney's fees:

$ 10,000.00	Section 19(1) penalties
$ 8, 255.64	TTD for 1/12/12 - 4/15/12 (13-4/7 weeks [at] $ 608.31 per week)
+$ 6,364.83	TPD for 4/16/12-8/10/12
$ 14,620.47	Total unreasonable and vexatious late payments
X 50%	Section 19(k) rate
$ 7,310.24	Section 19(k) penalties
$ 14,620.47	Total unreasonable and vexatious late payments
X 20%	Section 16 rate
$ 2,924.09	Section 16 Attorney's fees

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 608.31 per week for a period of 132-6/7 weeks from July 1, 2009 through January 26, 2010 (30 weeks) and April 27, 2010 through April 15, 2012 (102-6/7 weeks), that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 6,364.83 for the period from April 16, 2012 through August 10, 2012, that being the period of temporary partial disability under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to [*8] Petitioner the sum of $ 608.31 per week for a period of 37-5/7 weeks from August 11, 2012 through May 1, 2013, that being the period of maintenance under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 432.31 per week beginning May 2, 2013, as provided in § 8(d)1 of the Act, for the reason that the injuries partially incapacitated him from pursuing his usual and customary line of employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 7,310.24 as provided in § 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of $ 10,000.00 as provided in § 19(1) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $ 2,924.09 as provided in § 16 of the Act; the balance of attorneys' fees to be paid by Petitioner to his attorney.

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, [*9] if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 36,500.00, 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.

December 05, 2014

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on February 19, 2013, and August 27, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES
F. Is Petitioner's current condition of ill-being causally related to the injury?
K. What temporary benefits are in dispute?

TTD
L. What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon Respondent?

FINDINGS

. On June 15, 2009, the respondent was operating under and subject to the provisions of the Act.

.On this date, an employee-employer [*10] relationship existed between the petitioner and respondent.

. On this date, the petitioner sustained injuries that arose out of and in the course of employment.

. Timely notice of this accident was given to the respondent

. In the year preceding the injury, the petitioner earned $ 47,447.92; the average weekly wage was $ 912.46.

. At the time of injury, the petitioner was 57 years of age, single with no children under 18.

. The parties agreed that the petitioner received all reasonable and necessary medical Services.

. The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.

. On February 19, 2013, a Section 19(b) hearing was started and testimony was given, however the parties reached an agreement and the 19(b) petition was withdrawn. The parties agreed that the evidence and testimony presented on February 19, 2013, be considered in this hearing *sub judice.*

. On February 19, 2013, the respondent agreed that the petitioner was entitled to temporary total disability benefits for 145-5/7 weeks from July I, 2009, through April 15, 2012, temporary partial disability benefits [*11] for 16-517 weeks from April 16, 2012, through August 10, 2012, and maintenance benefits for 27-4/7 weeks from August 11, through February 19, 2013, but currently disputes the petitioner's entitlement to any benefits from January 27, 2010, through October 27, 2010, and August 11 through 13, 2012.

. On August 27, 2013, the respondent also agreed that the petitioner is entitled to additional temporary total disability benefits for 38 weeks from August 14, 2012, through May 6, 2013, and for 2 weeks from May 14, 2013, through May 27, 2013, and to additional temporary partial disability benefits for 8-4/7 weeks from May 28, 2013, through July 26, 2013.

ORDER:

. The respondent shall pay the petitioner temporary total disability benefits of $ 608.31/week for 115-4/7 weeks, from July 1, 2009, through January 26, 2010, and August 26, 2010, through April 15, 2012, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

. The respondent shall pay the petitioner temporary partial disability benefits of $ 6,364.83 for the period from April 16, 2012, through August 10, 2012.

. The respondent shall pay the petitioner maintenance [*12] benefits of $ 608.31/week for 37- 5/7 weeks for the period from August 11, 2012, through May 1, 2013.

. The respondent shall pay the petitioner the sum of $ 352.84/week for the duration of the petitioner's disability, as provided in Section 8(d)l of the Act, beginning on May 2, 2013.

. The respondent shall pay the petitioner compensation that has accrued from June 15, 2009, through August 27, 2013, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay $ 10,000.00 in penalties, as provided in Section 19(1) of the Act.

. The respondent shall pay $ 2,000.00 in attorney's fees.

. All claims for Section 19(k) penalties and fees are denied.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal [*13] results in either no change or a decrease in this award, interest shall not accrue.

Findings of facts:

The petitioner, a warehouse worker, injured his right shoulder while lifting on June 15, 2009. The petitioner sought care at Mercy Health System on June 19th and it was noted that he had received prior emergency care for right shoulder pain on June 18th and that he exhibited decreased range of motion, tenderness and decreased strength in his right shoulder. Their diagnosis was a right shoulder strain and rotator cuff sprain. On June 23rd, Dr. Craig Cummins examined the petitioner and on July 14th opined that an MRI revealed a rotator cuff tear of the supraspinatus tendon. On July 29th, Dr. Cummins performed a right shoulder arthroscopic capsular release, a debridement of calcific tendinitis, an acromioplasty, a rotator cuff repair and a biceps tenodesis. The petitioner reported improved symptoms at follow-ups with Dr. Cummins through January 26, 2010, at which time, he was released to full-duty work and physical therapy was discontinued.

On April 27, 2010, the petitioner complained to Dr. Cummins of stiffness and limited range of motion in the right shoulder, and an inability [*14] to perform activities of daily living. Dr. Cummins opined on May 18th that an MRI revealed a healed rotator cuff. Dr. Marc Breslow opined after an independent evaluation on August 26lh that the petitioner needed first, an arthroscopic release and manipulation and second, a revision rotator cuff repair. On October 28, 2010, the petitioner underwent a right shoulder capsular release, lysis of adhesions, removal of a loose suture anchor and a subacrominal decompression by Dr. Cummins. The petitioner started physical therapy on October 29th and was released to light duty by Dr. Cummins on November 9th. He was started with work conditioning on January 19, 2011. A functional capacity examination on February 22, 2011, demonstrated the petitioner's ability was at the medium physical demand level 158 with right-sided restrictions of no occasional unilateral lifting greater than five pounds above shoulder height, no frequent, prolonged or repetitive above-shoulder-level reaching or lifting and no unilateral carrying greater than 50 pounds. On March 8, 2011, Dr. Cummins released the petitioner to medium-level work with right aim restrictions and opined that the petitioner should be at maximum [*15] medical improvement nine months after October 28, 2010, i.e. July 28, 2011.

On May 29, 2012, the petitioner returned to Dr. Cummins and reported no significant pain but continued stiffness with some limitation of function. The doctor recommended a home exercise program. He was evaluated by Dr. Peter Tonino on September 20, 2012, who opined that the petitioner was at MMI and was capable of working within the restrictions of the FCE.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his right shoulder is causally related to the work injury.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND MAINTENANCE:

The respondent agreed to benefits for the petitioner from July l, 2009, through January 27, 2010, but disputes any benefits through October 28, 2010. On January 26, 2010, the petitioner was released to full-duty work by Dr. Cummins. On April 27, 2010, Dr. Cummins requested an MRI and discussed the possibility of a revision surgery but did [*16] not change the petitioner's work status. Dr. Cummins recommended surgery on May 18th without changing the petitioner's work status. Dr, Marc Breslow opined on August 26th that the petitioner was not at maximum medical improvement.

The petitioner failed to prove that he was entitled to temporary total disability benefits from January 27, 2010, through August 25, 2010. Nor did the petitioner establish any entitlement to maintenance benefits since he did not prove that his termination was due to his injury or that he was conducting a genuine job search or undergoing vocational rehabilitation during that period. The petitioner's request for temporary total disability and/or maintenance benefits from January 27, 2010, through August 25, 2010, is denied. The petitioner's request for temporary total disability benefits from August 26, 2010, through October 27, 2010, is granted based on Dr. Breslow's opinion on August 26th that the petitioner was not at maximum medical improvement.

The respondent agreed to pay temporary total disability benefits from October 28, 2010, through April 15, 2012 and temporary partial disability benefits from April 16, 2012, through August 10, 2012, however, the [*17] parties dispute the amount of the temporary partial disability benefits due the petitioner. During that period, the petitioner's regular earnings at Banner Day Camp were $ 8.25 per hour. Petitioner's Exhibit # 14, the petitioner's request to the respondent for benefits, included documents that were not consistent regarding the petitioner's regular and overtime hours or his

total hours worked. It also included unreliable calculations of the temporary partial disability benefits since it utilized an inaccurate conversion of the minutes worked into decimals and computed partial weeks seven and twenty-four as full weeks. Except for two days at the start of the petitioner's employment with Banner, he worked more than eight hours every day for a total of 722.98 hours over 16-5/7 weeks (or 17 weeks), which is approximately overtime hours. Excluding any overtime pay earned By the petitioner, which would reduce the amount of any benefits due the petitioner, two-thirds of 17 weeks at $ 910.46/wk minus 723 hours at $ 8.25/hr is $ 6,364.83, which is approximately the amount paid by the respondent.

The respondent shall pay the petitioner temporary total disability benefits of $ 608.31/week for [*18] 115-4/7 weeks, from July 1, 2009, through January 26, 2010, and August 26, 2010, through April 15, 2012, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner. The respondent shall pay the petitioner temporary partial disability benefits of $ 6,364.83 for the period from April 16, 2012, through August 10, 2012.

The petitioner began a job search and obtained the assistance of Vocatmodve in November 2012. He started working at Walmart on May 2, 2013, at $ 8.25 per hour. The petitioner is awarded maintenance benefits of $ 608.31/week for 37-5/7 weeks for the period from August 11, 2012, through May 1, 2013.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of occasional right shoulder pain. He can lift his arm but refrains from heavy lifting and overhead lifting. His current wages are $ 8, 25 per hour for 30 to 32 hours per week at Walmart. He is capable and is not prohibited from working forty hours per week. The petitioner worked more than forty hours a week with Banner and is applying for more hours with Walmart. The parties' opinions of the petitioner's earning capacity based on their [*19] respective labor market surveys were $ 8 to $ 10 per hour and $ 9 to $ 14 per hour. Averaging the mean hourly rates provided by the parties and the petitioner's current hourly rate, the petitioner's earning capacity is $ 9.58 per hour. The petitioner's earning capacity for a 40-hour week is $ 383.20 ($ 9.58 times 40 hours).

There is no evidence of the wages the petitioner would currently earn in his former position with the respondent or any competent evidence of the wages he last earned in the employ of the respondent. Based on the stipulated average weekly wage of $ 912.46, the petitioner has a wage differential loss pursuant to Section 8(d)1 of the Act of $ 352.84 (two-thirds of $ 912.46 minus $ 383.20). The respondent shall pay the petitioner the sum of $ 352.84/week for the duration of the petitioner's disability, as provided in Section 8(d)1 of the Act beginning on July 27, 2013.

FINDING REGARDING PENAL TIES AND FEES:

The petitioner's request for penalties for the delay in the payment of temporary partial disability benefits for the period from April 16, 2012, through August 10, 2012, is denied. The petitioner's request to the respondent for benefits included documents [*20] that were inconsistent regarding the petitioner's regular, overtime and total hours. Moreover the petitioner's request did not include copies of the petitioner's weekly wages or documentation for an accurate and reliable calculation of benefits due.

The petitioner proved that he is entitled to Section 19(1) penalties of $ 10,000.00. On March 8, 2011, Dr. Cummins opined that the petitioner would be at maximum medical improvement on July 28, 2011, and released the petitioner to medium-level work with right arm restrictions. The petitioner was not at maximum medical improvement and had work restrictions on May 26, 2011. He was entitled to temporary total disability benefits for 9-1/7 weeks from May 26, 2011, through July 28, 2011. The temporary total disability benefits were paid on July 6, 2012, which is more than 345 days from the date the last benefit was due. The respondent failed to rebut the presumption of unreasonableness of their delay in the payment of the temporary total disability benefits. The petitioner is awarded penalties under Section 19(1) of $ 10,000.00 and attorney's fees of $ 2,000.00.

The petitioner's request for Section 19(k) penalties and fees is denied. The petitioner [*21] failed to prove that the respondent's conduct was vexatious or unreasonable. All claims for Section 19(k) penalties and fees are denied.

FINDING REGARDING BENEFITS PAID BY THE RESPONDENT:

Based on Respondent's Exhibit # 1, the respondent paid $ 99,072.29 in temporary total disability, temporary partial disability and maintenance benefits to the petitioner and is entitled to an off-set toward benefits due the petitioner for said amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

1 of 100 DOCUMENTS

JENNIFER JURCAK, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO. 10WC 43618

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

10 IWCC 883; 2014 Ill. Wrk. Comp. LEXIS 1047

October 09, 2014

JUDGES: Michael J. Brennan; Thomas J. Tyrell

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability (TTD), causal connection, and medical, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Jennifer Jurcak sustained an accident and injury to her right knee only that arose out of and in the course of her employment on September 21, 2010. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission. 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).*

The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties. Based on the evidence, the Commission finds that Ms. Jurcak sustained a work-related accident on September 21, 2010 resulting in an injury to her right knee. Petitioner failed to prove [*2] that she sustained any other injury as the result of her work accident.

As the result of the work-related accident, the Petitioner is entitled to TTD from September 22, 2010 through October 21. 2010 and from June 24, 2011 through November 17, 2011. The Petitioner is entitled to all reasonable and necessary medical expenses related to the right knee through November 17, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Jennifer Jurcak filed an Application for Adjustment of Claim on November 12, 2010 alleging injury to her right knee and low back while at work on September 21, 2010.

2. The Petitioner has been employed as a Traffic Control Aid with the City of Chicago since November 1998. She sustained a prior work-related injury on January 31, 2002 when she was struck by a car. T.10. She underwent three right knee surgeries and, as a result, could only straighten her right leg eighty percent of the way. *Id*. As a result of the 2002 injury, Petitioner received permanent restrictions and was found to have sustained forty percent loss of use of the right leg. T.25,

3. Jurcak was seen by Dr. Jayant Sheth on April 27, 2006 (this is [*3] the final medical examination of the right knee prior to the September 2010 accident). Examination revealed a mild limp on the right side

secondary to knee pain. The right knee had mild swelling and no joint effusion or instability. Her extension was near normal secondary to restricted flexion of 110 degrees with mild pain. Her diagnosis was chronic right knee pain. She was at MMI and discharged with limited duty restrictions. PX.2.

4. Petitioner testified that she did not receive any right knee treatment between April 2007 and September 21, 2010. T.16. During this period, however, her right leg never went straight. She could not ride her bike and had to learn to live with her knee condition. *Id*.

5. On September 21, 2010, Ms. Jurcak was working during rush hour in the middle of the intersection of State and Madison street in downtown Chicago. She was directing the two lanes of turning traffic. T.7. As she was backing up "kind of swiftly" guiding traffic, her right leg "totally" went straight and "jolted." *Id*. She testified that she was trying "so quickly" to move back to turn the cars as it was rush hour when her leg went straight and she jolted. T.8. She did not fall to [*4] the ground, but tried to stop herself from losing her balance. T.10. She testified that she was walking backwards when the incident occurred and did not look to see if there were any bumps or cracks in the road. T.24. She worked 4 more hours despite her pain and finished her shift. T.I2. Jurcak described a burning pain between the right knee and ankle and a shooting pain with a stiff back and a poking sensation. *Id*.

6. Petitioner reported the incident to her supervisor, Louise Gomez. A Report of Occupational Injury or Illness was completed on September 21, 2010. Petitioner reported that she thought she popped her knee when she was backing up. RX.2. 7. Petitioner presented to Mercy Hospital Medical Center on September 21, 2010 following the incident with her right knee and low back. She reported hearing a popping sound in her knee while directing traffic. Examination of the right knee revealed moderate swelling with extension limited by pain. She had a negative anterior drawer and McMurray's test. She had no ligament laxity. Examination of the back revealed no swelling or spinous process. There was mild paraspinous TTP. Flexion reproduced pain. The diagnosis was knee effusion [*5] and lumbar strain. PX.l.

8. Petitioner underwent an x-ray of the right knee on September 22, 2010 that revealed degenerative disease. She was continued off work. PX.l.

9. Petitioner was seen by Dr. Sheth on October 21, 2010 with continued low back pain. Her right knee had improved to its pre-injury condition. She had a normal gait. She had tenderness of the LS spine along with some tightness in the paraspinal lumbar muscle on the right. She could forward flex up to mid leg with pain. The remainder of movements caused minimal discomfort. The right knee was near pre-injury level and she had no tenderness. The diagnosis was lumbar muscle strain. She was returned to limited duty work. PX.l. Ms. Jurcak testified that she returned to full-duty work on October 22, 2010. T.14.

10. Petitioner underwent an MR1 without contrast of the right knee at Premier Health Imaging on December 6. 2010. There was no evidence of an acute bony injury. No meniscal tear or ligament disruption was appreciated. She had developed a shallow trochlear groove of the femur. There was mild scarring in the Hoffa's fat pad. PX.4. 11. Petitioner underwent right knee surgery on June 24, 2011 followed by physical therapy. [*6] T.14.

12. Ms. Jurcak was seen by Dr. Newman on October 18, 2011. She had pain along the medial joint, the medial collateral ligament, and the medial capsule. Dr. Newman reviewed the MRI and noted that Petitioner's symptoms were consistent with arthritic pain. He recommended chronic anti-inflammatory medication. She was close to MMI. She was off work due to her back. PX.3.

13. Petitioner was seen by Dr. Newman on November 15, 2011. She had continued medial right knee pain that was rather diffused. He opined that Petitioner's symptoms were probably early degenerative arthritis secondary to her original injury and subsequent surgeries. She was nearing MMI. An FCE was recommended. PX.2. She was to remain off work. PX.3.

14. Petitioner was seen by Dr. Slack on November 17, 2011. According to the medical record, Petitioner no longer had right leg pain. Dr. Slack's impression was that Ms. Jurcak had persistent low back de-

rangement status post lumbar disc excision. He recommended a new lumbar MRI to rule out any significant evidence of disc re-herniation to account for her consistent symptoms. She was to remain temporarily totally disabled from work. PX.3.

15. Petitioner underwent a Section [*7] 12 examination with Dr. Pietro Tonino at Loyola University on June 17, 2013 at the request of the Respondent. Examination revealed very diffuse tenderness parapatellar. There was no effusion and the ligaments were intact. There were no signs of meniscal or ligamentous pathology. The x-rays were normal. She had reached MMI for her right knee. No further treatment was necessary. She could return to work with regard to her right knee. Based on her multiple knee surgeries, it was unlikely that the September 2010 incident was a significant causative factor. RX.4.

16. Dr. Tonino authored an addendum to his June 17, 2013 report on July 10, 2013. He reviewed the Mercy Works records from September 22, 2010. He opined that the September 22, 2010 incident was not a significant aggravating factor of her right knee. The complaints she alleged began while stepping backwards with no fall or direct impact to the knee. RX.5.

17. Petitioner underwent a Section 12 examination with Dr. Alexander Ghanayem of Loyola University on July 18, 2013 at the request of the Respondent. He noted that the mechanism that she reported of stepping back and having her knee pop would not be sufficient to cause a back [*8] injury of any significance. The degenerative findings at L4-L5 and a small, non-compressive central disc protrusion at L5-S1 in all likelihood pre-dated the September 2010 incident. Her condition was not at risk for aggravation given the mechanism of injury. She had non-compressive disc pathology, which did not correlate with her low back symptoms. She did not have any radicular pain as well, but rather knee pain on the right side. She may have sustained a back sprain at worse. Her need for surgery did not emanate from her 2010 accident. She was not restricted from work. A lumbar strain would not cause any long term disability. She had reached MMI. Removal of the hardware was acceptable, but un-related to the accident. She could return back to work without restrictions. RX.3.

18. Ms. Jurcak testified that she currently notices that her knee grinds when she walks. Her knee is stiff when she wakes up in the morning and she has to move her leg if she sits too long. T.17. She has learned to accommodate herself with the pain. *Id*. She can walk a couple of blocks and up to 3/4 a mile before the grinding starts. T.18. Her leg is worse now and is a lot weaker. *Id*. If she sits for [*9] about an hour, she gets a tingling sensation and her knee goes stiff. T.19. She does not take any medication. T.20. Her back is in constant pain and she experiences a poking sensation. *Id*. She also feels a compression, squeezing sensation. T.21. Her daughters help her with the laundry. *Id*. She did not have any of the knee and back sensations prior to September 21, 2010. T.23.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180(1991).*

In order for accidental injuries to be compensable under the Act, a Petitioner must show such injuries arose out of and in the course of his employment. *Eagle Discount Supermarket, 82 Ill. 2d at 337-38, 412 N.E.2d at 496; Nabisco Brands, Inc. v. Industrial Comm'n. 266 Ill. App. 3d 1103, 1106, 641 N.E.2d 578, 581, 204 Ill. Dec. 354 (1994).*"Arising out of' [*10] refers to the requisite causal connection between the employment and the injury. In other words, the injury must have had its origins in some risk incidental to the employment. *See Eagle Discount Supermarket, 82 Ill. 2d at 338, 412 N.E.2d at 496; William G. Ceas & Co., 261 Ill. App. 3d at 636, 633 N.E.2d at 998.* In addition, an injury arises out of the employment if the Petitioner was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. L. Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 548, 578 N.E.2d 921, 161 Ill. Dec. 275 (1991).* "In the course of' refers to the time, place, and circumstances under which the accident occurred. See *William G. Ceas & Co., 261 Ill. App. 3d at 636, 633 N.E.2d at 998.* The determination of whether an injury arose out of and in the course of a claimant's employment is a question of fact for the Commission.

Employers take their employees as they find them. *O'Fallen School District No. 90 v. Industrial Comm'n, 313 Ill. App. 3d 413.* 417, [*11] *729 N.E.2d 523, 246 Ill. Dec. 150 (2000).* To result in compensation under the Act, a claimant's employment need only be a causative factor in his condition of ill-being; it need not be the sole cause or even the primary cause. *Sisbro Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).* "[A]

preexisting condition does not prevent recovery under the Act if that condition was aggravated or accelerated by the claimant's employment." *Caterpillar Tractor Co. v. Industrial Comm'n, 92 Ill. 2d 30, 36,440 N.E.2d 861, 65 Ill. Dec. 6 (1982).*

The Commission notes that Ms. Jurcak had a pre-existing right knee condition. The Petitioner sustained a prior work-related accident in 2002 that resulted in three surgeries to her right knee. As a result of the accident and subsequent surgeries, Ms. Jurcak was unable to fully straighten her leg. She subsequently returned to work with permanent restrictions. The Commission further notes that the record is void of any mention of Jurcak receiving medical treatment [*12] to her right knee between April 2007 and September 21, 2010. There is no indication that Petitioners pre-existing right knee condition impeded her ability to perform her job duties as a traffic control aid prior to September 21. 2010.

On the day of the incident, Petitioner was in the middle of the street directing rush hour traffic in downtown Chicago. Despite the Petitioner's testimony that she did not see anything that caused her to feel the jolt in her right knee, the unrebutted evidence establishes that Ms. Jurcak was walking backwards quickly while directing oncoming traffic when the incident occurred. The evidence demonstrates that Jurcak's job required her to direct rush hour traffic. The Commission finds that the Petitioner was exposed to a risk of injury greater than that which is faced by the general public.

The Commission finds that Petitioner's pre-existing condition was aggravated by the work accident of September 21, 2010. Ms. Jurcak is entitled to TTD from September 22, 2010 through October 21, 2010. On October 21, 2010, Dr. Sheth's examination revealed that Petitioner's right knee was near her pre-injury level and she could return to limited duty work. The Petitioner [*13] is also entitled to TTD from June 24, 2011, the date of her right knee surgery, through November 17, 2011, the date Dr. Slack noted Petitioner no longer had right leg pain. The Petitioner is entitled to all reasonable and necessary medical expenses related to her right leg.

It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981).* Interpretation of medical testimony is particularly within the province of the Commission. A. *O. Smith Corp. v. Industrial Comm'n, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).* The resolving of conflicting medical views, including those relating to causation of a physical condition, is peculiarly within the province of the Industrial Commission. *Ford Motor Co. v. Industrial Com., 55 Ill. 2d 549, 554.*

The Commission adopts the opinions of Dr. Ghanayem in finding that Petitioner's back condition is not related to her work accident. Dr. Ghanayem noted that the [*14] mechanism of stepping back and having her knee pop would not be sufficient to cause a back injury of any significance. Dr. Ghanayem noted that the degenerative findings at L4-L5 and a small, non-compressive central disc protrusion at L5-S1 in all likelihood pre-dated the September 2010 incident. They were not at risk for aggravation given the mechanism of injury. She had non-compressive disc pathology which did not correlate with her low back symptoms. She did not have any radicular pain as well, but rather knee pain on the right side. Based on Dr. Ghanayem's opinion, the Commission finds that the work accident was not the cause of Jurcak's back condition and, as such, her back condition is not causally related to the accident.

The Commission remands this case back to the Arbitrator for a hearing on permanency related to the right knee only.

IT IS THEREFORE ORDERED BY THE COMMISSION, that the Decision of the Arbitrator filed on October 16, 2013, is hereby reversed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 598.15 per week for a period of 25-2/7 weeks, from September 22, 2010 through October 21, 2010 and from June 24, 2011 through [*15] November 17, 2011 that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses related to the right knee only under § 8(a) of the Act and subject to the medical fee schedule.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner [*16] 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

DATED: OCT 09 2014

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION AMENDED DECISION 19(b)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **October 16, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. Is Petitioner's current condition of ill-being causally related to the injury?
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?
[*17] TTD

FINDINGS

On the date of accident, **September 21, 2010**. Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **46,655.96**; the average weekly wage was $ **897.23**.

On the date of accident. Petitioner was **38** years of age, ***single*** with **3** dependent children.

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

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

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

ORDER

The Arbitrator finds that the petitioner did not sustain an accident arising out of her employment. As such, [*18] *no benefits are awarded. See attached for specific findings of law and fact.*

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

12-08-13

Date

FINDINGS OF FACT

The petitioner testified that she had been working for the City of Chicago as a Traffic Control Aide since November of 1998. Her job duties were to direct vehicles in the streets of the central business district of Chicago.

The petitioner stated that on September 21, 2010, [*19] she was directing traffic on State and Madison streets, was backing up to get out of the way of cars and to direct other lanes of cars turning left, and felt leg pain. She stated that her leg went back and went totally straight, which it never does, due to a previous surgery. She testified that her body jolted at that time. The petitioner testified that she did not fall, and was able to continue working until the end of her shift.

The petitioner reported the incident to her supervisor, Luis Gomez. Mr. Gomez filled out a City of Chicago Report of Occupational Injury or Illness on September 21, 2012. (RX 2) At that time, it was stated that the petitioner walked in and stated "I think I popped my knee... I was at Madison and State on the double west bound lanes of State when I was backing up I poped [sic] my knee at 1630 hr."

The petitioner was then seen at Mercy Hospital and Medical Center. (PX1) The history provided was that the petitioner "Denies new injury, but states she heard 'popping' sounds in knee today... presents with a complaint of right knee pain, right knee swelling and s/p directing traffic and twisting wrong on knee, feeling 'pop' and twisting back in the process with [*20] now back pain. Pt did not fall." (PX1) The petitioner was diagnosed with knee swelling and a lumbar strain at that time. The petitioner remained off work from September 22, 2010 through October 21, 2010 and then was released to return to work full duty.

The petitioner was able to work her full duty job from October 22, 2010 through November 29, 2010. Eventually the petitioner came to see Dr. Newman seeking treatment for her right knee pain on November 30, 2010. (PX 3) At that time, Dr. Newman related the petitioner's knee condition to the September 21, 2010 incident and recommended an MRI for the knee and physical therapy for the low back.

On December 6, 2010, and MRI of the right knee was performed which showed no knee joint effusion, no periarticular bursal effusion or cyst detected, no evidence of acute bone injury and no meniscal tear or ligament disruption. (PX 4) Upon review of the MRI, Dr. Newman recommended conservative treatment including physical therapy. (PX 3)

On January 10, 2011, the Petitioner presented to MRI of River North for an MRI of her lumbar spine per the recommendation of Dr. Newman. (PX 4) The MRI revealed that there were degenerative changes with mild degeneralized [*21] annular bulging at L4-5 and focal posterior central disc bulge at the L5-S1 level. There was no significant canal or foraminal stenosis or evidence of neural impingement. On January n, 2011, the Petitioner followed up with Dr. Newman. (PX 3) The Petitioner had not improved. Upon examination, the Petitioner had pain and crepitation in the knee, which Dr. Newman stated "we have accepted as being an aggravation of an old injury." (PX 3) Upon review of the Petitioners January 10, 2011 low back MRI, Dr. Newman disagreed with the radiologist's findings and opined that

the Petitioner had a significant foraminal encroachment at the L4-5 level. Dr. Newman opined that the Petitioner was a candidate for a surgical intervention, and Dr. Newman referred the Petitioner to Dr. Charles Slack.

On January 26, 2011, the Petitioner was evaluated by Dr. Charles M. Slack. (PX 3) Upon examination, Dr. Slack reviewed the standing lumbar flexion/extension x-rays, which were done on January 26, 2011 and the MRI scan of January 10, 2011. Dr. Slack's impression was that the Petitioner had persistent severe right lumbar radiculopathy of the L5 nerve area with L4-5 spondylosis with or without L4-5 disc bulge and [*22] superimposed right-sided small disc protrusion. Dr. Slack's plan included having a right-sided transforaminal epidural steroid shot at the L4-5 level. On February 7, 2011, the petitioner underwent a right L4-5 transforaminal epidural steroid injection.

On March 3, 2011, the Petitioner was seen at a follow-up visit with Dr. Slack. The petitioner reported no improvement with the epidural steroid injection. Dr. Slack's plan included recommended cervical intervention with a lumbar disc excision on the right at L4-5 as the patient has failed conservative treatment.

On April 8, 2011, the Petitioner presented to Dr. Slack at Swedish Covenant Hospital. (PX 5) The Petitioner underwent a right L4-L5 hemolaminectomy, medial facectetomy, and excision of herniated nucleus pulposeus. The Petitioner's pre-operative diagnosis and post-operative diagnosis was herniated lumbar disc, L4-L5 on the right.

Following little to no relief with conservative treatment for her right knee, on June 14, 2011, Dr. Newman opined that the petitioner would be a candidate for a repeat arthroscopic procedure. (PX 3) This was performed on June 24, 2011 and the post-operative diagnosis was "synovial impingement of the [*23] right knee". The petitioner underwent a post-operative course of care including physical therapy and cortisone injections in order to attempt to reduce swelling in the petitioner's knee.

On October 18, 2011, Dr. Newman opined that the petitioner's symptoms were consistent with arthritic pain and suggested that the Petitioner be placed on chronic anti-inflammatory medication. Dr. Newman opined that the Petitioner was very close to having reached her maximum medical improvement point. Dr. Newman did not think that further diagnostic studies or surgical interventions were indicated. On November 15, 2011, the petitioner returned one final time to Dr. Newsman who opined that the Petitioner's symptoms were probably early degenerative arthritis secondary to her original injury and subsequent surgeries. Dr. Newman opined that she is getting close to being at maximum medical improvement. Dr. Newman's plan was to schedule an FCE. (PX 3) No FCE was performed because the petitioner was still treating for her low back. The petitioner testified that she has not seen Dr. Newman since November of 2011 because she has been treating for her low back.

On November 17, 2011, the Petitioner presented to [*24] Dr. Slack for a follow-up visit. (PX 3) Dr. Slack noted that the Petitioner was no longer having right leg pain. Dr. Slack's impression was that the patient had persistent low back derangement status post lumbar disc excision. Dr. Slack's plan was to have the Petitioner undergo a new lumbar MRI scan to rule out any significant evidence of disc re-herniation to account for her consistent symptoms. The Petitioner was to remain temporarily totally disabled from her work

On January 16, 2012, the Petitioner presented to Dr. Slack She had undergone a lumbar MRI scan on November 28, 2011. (PX 4) Physical examination revealed that the Petitioner was basically unchanged. Upon review of the MRI films, Dr. Slack stated the MRI showed disc space narrowing at the L4-5 level consistent with the level she had undergone the lumbar disc excision. Dr. Slack's impression was that the Petitioner had persistent low back derangement that appeared to be due to a discogenic pain response from the L4-5 level status post lumbar disc excision for herniated disc. Dr. Slack's plan was to recommend the Petitioner be evaluated by Dr. Slack's associated, Dr. Ted Fisher. Dr. Slack suggested that Dr. Fisher evaluate [*25] the Petitioner for surgical intervention with interbody and instrumented posteriolateral fusion at the L4-5 level due to her ongoing pain. (PX 3)

Dr. Fisher examined the petitioner on March 8, 2012. (PX 3) At that time, she reported that her low back pain began when she was hit by a car while working approximately 10 years ago. The petitioner did testify as to an accident which occurred in 2002 when she was hit by a car. At that time, Dr. Fisher diagnosed the petitioner with post laminectomy syndrome. Since the petitioner had failed conservative treatment including injections of physical therapy, a surgical procedure was recommended in the form of an L4-S1 PLIF procedure, or fusion. This procedure was performed on August 3, 2012. (PX 6) Following same, the petitioner returned to Dr. Fisher reporting that her lower extremity radicular symptoms have resolved.

The petitioner returned three months status post fusion on November 1, 2012 denying radicular symptoms, but reporting some right sided back pain. At that point, she was to start physical therapy.

On April 4, 2013, the petitioner returned to see Dr. Fisher reporting pain 5 out of 10 to 10 out of 10. The petitioner was continued [*26] on a home exercise routine and was recommended for a CT scan of the lumbar spine.

The petitioner returned to Dr. Fisher on May 23, 2013. At that time a trigger point injection was performed. A recommendation of hardware removal from L4-S1 was made and the petitioner indicated her willingness to undergo same. (PX 3) The petitioner testified that she wishes to undergo the procedure as recommended by Dr. Fisher.

The petitioner was seen by Dr. Tonino for a Section 12 medical exam on June 17, 2013. (RX 4) At that time, the petitioner reported a consistent history wherein she stepped backwards and felt her knee pop. In Dr. Tonino's supplemental report dated July 10, 2013, he stated that the petitioner's work incident was "not a significant aggravating factor of her right knee. Complaints, she alleges, began while stepping backwards with no falls to the knee or direct impact to the knee." (RX 5) Dr. Tonino also opined that the petitioner can return to full duty as a traffic aide with regard to her right knee. (RX 4)

The petitioner was seen for a second Section 12 medical exam at the request of the respondent by Dr. Ghanayem. (RX 3) Dr. Ghanayem stated that the petitioner reported an accident [*27] history that she was at work, walking backwards and felt a pop in her knee. Afterwards she "jerked her back". Dr. Ghanayem opined that the mechanism that she reported to him would not be sufficient to cause a back injury of any significance. He stated that the MRI findings of degenerative changes at L4-5 and L5-S1 would have predated her September of 2010 incident, nor was she at risk for an aggravation given the mechanism of injury. He goes on to state that the petitioner had non-compressive disc pathology which did not correlate with her low back symptoms. He stated that as a result of the incident, the petitioner would have sustained a back strain, at worst Finally, Dr. Ghanayem stated that in spite of the petitioner's non-causally related fusion and possible need for hardware removal, that she should be able to return to work full duty without restrictions as far as her low back is concerned.

The petitioner testified that she still has stiffness in the right knee, especially when she wakes up in the morning. She stated she could walk about three-quarters of a mile but then experiences grinding in her knee and pain. She states she can sit for an hour, then has to walk because otherwise [*28] her knee gets stiff. Regarding her back, the petitioner testified that her back is always in pain, and she experiences a poking or stabbing type pain. She also feels a squeezing sensation. She gets help from her daughter with lifting things from floor level, and estimates she can carry approximately 10-12 pounds.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE C, WHETHER THE PETITIONER SUSTAINED AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the facts presented and the petitioner's stated accident history, the arbitrator finds that the petitioner did not sustain an accident arising out of her employment because the accident as described by the petitioner does not rise to the definition of accident within the meaning of the Illinois Workers' Compensation Act. The petitioner bears the burden to prove that her job puts her at a greater risk than the general public. Indeed, while being a traffic control aid puts a person at greater risk of being hit by a car (which was the case in the petitioner's 2002 compensable claim), the petitioner testified that she was walking backwards and felt a pop in her knee which caused her back [*29] to twist. The petitioner stated that there was no defect in the premises. The petitioner stated that she was walking swiftly, but that she was not, for instance, jumping out of the way of an oncoming vehicle.

The petitioner's claim is analogous to the claim in Smith v. Chester Mental Health State of Illinois. 07 W.C. 19684, *No. 11 I.W.C.C. 0032* (January 10, 2011). In that case, the petitioner testified that he worked as a security guard and performs repetitive walking on a daily basis. Indeed it was unrebutted that, "Petitioner engages in prolonged work related weight bearing which is far beyond that experienced by the general public." In that case, the petitioner testified that he was making rounds when he felt his knee pop. The Commission affirmed the Arbitrator's decision in that case stating, "the accident described ... is not an accident within the meaning of the Act, nor does the description of those events support the Petitioner's contention of a repetitive walking claim." Similarly, in this case, the petitioner is on her feet for prolonged periods of time - arguably greater than the general public. However, her mechanism of accident as described [*30] by her is nearly identical to the incident described in Smith. Therefore, in light of the facts presented before the

Arbitrator, and in keeping with current case-law, the Arbitrator finds that the petitioner did not sustain an accident arising out of her employment As such, all benefits are hereby denied.

Finally, please consider the case of *Elliott v. Industrial Commission, 153 Ill. App. 3d 238,106 Ill. Dec. 271, 505 N.E.2d 1062* (1s1 Dist 1987), where a correctional officer employed by the County of Cook was descending a flight of stairs in prison when his leg gave way resulting in injuries to his back and leg. The Industrial Commission and the Circuit Court found the case compensable. The Appellate Court reversed and found that the fall was idiopathic rather than an unexplained fall, and therefore, was not compensable. The Court noted that the fall was not employment related but rather resulted from an internal, personal condition, a preexisting weakened back and leg resulting from an automobile accident.

WITH RESPECT TO ISSUE F, IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR [*31] FINDS AS FOLLOWS:

The Arbitrator has found that the petitioner has not sustained an accident arising out of and in the course of her employment As such all other issues are moot If the petitioner is found to have sustained an accident arising out of and in the course of her employment, the arbitrator should find that the petitioner's current condition of ill-being is not causally related to the injury.

Regarding the petitioner's right knee claim, it is clear from the record and the petitioner's testimony that she has a long-standing history of knee problems. She had prior surgery and obtained a trial award for that condition. At trial, the petitioner testified that her knee even prior to the incident was symptomatic, and she could not straighten it all the way. Her accident history indicated that she was walking backwards and felt her knee pop. She did not fall or twist her knee in any way and there was no defect in the premises. Though Dr. Newman opined that the petitioner's ongoing knee condition is causally related to the work incident of September 21, 2010, the arbitrator finds Dr. Tonino's opinions more persuasive and credible. Dr. Newman did not discuss the mechanism of injury [*32] in any great detail in his reports, nor is there any mention of the petitioner's prior knee condition. He simply stated that the petitioner's condition is related to the September 21, 2010 incident. Dr. Tonino's opinions are more credible because he discusses the petitioner's prior knee condition and its effect on the petitioner's current condition. Indeed, Dr. Tonino had evaluated the petitioner shortly before the September 2010 incident in May of 2010 and reviewed the entirety of her prior medical history. (RX 4) In his supplemental report, Dr. Tonino opined that "considering this patient's past medical history of multiple arthroscopies of this knee, it is my impression within a reasonable degree of medical and surgical certainty that the September 22 [sic], 2010 incident was not a significant aggravating factor of her right knee. Complaints, she alleges, began while stepping backwards with no falls to the knee or direct impact to the knee." (RX 5) Therefore, the most complete opinion, taking into account the petitioner's medical history regarding her right knee, as well as the mechanism of injury, is Dr. Tonino's opinion. Therefore, the Arbitrator finds that the petitioner's current [*33] condition of ill-being as regards her right knee is not causally related to the work incident of September 21, 2010.

Regarding the petitioner's low back condition, while the petitioner gives a consisted accident history that her body jerked when her knee popped on September 21, 2010, the arbitrator finds that her current condition of ill being as regards her low back is not related to that incident. In support of same, the arbitrator relies on the opinions of Dr. Ghanayem, and finds them to be the only credible opinion from a spinal specialist in the record. (RX 3) This is based on the fact that Dr. Ghanayem reviewed the petitioner's symptoms, diagnostic reports and examination in conjunction with a discussion of the mechanism of accident. Neither Dr. Slack, nor Dr. Fisher, the spinal specialists treating the petitioner, opined as to whether or not her symptoms are causally related to the September 21, 2010 incident (PX 3) Dr. Newman, who initially treated the petitioner for her right knee and lumbar spine, did opine that her symptoms, as of November 30, 2010 were related to the September 21, 2010 incident however he diagnosed the petitioner with a lumbar strain - the exact same diagnosis [*34] provided by Dr. Ghanayem. (PX 3) Dr. Ghanayem specifically stated in his report that the, "mechanism of injury she reported me of stepping back and having her knee pop would not be sufficient to cause a back injury of any significance." (RX 3) He further stated that the petitioner's MRI findings predated her September 2010 incident, nor was there risk of an aggravation given the mechanism of injury. Therefore, because Dr. Ghanayem is the only spinal specialist providing an opinion regarding causation of the petitioner's low back condition, and stating that the petitioner may have sustained a back sprain, at worst, consistent with Dr. Newman's initial diagnosis, the Arbitrator finds that the petitioner's current condition of ill being is not causally related to the September 21, 2010 occurrence.

WITH RESPECT TO THE REMAINING ISSUES, J, K, L, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has found that the petitioner did not sustain an accident arising out of her employment. The Arbitrator has also found that the petitioner's conditions as relate to her right knee and low back are not causally related to the September 21, 2010 occurrence. As such, all other issues are moot.

DISSENTBY: KEVIN [*35] W. LAMBORN

DISSENT: I respectfully dissent from the decision of the majority. I would affirm Arbitrator Carlson's thorough and well reasoned decision in its entirety and without modification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesOccupational DiseasesWorkers' Compensation & SSDICompensabilityInjuriesPreexisting Conditions

2 of 19 DOCUMENTS

RICHARD DROBAC, PETITIONER, v. HARRAH'S CASINO, RESPONDENT.

NO: 07WC 29247, 11WC 14035

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

14 IWCC 943; 2014 Ill. Wrk. Comp. LEXIS 1000

November 3, 2014

JUDGES: David L. Gore; Mario Basurto; Stephen Mathis

OPINION: [*1]

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

1. Petitioner was a Blackjack Dealer for Respondent. He has held this position since 1986. Respondent imposed a quota on him, where he had to deal between 650 and 700 hands per hour and shuffle the deck within a three-minute time period. He shuffled half a deck at a time until full decks were shuffled. While dealing, he also had to reach across his body with his right hand into the card "shoe" to pull out 2-3 cards for up to seven players at a time. Supervisors timed him with a stop watch.

2. On July 20, 2006 Petitioner visited Dr. Fakhouri with complaints of numbness and tingling in his right hand fingers. He was having problems dealing at work, and noticed he was dropping [*2] cards off of the table. The rule is that when a card is dropped, the dealer must take all the cards out of the shoe and re-count them. This slows up the game, which causes Respondent to lose money.

3. Dr. Fakhouri diagnosed Petitioner with carpal tunnel and performed a steroid injection, which was unsuccessful. Eventually he operated on Petitioner on December 8, 2006. This was the first of 3 surgeries. After the first surgery, Petitioner's numbness subsided temporarily but then returned.

4. Petitioner underwent a second carpal tunnel release on February 13, 2008. He returned to work July 24, 2008 but was unable to work in the high roller area because he could not work fast enough. He was placed in another area where the quota was only 500 hands per hour.

5. Petitioner resumed treatment for his wrist in March of 2009. At that time Dr. Chang restricted Petitioner's use of his right arm, the use of vibratory tools and the repetitive use of his right hand. In September 2009 Petitioner took 6 months off work to care for his wife, who eventually died of cancer on March 20, 2010.

6. Upon returning to work Petitioner developed problems in his left hand. He reported this to his supervisor [*3] and filed a new claim on November 8, 2010. He had not received any treatment at that point. 6 days later he was involved in a non work-related car accident.

7. Petitioner underwent a third surgery March 25, 2011. He has not returned to work since. He underwent an Independent Medical Evaluation (IME) on May 25, 2011 and was terminated June 17, 2011 due to his failure to return to work. In January 2012, Dr. Chang opined that the car accident in no way affected Petitioner's carpal tunnel.

8. On October 3, 2011 a Dr. Richter permanently restricted Petitioner from dealing.

9. Petitioner notices that his right hand has deteriorated. His finger numbness has returned and the back of his wrist feels brittle. The incision location is also painful, his hand is cold 90 percent of the time and he has no strength.

10. Petitioner has not looked for work since being terminated. He filed for unemployment against Respondent in 2011. He received benefits for 5 months. At that time a vocational evaluation determined that he was unable to work, thus he could not receive unemployment benefits any longer.

11. Petitioner is not currently treating for his back, neck or hands.

12. Ms. Keri Stafseth is [*4] a Rehabilitation Counselor for Vocamotive Inc. After interviewing Petitioner she learned that prior to working for Respondent, Petitioner had worked in hospital maintenance, construction, painting and had earned money investing in the stock market.

13. Petitioner reported that he could sit for 60 minutes prior to changing positions due to spine pain; he could stand for 60 minutes and walk for 75 minutes. He could drive a car for 30 minutes.

> The Commission affirms the Arbitrator's rulings on the issues of accident, notice, causal connection, medical expenses and temporary total disability.
>
> The Commission, however, reverses the Arbitrator's ruling on odd-tot permanent and total disablement. The Commission views the evidence slightly differently than the Arbitrator, noting Petitioner's previous work experience working in hospital maintenance, construction, painting and investing in the stock market The Commission also notes that Petitioner has not looked for work since being terminated by Respondent. Based on this evidence, the Commission vacates the Arbitrator's odd-lot permanent and total disablement award, instead granting Petitioner a permanent partial disability (PPD) award [*5] based on his current hand complaints. The Commission awards Petitioner PPD benefits for a 65% loss of use of his person as a whole under § 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 619,97 per week for a period of 325 weeks, as provided in § 8(d)(2) of the Act, for the reason that the injuries sustained caused a 65% loss of use of his person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all medical expenses awarded by the Arbitrator under § 8(a) of the Act

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all temporary total disability benefits awarded by the Arbitrator.

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 [*6] a Notice of Intent to File for Review in Circuit Court.

DATED: NOV 03 2014

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox Illinois**, on **3/18/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
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?
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?
TTD
O. Other **Permanent Total Disability**

FINDINGS

On 7/20/06, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$ 60,443**; the average weekly wage was **$ 1,162.36**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** dependent children.

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 774.91/week for 84-2/7 weeks, commencing 12/8/06 through 3/6/07, 2/13/08 through 7/8/08, 3/25/11 through 3/12/12 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7/20/06 through 3/18/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent [*8] shall be given a credit of $ 23,556.59 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 49,450 for treatment provided by Dr. Fakhouri, $ 5,057 for treatment from Tinley Woods Medical Center, and $ 10,321 for treatment from Novacare, as provided in Sections 8(a) and 8.2 of the Act. Per stipulation between the parties, Respondent shall pay and hold Petitioner harmless for charges for treatment involving the right arm and hand from Ralph Richter MD, Salvatore Fanto, Dr. Chang/Midwest Spinecare, Nicholas Angelopoulos MD, CINN, and In galls Memorial Hospital. Per further stipulation between the parties, Respondent shall be given an 8(j) credit for medical benefits that were paid through Respondent's group carrier to the date of Petitioner's termination, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $ 774.91/week for life, commencing 3/13/12, as provided in Section [*9] 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

Signature of Arbitrator

7/11/13

Date

Attachment to Arbitrator Decision

STATEMENT OF FACTS:

Petitioner became a blackjack dealer for Respondent in 1986 and worked in that capacity until his position was terminated in 2011. Petitioner dealt blackjack hands to up to seven players at his table. Petitioner testified mat the casino required its blackjack dealers to deal at a rate [*10] of 650 and 700 hands of cards each hour. The cards were located in a shoe on the left side of Petitioner's body. To take a card out of the shoe, Petitioner swept his right hand across his body to the shoe and an upward sweeping motion with the right hand to lift the door on the shoe to access each card. This was followed by a downward sweeping motion to pull each card out of the shoe. Petitioner provided that he then grabbed each card to place the card in front of the player, again using the right hand to flip the card upward for viewing. Petitioner handed out two to four cards per player. At the end of each game, Petitioner collected and paid out chips to the players. Petitioner stated that he grabbed the chips around the edges to place and to remove them from the table. Paying out chips required Petitioner to grab chips from stacks located in front of him which he then distributed to winning players. Petitioner used his right hand for all payouts except for the two players sitting farthest left. He also used the right hand to pick up the cards left by each of the players. Petitioner testified that he worked 8 hours shifts with 15 minute breaks after each hour and a half of work. [*11] Petitioner worked for much of his time in the high roller tables.

Petitioner explained that he developed pain and numbness in his right hand in early 2006 while performing this work. The pain worsened and he started dropping chips and cards. Petitioner indicated die drops resulted in even more hand maneuvers as casino protocol required him to display his hands to both supervisors and the overhead security cameras after each drop. Petitioner testified that he repeatedly discussed his worsening problems with his supervisors when he dropped chips or cards. Petitioner testified that he last spoke with the supervisor about the problems he was having with the work no less than two weeks before he sought treatment with Anton Fakhouri MD.

Petitioner began treatment with Dr. Anton Fakhouri on 7/20/06. (PX2) Fakhouri documented a history of four months of progressively worsening tingling, numbness and pain in the right hand. Dr. Fakhouri diagnosed right carpal tunnel syndrome and ordered electrical tests. An EMG/NCV was done on 7/26/2006, revealing right carpal tunnel syn-

drome and evidence of old left carpal runnel syndrome. Cortisone was injected into the right wrist on 8/3/06 with minimal [*12] relief. Dr. Fakhouri noted that Petitioner's symptoms were aggravated with day to day activities such as dealing cards at work. Dr. Fakhouri performed the first carpal tunnel release on 12/8/2006. Petitioner's numbness partially resolved with surgery and Petitioner returned to full dealing activities on 3/6/07. Petitioner missed a total of 62 days of work following this surgery.

Petitioner's symptoms gradually returned while he worked and Petitioner again saw Dr. Fakhouri in May of 2007. (PX2) Petitioner complained of right shoulder pain, wrist pain and forearm pain at this point. Dr. Fakhouri performed a cortisone injection into the shoulder and sent Petitioner for scans. X-rays, a CT scan and then a MRI were done of the wrist

Petitioner's complaints continued to worsen with his dealing activities and Fakhouri performed the second carpal tunnel release on 2/13/2008. (PX2) Petitioner missed 101 days of work for this surgery, returning to work on 7/3/08. Before Petitioner returned to work, he went through a functional capacity evaluation on 5/12/08. The FCE found Petitioner to be capable of light duty work, with lifting 25lbs occasionally and 20 lbs frequently. (PX2) Notably, Petitioner's [*13] fine finger dexterity scores were in the 15th percentile or less when compared to the overall population. The coordination section of the test noted that Petitioner was occasionally dropping pegs and discs during testing. The FCE warned that it was beyond the scope of its evaluation to assess whether Petitioner could return to work as a blackjack dealer. Even so, Petitioner did return to full blackjack duties on 7/4/08. On 7/14/08, Dr. Fakhouri authored a letter opining that Petitioner's work activities may have aggravated or been causally involved in the diagnosis and condition of his carpal tunnel syndrome. Dr. Fakhouri noted that most of Petitioner's symptoms were coming from the carpal tunnel syndrome and not the bony lesion in the wrist.

Petitioner's symptoms partially resolved with the second surgery. Petitioner testified that the carpal tunnel symptoms again worsened while he was fully engaged in blackjack dealing.

In October of 2008, Petitioner began receiving treatment for cervical complaints with Dr. Angelopoulos, (PX5) A cervical MRI was followed with two epidural steroid injections and then a radiofrequency ablation on 2/17/09. An EMG/NCV from 11/12/08 found evidence of [*14] moderate median neuropathy at the right wrist of both the motor and sensory fibers. No evidence was found for cervical radiculopathy or myopathy.

By March of 2009, Petitioner's right hand symptoms had worsened, he had numbness and tingling in the right hand and pain in both upper extremities. Petitioner sought treatment with Dr. Chang on 3/10/09, reporting a two year history of neck and right hand pain which worsened throughout the workday. (PX4) On a return to work form, Dr. Chang diagnosed herniated discs at C5-6 and C6-7 and placed work restrictions against lifting more than 10 lbs, vibratory tool use, overhead lifting, and repetitive use of the right arm and hand. He also restricted Petitioner to minimal bending and stooping.

During the return visit on 5/19/09, Dr. Chang noted that Petitioner was working full duty which had aggravated his neck and left arm pain, numbness and tingling. (PX4) Petitioner was also experiencing symptoms on the right side as well as lumbar complaints.

On 8/31/09, Dr. Angelopoulos documented Petitioner's increasing right neck pain which radiated down the right arm. (PX5) On 9/10/09, Dr. Angelopoulos diagnosed the condition as C6-7 spinal stenosis and [*15] degenerative disc disease from C4 to C7. Dr. Angelopoulos recommended additional cervical steroid injections.

Petitioner testified that his wife was suffering from end stage cancer at this point and he took six months off to be with his wife. Mrs. Drobac passed away in March of 2010. Petitioner returned to blackjack dealing with resumption of his right hand complaints.

Petitioner underwent a course of therapy from 5/3/10 to 6/1/10. (PX9) A 6/7/10 cervical MRI was reported as showing no change from the October 2008 MRI. Respondent sent petitioner for an IME with Dr. Kern Singh on 8/30/2010. Dr. Singh felt there was no causal relationship between Petitioner's work and his cervical and lumbar spine conditions. Singh did not address the carpal tunnel syndrome. (RX 7)

Petitioner returned to Dr. Chang on 6/15/10. (PX5) Dr. Chang read the MRI as showing a slightly larger herniation at C5-6, causing moderate to severe left sided foramina! compression. On 6/28/10, Petitioner returned to Dr. Angelopoulos complaining of an increase in his neck pain and radiation into the right upper extremity since the last visit in November of 2009. (PX5) Dr. Angelopoulos also felt that the MRI revealed worsening [*16] of then herniation at C5-6. Dr. Angelopoulos performed additional cervical epidural steroid injections on 7/26/10 and 8/9/10.

On 11/14/2010, Petitioner was involved in a non-occupational car accident Petitioner filed for leave under the FMLA on 11/18/10 and began treatment with Dr. Salvatore Fanto. (PX3) Dr. Fanto documented numbness and tingling in the bilateral hands along with some new neck pain since the motor vehicle accident, Dr. Fanto recommended that Petitioner obtain an updated EMG/NCV and arterial studies.

Petitioner next had a neurosurgical consultation with Amish Patel MD on 11/24/10, reporting prior neck pain but no shooting pains in arms. Petitioner also reported that the shooting pains were preventing him from working after his car accident. Dr. Patel felt that there were signs of radiculopathy and/or of bilateral carpal tunnel syndrome. He agreed with the recommeodation for an EMG/NCV. (PX 3) The updated test was done on 11/24/10, revealing evidence of moderate to severe bilateral carpal tunnel syndrome and mild to moderate bilateral ulnar neuropathy, most likely with compression at the wrist. (PX 3) Arterial studies done at Ingalls Hospital on 11/26/2010 revealed [*17] no definite evidence of significant upper extremity arterial disease which might account for the complaints. (PX7)

A repeat cervical MRI was done on 11/29/10. (PX4) Dr. Chang thought the MRI findings were similar to the pre-motor vehicle accident MRI. (PX4) Petitioner had multilevel degenerative changes, most significantly at C5-6 with left greater than right foraminal narrowing and moderate compression of the left ventral thecal sac. The MRI also revealed prominent degenerative facet changes on the left side at C3-4 and a central disc protrusion at C4-5. At the 12/2/10 office visit, Dr. Chang noted that Petitioner's car accident probably resulted in an acute aggravation of the cervical radiculopathy which was magnifying the carpal tunnel symptoms. Dr. Chang removed Petitioner from work for 5 weeks and sent Petitioner for therapy at Novacare. In his 1/5/12 note, Dr. Chang noted that the car accident aggravated Petitioner's cervical and lumbar conditions, but it in no way affected the carpal tunnel syndrome.

Petitioner started therapy at Novacare on 3/7/11 and his neck and back improved. (PX9) Therapy did not resolve the carpal tunnel symptoms. On 3/15/11, Dr. Chang released Petitioner [*18] to work with respect to the neck and back. (PX4) He did not release Petitioner for the hands. (PX4) Petitioner continued treatment with Dr. Fanto for the hands. (PX3)

On 3/25/2011, Dr. Fanto performed an open release of the right carpal runnel, release of the ulnar nerve, and a Guyon's canal decompression of the flexor carpi radialis and carpi ulnaris tendons. (PX7) Dr. Fanto restricted Petitioner from work through 6/11/11. (PX3)

Respondent sent Petitioner for its second IME with a hand specialist on 5/25/11. (PX1) Dr. Ralph Richter documented an extensive history relating to the work injuries. A carpal tunnel release on 12/8/06 partially resolved the numbness in the median distribution of the right hand. Petitioner's nocturnal complaints did resolve. Petitioner returned to work and then returned to Dr. Fakhouri in May of 2007 with new complaints of shoulder pain and the wrist and forearm pain. Petitioner had a repeat carpal tunnel release on 2/13/08 and returned to his dealing duties. Petitioner developed recurrent symptoms in his right hand around 2009. He also developed pain in both upper extremities as well as numbness and tingling in the right hand. Petitioner underwent a third [*19] carpal tunnel release on 3/25/11 under the care of Dr. Fanto. This surgery included a Guyon's canal release and decompression of the flexor carpi radialis and ulnaris tendons in the right wrist. Petitioner reported to Dr. Richter that the last surgery had not done much to relieve his symptoms. Petitioner continued having pain, numbness and tingling in his right hand. Patient was engaged in therapy and had not yet returned to work as of the date of Richter's evaluation. Dr. Richter diagnosed the condition as carpal tunnel syndrome. Dr. Richter felt that Petitioner's current symptoms were related to his dealing activities and the treatment he had undergone to treat the condition. Dr. Richter did not believe that Petitioner engaged in any non-work activities which would have given rise to the condition. Dr. Richter explained his causal opinion on his belief that Petitioner performed forceful repetitive motion with his duties as a dealer. Dr. Richter noted that this type of activity had been shown to be a significant factor in the development of carpal tunnel syndrome. Dr. Richter advised against additional surgery given the lack of relief obtained from the third surgery.

Petitioner testified [*20] that he was terminated by Respondent on 6/17/11. Petitioner provided that he was terminated for failing to return to work before expiration of the leave deadline which Respondent had imposed.

Petitioner returned to Dr. Richter on 10/3/11 for treatment. (PX1) Petitioner complained of continuing numbness and tingling in the hand as well as coldness. He was also beginning to report symptoms in his left hand at this point. Dr. Richter noted that workers compensation carrier had not approved occupational therapy for Petitioner. Dr. Richter again advised against surgery and told Petitioner to use the hand as best as he could. Dr. Richter also imposed permanent work restrictions against rapid repetitive motions and against heavy activity with the hands. Dr. Richter's diagnosis was bilateral carpal tunnel syndrome.

Petitioner made demands for vocational rehabilitation and maintenance upon Respondent on 10/4/11, 11/22/11, 12/6/11 and 1/17/12. (PX13) Petitioner then sought a vocational evaluation with Vocamotive on 3/12/2012. (PX14) Petitioner presented testimony from a certified rehabilitation counselor in support of his claim. Kari Stafseth CRC performed vocational services with Vocamotive [*21] on behalf of workers, employers and carriers. Ms. Stafseth noted that she even did vocational work for Sedgwick who was handling the immediate case. Ms. Stafseth interviewed Petitioner, outlining the details she obtained from him which were relevant to her opinions. She noted that Petitioner had a limited work history and limited transferable skills. She also reviewed work restrictions and a number of Petitioner's recent physicians. She then performed a transferable skills analysis where she entered all of these variables into a computer database to see what jobs were actually available for Petitioner. The results revealed no available positions for a worker with Petitioner's background, restrictions and age. Based on all of this information, Ms. Stafseth testified that Petitioner had lost access to his customary occupation and further, that he had lost access to a stable labor market in general. Petitioner was unemployable. Respondent challenged Ms. Stafseth on several points during cross examination. Respondent challenged her on whether Petitioner told her about the intervening car accident from November of 2010. Ms. Stafseth testified that she was aware of the accident through [*22] the medical records she had reviewed as part of her assignment. Ms. Stafseth further clarified that the auto accident was largely irrelevant to her analysis as she had based her opinions on the restrictions and limitations which Petitioner had for his hands and arms. She noted that any additional restrictions for the neck and back would even further impair Petitioner's access to the labor market. Respondent next had Ms. Stafseth read an email into the record from Petitioner's counsel. In substance, the email asked Vocamotive to determine whether Petitioner was employable, and if so, to draft up a rehabilitation plan. Finally, Respondent challenged Ms. Stafseth's assumption as to whether any doctor had released Petitioner to return to work using the right hand.

The vocational expert determined that Petitioner had lost access to his usual and customary line of work as a dealer as he was restricted from rapid/repetitive motions and restricted from dealing cards and manipulations with me right hand. The evaluator concluded that Petitioner did not have access to a meaningful labor market due to his level of education, limited work history, lack of transferable skills and the condition of [*23] his hand. In the evaluator's opinion, Petitioner was totally disabled.

Respondent sent Petitioner for IMEs with four separate examiners. Drs. Nagle, Richter and Vender were engaged to address the hand injury. Dr. Singh was engaged to evaluate the alleged cervical injury.

Dr. Nagle performed the first DME on 11/15/07. (PX10) Dr. Nagle reported a history of a correlation between Petitioner's work activities and his symptoms. By the end of the workday, Petitioner experienced increased discomfort and paresthesias in his hands. Petitioner also had pain the base of the thenar eminence and his long and ring fingers were numb. Petitioner also complained of some discomfort in the right shoulder and the front of his proximal forearm. As the work day progressed, Petitioner experienced an increase in the discomfort in his hand, forearm and shoulder. Dr. Nagle diagnosed Petitioner with carpal tunnel syndrome on the right side as well as a bony lesion in the distal radius. Dr. Nagle felt that the work activities had not caused the bony lesion in the distal radius. However, Dr. Nagle also thought that the majority of Petitioner's symptoms were attributable to continued irritation of the median nerve [*24] in the carpal canal. Dr. Nagle noted that Petitioner engaged in no outside activities which would aggravate his current condition. Dr. Nagle recommended mat Petitioner follow up with his treating physicians as he had not yet reached maximum medical improvement.

Respondent next sent Petitioner for an independent medical examination with Ralph Richter MD on 5/25/11. (PX1) Dr. Richter is a hand specialist. Dr. Richter documented an extensive history relating to the work injuries. Petitioner's first carpal tunnel release partially resolved the numbness in the median distribution of the right hand. Petitioner's nocturnal complaints resolved with the surgery. Petitioner returned to work with development of new complaints of shoulder pain and wrist and forearm pain. Dr. Fakhouri performed a repeat carpal tunnel release and Petitioner again returned to his dealing duties. Petitioner developed recurrent symptoms in his right hand around 2009. He also developed pain in both upper extremities as well as numbness and tingling in the right hand. Dr. Fanto next operated on Petitioner, releasing the right carpal canal, right Guyon's canal, and decompressing the flexor carpi radialis and ulnaris [*25] tendons in the right wrist. Petitioner told Dr. Richter that the last surgery had not done much to relieve his symptoms. He continued having pain, numbness and tingling in his right hand. Patient was engaged in therapy and had not yet returned to work by the date of Richter's evaluation. Dr. Richter diagnosed the condition as carpal tunnel syndrome and he related Petitioner's current symptoms to carpal tunnel syndrome and the treatment he had received for that condition. Dr. Richter agreed that Petitioner engaged in no non-work activities that would have given rise to the condition. He explained his causal opinion on his belief that Petitioner performed forceful repetitive motion with his duties as a dealer. Dr.

Richter explained that this type of activity has been shown to be a significant factor in the development of carpal tunnel syndrome. Dr. Richter advised against additional surgery as Petitioner had not obtained relief from the third surgery.

Respondent ultimately engaged Dr. Michael Vender MD for an examination on 6/22/12. Dr. Vender offered disputes on diagnosis as well as causation. As to causation, Dr. Vender did not believe that dealing cards would cause carpal tunnel syndrome, [*26] (Vender dep.24) He did not inquire as to specifics on what Petitioner's job actually required. (Vender dep.21) He was aware that people dealt by holding me deck of cards or by pulling them out of a shoe one by one. (Vender dep.22) Dr. Vender thought Petitioner would deal, he would then wait, he would then pull out a card, pull out another card and that he would enjoy rest periods between these activities. (Vender dep.23) Dr. Vender explained that you needed a combination of both repetitiveness and forcefulness to develop "new" carpal tunnel syndrome. (Vender dep.23) Dr. Vender also disputed whether Petitioner's job was sufficiently forceful to lead to carpal tunnel syndrome. (Vender dep.23-24) Dr. Vender also did not know what force was required to develop carpal tunnel syndrome. Vender knew of no research addressing the causal relationship between card dealing and carpal tunnel syndrome. (Vender dep.114-115)

In addition to challenging causation, Dr. Vender disputed that carpal tunnel syndrome was the correct diagnosis. Dr. Vender admitted there were three separate electrical tests performed in the case showing moderate median mononeuropathy of the wrists. (Vender dep.49) Dr. Vender [*27] also did not dispute that each of the doctors performing me EMGs concluded there was evidence of carpal tunnel syndrome. (Vender dep.50) He did also not dispute that each of the operating surgeons felt they were addressing carpal tunnel syndrome. (Vender dep.50-51) He also recognized that Respondent's two LME doctors before him had made the carpal tunnel syndrome diagnosis. (Vender dep.54-55) With respect to correlating clinical symptoms to the electrical test findings, Dr. Vender admitted that Petitioner reported resolution of some of the nocturnal paresthesias following the first release. (Vender dep.55) Dr. Vender explained that this symptom was a classic sign for carpal tunnel syndrome, further admitting that the improvement in the symptoms suggests that the surgery had its intended effect of releasing pressure in the carpal canal. (Vender dep.55-56)

For the second surgery, Dr. Vender disputed whether the surgeon had removed synovitis from the tendon during the surgery, even though the surgical report documented removal of synovitis. He criticized the surgeon for making the synovitis diagnosis without getting a pathology report to support the diagnosis. (Vender dep.74) When Vender [*28] was asked about the pathology report which the surgeon had actually obtained following surgery, Dr. Vender admitted he had not seen the report. (Vender dep.75)

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material facts in support of the following conclusions of law:

C. Did an accident occur that arose out of and in the course of petitioner's employment with respondent?

D. What was the date of the accident?

F. Is petitioner's current condition of ill-being causally related to the 7/20/06 accident?

The Arbitrator finds that Petitioner suffered an accident which arose out of and in the course of his employment as a blackjack dealer for Respondent. The Arbitrator finds that carpal tunnel syndrome resulted from the accident and the manifestation date of me accident was properly designated as the first date of diagnosis by Dr. Fakhouri on 7/20/06.

Petitioner's testimony shows us that he was constantly flexing and sweeping his right hand while pulling cards, dealing cards, collecting and disbursing chips and shuffling the deck. 700 hands per hour with an average of three cards per player involves 2,100 sweeping movements upwards per hour to open [*29] the door to access cards, 2,100 flexion movements downward to pull the card from the shoe, 2,100 pinching and rotational movements just to put the cards in an upright position before each player, 700 pinching movements to collect finished hands, and at least 500 pinching and rotational movements to payout or to collect chips (5 out of 7 players paid by right hand). If we consider Petitioner was at this level of production over 6 hours and 45 minutes each shift (30 minute lunch plus three 15 minute shifts), we have a minimum of 51,689 hand movements a shift, not including movements needed for shuffling the deck. A full week of this work involved 258,445 movements with the right band and a 48 week year gives us 12,405,000 right hand movements. Ten years of this work involved 124,050,000 right hand movements. Even if Petitioner only worked at the minimal rate of 650 hands per hour, he was still performing right hand movements at 93% of those figures.

Petitioner noted that his worsening symptoms were correlated with the work activities and he sought treatment with Dr. Fakhouri on 7/20/06.

The timeline of the appearance and progression of carpal tunnel symptoms also supports the findings [*30] on causation and accident. As outlined in the findings of fact, the symptoms appeared gradually after years of work, the symptoms progressed with a recognized correlation with the dealing activities (see PX2 --Fakhouri's 8/31/06 note; PX10), the first two surgical releases provided relief of the symptoms and the symptoms reappeared and worsened when Petitioner return to his dealing activities.

Furthermore, with the exception of Respondent's third IME doctor, the opinions of the treating and examining physicians universally support the carpal tunnel diagnosis and its relationship to Petitioner's dealing. Dr. Fakhouri opined that Petitioner's work activities may have aggravated or been causally involved in the diagnosis and condition of his carpal tunnel syndrome. (PX2- 7/14/08 letter) Dr. Fanto expressly noted that Petitioner's carpal tunnel syndrome was work related on his 4/5/11 "Attending Physicians Statement" for disability insurance benefits. (PX3) Dr. Chang felt that the intervening car accident aggravated me cervical spine condition which, for a time, was magnifying carpal tunnel symptoms. (PX4-12/2/10 note) However, Chang further noted that the carpal tunnel syndrome was in [*31] no way worsened by the car accident (PX4-1/5/12 note)

Two out of three of Respondent's examiners did not dispute causation. Dr. Nagle reported a history of a correlation between Petitioner's work activities and his symptoms. Dr. Nagle diagnosed Petitioner with carpal tunnel syndrome on the right side as well as a bony lesion in the distal radius. Dr. Nagle was certain that work activities had not caused the bony lesion in the distal radius and all physicians appear to agree on this point However, Dr. Nagle thought that the majority of Petitioner's symptoms were attributable to continued irritation of the median nerve in the carpal canal, further stating that Petitioner engaged in no outside activities which would aggravate the carpal tunnel syndrome. (PX10) Respondent's second examiner was even more supportive of causation. Dr. Richter diagnosed the condition as carpal tunnel syndrome and he related Petitioner's current symptoms to carpal tunnel syndrome and the treatment he had received for that condition. Dr. Richter agreed with Nagle that Petitioner engaged in no non-work activities that would have given rise to the condition. Richter described Petitioner's dealing activities as [*32] involving forceful repetitive motions. Dr. Richter noted that this type of activity had been shown to be a significant factor in the development of carpal tunnel syndrome. (PX1)

Respondent next hired Dr. Michael Vender MD for an IME. Dr. Vender offered disputes on the diagnosis as well as on causation. As to causation, Dr. Vender did not believe that dealing cards would cause carpal tunnel syndrome, (Vender dep p.24) However, Dr. Vender's did not make an inquiry regarding die physical requirements of the work, he could not identify research even arguably supporting his denial and he admitted that science had not reached the stage where it could tell us how many movements were needed to cause carpal tunnel syndrome.

Although Dr. Vender did not make an inquiry about the physical demands of the dealing job. (Vender dep p.21), he thought Petitioner would deal a card, he would then wait, he would then pull out another card, pull out an additional card and that he would enjoy rest periods between these activities. (Vender dep p.23) As noted above, this was not the job that Petitioner had performed for over a decade for respondent. Dr. Vender explained that we needed a combination of both [*33] repetitiveness and forcefulness to develop "new" carpal tunnel syndrome. (Vender dep p.23) Dr. Vender never explained what he meant by "new" carpal tunnel. He also disputed whether Petitioner's job was sufficiently forceful to lead to carpal tunnel syndrome. (Vender dep p.23-24) He also knew of no research addressing the causal relationship between card dealing and carpal tunnel syndrome. (Vender dep p.114-115)

Dr. Vender was not persuasive when he challenged the carpal tunnel syndrome diagnosis. Dr, Vender admitted there were three separate electrical tests performed in the case showing moderate median mononeuropathy of the wrists. (Vender dep p.49) Dr. Vender did not dispute that each of the doctors performing the EMGs concluded there was evidence of carpal tunnel syndrome. (Vender dep p.50) He did also not dispute that each of the operating surgeons felt they were addressing carpal tunnel syndrome. (Vender dep p.50-51) He further noted that Dr. Fakhouri was a competent doctor who was unlikely to have performed multiple improper surgeries. (Vender dep p.31) Dr. Vender was questioned about Dr. Nagle's conclusion that we were dealing with relatively advanced carpal tunnel syndrome [*34] in the right hand which led to me first surgery, (Vender dep p.54-55) With respect to correlating clinical symptoms, Dr. Vender admitted that Petitioner reported resolution of some of the nocturnal paresthesias following the first release. (Vender dep p.55) Dr. Vender admitted that nocturnal paresthesias was a classic sign for carpal tunnel syndrome, further admitting mat the improvement in the symptoms suggests mat the surgery had its intended effect of releasing pressure in the

carpal canal. (Vender dep p.55-56) In this case, the electrical tests, physician consensus and the surgical results all point toward carpal tunnel syndrome as the proper diagnosis.

Dr. Vender took a similar approach to the second surgery performed by Dr. Fakhouri. Dr. Fakhouri performed a second release and a flexor tenosynovectomy on 2/13/08. (Vender dep p.61-62) Dr. Fakhouri reported that he found an overabundance of tenosynovitis in the flexor digitorum profundus and flexor digitorum superficialis tendon. (Vender dep p.64-65) Dr. Vender explained that tendons in the carpal canal have a coating called synovium which permits gliding of the tendons past each other. (Vender dep p.62-63) An overabundance of [*35] such material in the canal can cause pain and contribute to carpal tunnel syndrome. (Vender dep'p.63) According to the operative report, Dr. Fakhouri took off some of the coating during the surgery. (Vender depp.63) Dr. Vender disputed whether Fakhouri really found an overabundance of synovium at the time of the surgery. (Vender dep p.65) Vender provided that Fakhouri could not have properly made the synovitis diagnosis without a biopsy of the synovium to confirm the inflammation. (Vender dep p.74) However, when Vender was presented with the fact that Fakhouri had sent the synovium off for a pathological analysis, Dr. Vender admitted that he had not seen the pathology report. (Vender dep p.75) Dr. Vender was then challenged on whether he could really dispute Fakhouri's diagnosis when Vender had not seen the pathology report. (Vender dep p.75) Dr. Vender's disputes over causation and diagnosis are not persuasive.

The Arbitrator notes that Dr. Vender provided that excessive synovium can give rise to pain from the canal. While he identified a connective tissue disease as a potential source for excessive synovium, he admitted that there was no evidence that Petitioner suffered from that [*36] metabolic problem. (Vender dep p.63)

The Arbitrator is not persuaded by Respondent's arguments about the intervening car accident. Even Dr. Vender would not opine to a reasonable degree of certainty that the car accident caused or aggravated the carpal tunnel syndrome in the right hand. Dr. Vender could not make that claim at the same time he was disputing the validity of the carpal tunnel diagnosis. Further, by the time of the car accident, numerous doctors and electrical tests had documented the existence of the syndrome on the right side. Dr. Chang had been treating Petitioner for 20 months at that point and he had the benefit of following Petitioner for years as treatment unfolded. While Dr. Chang thought the car accident aggravated the cervical spine and magnified the carpal tunnel complaints, he also noted that the accident in no way affected the carpal tunnel syndrome. (PX4-1/5/12 note) By 3/15/11, Petitioner's cervical spine had responded to treatment well enough that Petitioner was released with respect to the spine. (PX4) Dr. Chang did not release Petitioner to work with respect to his right hand. Dr. Fanto was also treating the right hand at this point. However, Dr. Fanto [*37] expressly noted that Petitioner's carpal runnel syndrome was work related on his 4/5/11 "Attending Physicians Statement" for disability insurance benefits. (PX3) Fanto does not support Respondent's theory about the intervening car accident. While there is evidence to point to a flare-up in Petitioner's carpal tunnel symptoms following the car accident, there is nothing to indicate that they were anything more than a temporary flare of symptoms. Dr. Chang's cervical aggravation theory is credible considering that the symptoms were identified as "bilateral" following the car accident whereas the symptoms were limited to the right side before the accident Once the cervical inflammation was reduced, Petitioner returned to his baseline state of disability with respect to the right hand and arm and Dr. Fanto performed the third operation.

E. Was timely notice of the accident given to respondent?

The Arbitrator finds that Petitioner provided timely notice of his injuries to Respondent. Petitioner's unrebutted testimony indicates that he had an ongoing conversation with his supervisors about his developing right hand problems. His last conversation with the supervisors came two weeks [*38] prior to his first visit with Dr. Fakhouri on 7/2O/06. Respondent presented no witnesses to challenge the adequacy of notice.

J. Were the medical services that were provided to petitioner reasonable and necessary? Has respondent paid for all reasonable and necessary charges?

The Arbitrator finds, after reviewing the medical records introduced into evidence, as well as the testimony offered by Petitioner, that the medical treatment provided by Dr. Fakhouri, Tinley Woods Medical Center, Novacare, Ralph Richter MD, Salvatore Fanto MD, Dr. Chang/Midwest Spinecare, Nicholas Angelopoulos MD, CINN, and Ingalls Memorial Hospital was both reasonable and necessary under section 8(a) of the Act. Therefore, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 49,450 for treatment provided by Dr. Fakhouri, $ 5,057 for treatment from Tinley Wobds Medical Center, and $ 10,321 for treatment from Novacare, as provided in Sections 8(a) and 8.2 of the Act Per stipulation between the parties, Respondent shall pay and hold Petitioner harmless for charges for treatment involving the right arm and hand from Ralph Richter MD, Salvatore Fanto, Dr.

[*39] Chang/Midwest Spinecare, Nicholas Angelopoulos MD, CINN, and Ingalls Memorial Hospital. By stipulation between the parties, Respondent shall pay the medical bills for services rendered by said providers in conjunction with the fee schedule, subject to the provisions and limitations of sections 8(a) and 8.2 of the Act.

L. What amount of compensation is due for temporary total disability?

The Arbitrator finds that Petitioner was temporarily and totally disabled over three separate periods. Petitioner is entitled to TTD for the periods associated with his surgeries to the right hand and arm. Mr. Drobac initially missed work from 12/8/06 to 3/6/07 for the first carpal tunnel release. Petitioner next missed work from 2/13/08 to 7/3/08 for the second release. Petitioner's final absence from work for the third surgery ran from 3/25/11 through 3/12/12. The Arbitrator finds that 3/12/12 is the logical date of maximum medical improvement as the vocational analysis was completed on 3/12/12, determining that Petitioner had lost access to the labor market as a result of his injuries.

Respondent paid a total of $ 22,556.59 in TTD benefits over these periods. Respondent is entitled to a credit [*40] for TTD it has paid.

O. Whether Petitioner Is Permanently and Totally Disabled?

The Arbitrator finds that Petitioner has proven that he is permanently and totally disabled from work as a result of his work related injuries. This finding is based on the condition of Petitioner's right hand and arm by the time of the hearing as well as the testimony from the vocational specialist.

By the time of the hearing, Petitioner noted that his right hand lacked any strength, he constantly dropped things with the hand, his knuckles hurt and the back of his hand felt like it would break when he used it. His right hand was cold for 90% of the time and he relied on his left arm to cover for the right. Petitioner complained that his right arm was now useless.

As noted above, the sole source of evidence about Petitioner's access to the labor market came from Kari Stafseth CRC, a certified rehabilitation counselor who evaluated Petitioner. Ms. Stafseth performs vocational services on behalf of workers, employers and insurance carriers. Ms. Stafseth noted that she even did vocational work for the insurance carrier who was defending against the immediate case. To reach her conclusions, Ms. Stafseth [*41] interviewed Petitioner, outlining the details she obtained from him which were relevant to her opinions. She noted that Petitioner had a high school education, a limited work history and limited transferable skills. She noted that Petitioner had even tried to increase his marketability by using a typewriting program to enhance his typewriting capabilities. She also outlined the various work restrictions she was considering from Petitioner's recent physicians. She then performed a transferable skills analysis where she entered all of these variables into the Oasis computer database to see what jobs were actually available for Petitioner. The results revealed no positions for a worker with Petitioner's background, restrictions and age. Based on all of this information, she testified that Petitioner had lost access to his customary occupation and further, that he had lost access to a stable labor market in general. Petitioner was unemployable.

Respondent offered no vocational testimony to the contrary. Respondent did attempt to challenge Ms. Stafseth on several points during cross examination, none of which actually brought into question her opinions. Respondent repeatedly asked her [*42] whether Petitioner told her about the intervening car accident from November of 2010. Ms. Stafseth testified that she was aware of the accident through the medical records she had reviewed as part of her assignment. Ms. Stafseth further clarified that the auto accident was largely irrelevant to her analysis as she had based her opinions on the restrictions and limitations which Petitioner had for his hands and arms. She noted that any additional restrictions for the neck and back from the car accident would further impair Petitioner's access to the labor market. However, she had not considered the injuries from the car accident.

Respondent's final challenge to Ms. Stafseth was against her assumption that no physician had released Petitioner to work with her hand since the last surgery. Respondent began the attack with a claim that Dr. Vender had given such a release to Petitioner. Dr. Vender only disputed whether Petitioner's disability was related to his work activities. (RX p.45) Dr. Vender never disputed that Petitioner was disabled from working.

Petitioner's vocational evidence is unrebutted and as such, the Arbitrator finds that he has proven that he is entitled to permanent and [*43] total disability award.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

1 of 100 DOCUMENTS

CARL CRITTENDEN, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO. 08WC 19505

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 884; 2014 Ill. Wrk. Comp. LEXIS 1039

October 9, 2014

JUDGES: Thomas J. Tyrrell; Michael J. Brennan; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of the Petitioner's injury, 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 agrees with the Arbitrator that the Petitioner has proven entitlement to a wage differential award under § 8(d)(1) of the Illinois Workers' Compensation Act. However, the Commission finds that the Petitioner is entitled to a different amount than that awarded by the Arbitrator.

Pursuant to § 8(d)(1), in a wage differential scenario, the claimant is entitled to 66-2'3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

In this case, the Arbitrator calculated the weekly wage differential [*2] to be S581.06 per week, starting as of April 9, 2012, and continuing thereafter for the duration of the Petitioner's disability. She indicated that there was no real dispute that the Petitioner, but for being injured, would have been earning $ 32.79 per hour in his pre-injury job with Respondent (see Petitioner's Exhibit 10). She then noted that the two vocational experts who evaluated Petitioner and opined on his earning potential, Julie Bose and Steve Blumenthal, essentially determined Petitioner was capable of earning $ 8.25 to $ 3.78 per hour in suitable employment per § 8(d)(1). She found that $ 11.00 per hour would be reasonable, and then determined the weekly wage differential by multiplying each weekly wage by 40 hours ($ 51,311.60 for the former, $ 440.00 for the latter), subtracted the weekly wage Petitioner was capable of earning from what he would have been earning but for the injury, and took 66-2/3% of that figure, as required by § 8(d)(1).

The Commission finds that it is more reasonable in this case to determine, based on a review of all of the evidence, that the Petitioner is capable of earning $ 13.78 per hour. This results in a weekly wage differential of $ 506.93. [*3] The Commission believes that the Petitioner did not provide the effort that he should have in performing his job search, and exaggerated the difficulties he encountered in dealing with the Respondent's initial method of vocational assistance. While the Arbitrator indicates she did not find that Petitioner's participation in GED classes was vital to his finding work, the Commission believes that his lack of full participation was evidence of a lack of effort on his part. This lack of effort was also supported by the testimony of Julie Bose, who indicated that over time Petitioner's compliance deteriorated, in that he was not submitting his GED attendance sheets, was not following up on provided job leads and was not submitting weekly documentation. She also noted inconsistencies in the contacts he did provide, including one con-

tact at a location that had been out of business for some time prior to the alleged contact. In reviewing his job logs (Respondent's Exhibit 1), it is clear that he often would return to the exact same locations he previously contacted versus making new contacts. When Bose requested that Petitioner sign off on a release form to obtain his attendance records for [*4] his GED classes, Petitioner refused to do so. Petitioner's complaints of a weekly 3 hour round trip ride via public transportation to drop off his job search records to Chicago City Hall also support a lack of true effort on his part to locate employment and to work with the program. While such travel may not have been pleasant, the time consumption he reported is difficult to believe given his residential location and the City Hall location he had to provide his records to.

When a claimant is receiving weekly benefits while performing a search for alternative employment, the search is his "job" during this time. Taking the evidence as a whole, the Commission agrees that the Petitioner has clearly shown entitlement to a wage differential, however his lack of effort in obtaining alternative suitable employment leads us to determine that he is capable of earning the highest amount that Mr. Blumenthal opined he was capable of earning, $ 13.78 per hour. We note that while the Respondent could have initially provided more assistance to the Petitioner in his job search than it did, but this does not absolve the Petitioner's responsibility to do his best and give his best effort in finding [*5] alternative employment. In this case, we do not believe he provided such effort, and as a result have determined the proper weekly wage differential should be $ 506.93 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 758.84 per week for a period of 100 weeks, from April 12, 2008 through April 27, 2008 and from April 30, 2008 through March 15, 2010, that being the period of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 758.84 per week for a period of 107-6/7 weeks, from March 16, 2010 through April 8, 2012, that being the period of temporary partial incapacity for work under § 8(a)of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on April 9, 2012, Respondent pay to Petitioner the sum of $ 506.93 per week for the duration of Petitioner's disability, as provided in § 8(d)(1) of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest [*6] 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. This includes, but is not limited to, the $ 150,891.76 temporary total disability and temporary partial disability credits indicated in the Arbitrator's decision.

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 09, 2014

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **1/4/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
What temporary benefits are in dispute?
Maintenance
What is the nature and extent of the injury?

On **4/11/08**, Respondent ***was*** [*7] 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 $ **59,189.52**; the average weekly wage was $ **1,138.26**.
On the date of accident, Petitioner was **46** years of age, ***married*** with **3** dependent children.
Petitioner ***has*** received all reasonable and necessary medical services.
Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.
Respondent shall be given a credit of $ **71,005.42** for TTD, $ **N/A** for TPD, $ **79,886.34** for maintenance, and $ **N/A** for other benefits, for a total credit of $ **150,891.76**.
Respondent is entitled to a credit of $ **N/A** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability [*8] benefits of $ 758.84 /week for 100 weeks, commencing 4/12/08 through 4/27/08 and 4/30/08 through 3/15/10, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $ 758.84. week for 107 6/7 weeks commencing 3/16/10 through 4/8/12, as provided in Section 8(a) of the Act. For the reasons set forth in the attached conclusions of law, the Arbitrator declines to award maintenance benefits after April 8, 2012, as requested by Petitioner.

Wage differential

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a result of his undisputed work accident and that he is entitled to benefits under Section 8(d)! of the Act. On this record, the Arbitrator finds it appropriate to begin the award of such benefits on April 9, 2012, there being no real disagreement between the parties as of that date as to the suitability of a cashier or customer service position. Respondent shall pay Petitioner wage differential benefits of $ 581.06 week from 4/9/12 through 1/4/13, a period of 38 5/7 weeks, and continuing [*9] thereafter for the duration of the disability, because the injuries sustained caused a toss of earnings, as provided in Section 8(d)l of the Act.

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

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

Signature of Arbitrator

2/15/13

Date

Arbitrator's Findings of Fact

Petitioner was fifty years old as of the hearing held on January 4, 2013. In 1985, he began working for Respondent as a sanitation laborer, or garbage collector. His job involved pulling garbage cans to trucks, picking up debris and disposing of large items such as couches and appliances. A job description in evidence reflects that sanitation laborers are required to "perform strenuous [*10] physical tasks," lift and carry up to 75 pounds continuously, lift up to 100 pounds continuously and carry up to 100 pounds frequently. PX 9. Respondent raised no objection to PX 9.

Petitioner testified he previously pursued workers' compensation claims against Respondent. None of these claims involved his back and all of them were settled. In the claim now under consideration, he is seeking a wage differential award stemming from a back injury.

The parties agree that Petitioner sustained a work injury on April 11, 2008. Arb Exh 1. At about 8:00 AM that day, Petitioner lifted a bag containing yard waste, tossed the bag into the back of the garbage truck and felt extreme pain in his lower back. On direct examination, he testified he was unable to continue working after this incident. At Respondent's direction, he sought treatment at MercyWorks on Cumberland in Norridge, Illinois, where he saw Or. Marino.

Dr. Marino's note of April 11, 2008 sets forth a consistent history of the lifting incident. The doctor noted Petitioner had injured his back thirty years earlier. Petitioner complained of severe lower back pain radiating to his left leg, as well as tingling in his left foot

On examination, [*11] Dr. Marino noted tenderness in the mid-lumbar area, minimal muscle spasm, positive straight leg raising at 60 degrees bilaterally and an inability to bend or twist due to severe pain. He diagnosed an acute low back strain. He prescribed Naproxen and Cyclobenzaprine. He directed Petitioner to refrain from working and return to the clinic on April 15, 2008. PX 1.

Petitioner returned to MercyWorks on April 15, 2008, as directed, and saw Dr. Bleier. Dr. Bleier indicated that Petitioner reported improvement. On examination, Dr. Bleier noted flexion to 60 degrees, limited extension and negative straight leg raising. He instructed Petitioner to stay off work, start a home exercise program and return in a week. PX 1.

On April 22, 2008, Petitioner saw Dr. Bleier again and indicated he felt ready to try working. The doctor described Petitioner's gait as normal. He noted pain in the L2-L4 region and painful lateral hip rotation. He instructed Petitioner to remain off work. PX 1.

Two days later, Dr. Bleier re-examined Petitioner and noted "no radicular complaints." He released Petitioner to full duty as of April 28, 2008 and instructed him to return to MercyWorks in two weeks if he remained symptomatic. [*12] PX 1.

Petitioner returned to MercyWorks on April 29, 20O8 and again saw Dr. Bleier, The doctor noted that Petitioner "did return to work" but was now "complaining of increased low back pain" and "pain radial to left buttock." On examination, Dr. Bleier noted flexion to 90 degrees and very limited extension. He prescribed a lumbar spine MRI and took Petitioner off work. PX 1.

The MRI was performed without contrast on May 1, 2008. Dr. Simon, the interpreting radiologist, described the L3-L4 level as the "most significant level of abnormality," noting a moderate diffuse disc bulge along with an annular tear and a small, left-sided disc protrusion and bilateral neural foraminal narrowing. PX 2.

Petitioner returned to Dr. Bleier on May 5, 2008 and reported some improvement, Dr. Bleier reviewed the MRI results and recommended a course of physical therapy. He instructed Petitioner to remain off work. PX1.

Petitioner underwent therapy at Bryn Mawr Physical Therapy between May 6 and May 16, 2008 and returned to Dr. Bleier on May 19, 2008. Petitioner reported no improvement. He complained of "persistent low back pain radiating to left thigh." The doctor's examination findings were unchanged. [*13] He kept Petitioner off work and prescribed additional therapy. PX 1,

After three more therapy sessions, Petitioner returned to Dr. Bleier on May 29, 2008 and complained of increased pain after "just bending over to pick up paper off floor." The doctor kept Petitioner off work and arranged for him to see Dr. Cupic.

Dr. Cupic administered two epidural steroid injections in June of 2008 and a lumbar facet injection in July of 2008. Petitioner testified that he "felt a little better for a little while" after undergoing these injections.

On July 24, 2008, Petitioner saw Dr. Spencer, a spine surgeon. Petitioner testified that MercyWorks referred him to Dr. Spencer.

Dr. Spencer's initial note of July 24, 2008 sets forth a history of a work-related back injury on April 11, 2008 followed by therapy and injections. Petitioner indicated he was gradually getting better.

Dr. Spencer described Petitioner's gait as normal. He noted no abnormalities on examination. He described Petitioner's complaints as "largely mechanical and non-consistent." He interpreted the MRI as showing some degenerative changes with no evidence of significant nerve root compression or disc herniation. He indicated Petitioner [*14] "appears to be recuperating from an acute back sprain." He prescribed Naprosyn and instructed Petitioner to remain off work for an additional two weeks. PX 2.

Petitioner returned to Dr. Spencer on September 10, 2008 and indicated he was making no progress. The doctor re-evaluated him and concluded that surgery was in fact necessary, despite his previous findings. He recommended a discectomy and fusion at L3-4 and instructed Petitioner to remain off work. He saw Petitioner again on October 1, 2008 and wrote to Respondent's Committee on Finance, indicating he was awaiting approval of the proposed surgery. PX 2.

Dr. Spencer performed an L3-L4 laminectomy, discectomy and posterior lumbar interbody fusion at Advocate Lutheran General Hospital on October 20, 2008. PX 2.

Petitioner testified the surgery relieved his leg pain but he continued to have low back pain.

Petitioner continued to see Dr. Spencer postoperatively. On January 22, 2009, the doctor recommended five more weeks of therapy before a possible return to work. On March 5, 2009, the doctor released Petitioner to work but instructed him to return in three months for a re-check X-ray. PX2.

Petitioner returned to Dr. Spencer on [*15] April 16, 2009 and complained of pain secondary to performing his regular duties. The doctor prescribed Flexeril for night time pain and spasm and released Petitioner to light duty with no lifting over 20 pounds and no bending. PX 2.

On June 11, 2009, Dr. Spencer took Petitioner off work and recommended additional therapy progressing to work hardening, PX 2. Petitioner began a course of therapy at Advanced Physical Medicine Centers on June 17, 2009. PX 2.

On August 11, 2009, Dr. Spencer released Petitioner to light duty and told Petitioner to discontinue therapy. PX 2. Petitioner testified that no light duty was available, that he advised Dr. Spencer of this and that the doctor then recommended work conditioning,

At Respondent's request, Petitioner saw Dr. Kern Singh of Midwest Orthopaedics for a Section 12 examination on September 3, 2009, Petitioner rated his low back pain at 4/10. He indicated that therapy had provided minimal relief.

On examination, Dr. Singh noted 5/5 positive Waddell findings. He characterized Petitioner's condition as degenerative. He recommended a functional capacity evaluation and indicated Petitioner should undergo two to four weeks of work conditioning if [*16] the evaluation proved to be valid. PX4.

On September 17, 2009, Dr. Spencer recommended a functional capacity evaluation. PX 2. Petitioner underwent this evaluation at Athletico on October 17, 2009, Petitioner reported that he performed one day of full duty at April of 2009 but was limited by pain. Petitioner also reported that he was currently subject to a 20-pound lifting restriction but that Respondent was unable to accommodate this restriction.

The evaluator concluded that Petitioner put forth "good, though not entirely full, effort" during the evaluation. He based this conclusion on the fact that Petitioner was "limited by reported low back pain before objective measures of physical effort... indicated that full effort was being exerted." He described Petitioner's subjective reports of pain to be "both reasonable and reliable." He found Petitioner capable of functioning at a light physical demand level and noted that Petitioner "did not meet the identified physical demand requirements of his target job of laborer/refuse collector." He recommended a variety of work restrictions, including no lifting or carrying over 20 pounds on an occasional basis, no frequent or repetitive bending [*17] or twisting and no prolonged walking. PX 3.

On October 29, 2009, Dr. Spencer noted that Petitioner had completed a functional capacity evaluation. He stated: "we are going to attempt to release [Petitioner] to work full duty." Two weeks later, Petitioner returned to Dr. Spencer and indicated he was back to work but experiencing pain. The doctor prescribed Motrin, to be taken three times daily. PX 2.

On January 20, 2010, Dr. Spencer recommended a repeat lumbar spine MRI due to Petitioner's ongoing complaints. The MRI, performed without contrast on February 2, 2010, showed post-operative changes at L3-L4 with no evidence of central or foramina 1 stenosis.

On February 11, 2010, Or. Spencer reviewed the repeat MRI and recommended that Petitioner return to work within the restrictions recommended by the functional capacity evaluator. PX2.

At Respondent's request, Dr. Singh re-examined Petitioner on March 18, 2010. Dr. Singh noted a pain rating of 4/10. On examination, he noted no positive Waddell findings. He found Petitioner's current symptoms to be causally related to the work injury. He found Petitioner to be at maximum medical improvement. With respect to work status, he recommended [*18] permanent restrictions based on the functional capacity evaluation. PX 5.

On March 27, 2010, Petitioner saw Dr. Chmell for an examination at the request of his attorney. The doctor's report of March 29, 2010 sets forth a consistent history of the April 11, 2008 work accident and subsequent treatment. The doctor noted that Petitioner had not worked since December 9, 2009 "because he has not been provided with a light duty job."

Petitioner complained of mild low back discomfort with minimal activities, Petitioner Indicated he did reasonably well when inactive but would develop back pain radiating into his buttocks and thighs "even with a small amount of physical activity, such as household chores." He reported taking Ibuprofen frequently and a muscle relaxer occasionally.

Dr. Chmell described Petitioner's gait as normal. On examination of the lumbar spine, he noted a healed surgical scar between LI and L5, tenderness of the paraspinal muscles on both sides of this scar and a diminished range of motion. He was able to accomplish straight leg raising to 80 degrees bilaterally "with back, buttock and thigh pain."

Dr. Chmell reviewed Dr. Singh's reports along with the functional capacity [*19] evaluation and various treatment records. He found Petitioner to be at maximum medical improvement and characterized the treatment to date as reasonable and necessary. He agreed with the results of the functional capacity evaluation and indicated Petitioner could never resume working as a laborer. PX 6.

At the request of his attorney, Petitioner met with Steven Blumenthal, MS, CRC, a certified rehabilitation counselor [hereafter "Blumenthal"], on August 2, 2010 for purposes of a vocational rehabilitation assessment. Blumenthal issued a report the same day. He also prepared and signed a rehabilitation plan in accordance with Section 7110.10 of the Rules Governing Practice Before the Commission. PX 7.

In his report, Blumenthal described Petitioner as cooperative and communicative. He observed no pain behaviors. He stated that Petitioner "appeared motivated to return to work in another capacity."

Blumenthal described Petitioner's driving status as follows:

> "[Petitioner] reports that he holds a valid standard Illinois driver's license but that it is currently suspended due to receiving two speeding tickets and he expects to be able to have his license active again as of December 2010."

[*20] Petitioner denied any felony convictions but reported a DUI arrest in 1995.

Petitioner rated his current back pain level as 3/10. He had last seen Dr. Spencer in February 2010 and had no follow-up appointments. He reported taking Ibuprofen twice weekly and doing stretches at home on a daily basis. He denied having any health problem other than his back condition that would affect his ability to resume working. When asked about his current emotional status, he indicated it was difficult for him to not be able to get up in the morning and go to work. He reported "looking at other work such as customer service and sales."

Petitioner indicated he graduated from Wells High School in Chicago in 1980, He described himself as a "C" student. He had attended a computer class for two to three weeks in the 1980s. He reported having a home computer. He described himself as a "hunt and peck" typist.

Petitioner reported having worked as a bagger and cashier at a Jewel store in the early 1980s. He was unemployed between 1983 and 1985. In 1985, he began working as a laborer/garbage collector for Respondent. He was a member of the laborers union during the period he worked for Respondent. As of his [*21] April 11, 2008 work accident, he earned $ 26.00 per hour. Between 1997 and 2003, he worked part-time for Target as a supervisor in customer service. When be left Target in 2003, he was earning $ 11.00 per hour. Between November 2007 and April of 2008, he did some maintenance-related work for Shriners Hospital, cleaning a kitchen and vacuuming floors. He earned $ 12.00 per hour for this work.

Petitioner informed Blumenthal he was receiving $ 495/month in disability pay from the pension board along with his workers' compensation benefits. He dented applying for Social Security disability benefits.

Petitioner indicated he felt he could still perform his customer service job at Target if his restrictions could be accommodated. He also expressed willingness to work as an unarmed security guard in a residential or industrial setting.

Blumenthal administered various tests to Petitioner. He indicated that the Gates-MacGinitie reading test showed Petitioner's reading skills to be "in the average range in comparison to entering community college students." Petitioner's WRAT [Wide Range Achievement Test] scores showed that his spelling, math paper and pencil computational

skills were below average. [*22] Petitioner scored in the "low average to average range of non-verbal problem solving ability" on BETA III testing.

Blumenthal concluded that Petitioner's work experience was a better indicator of his aptitudes and abilities than his test scores, noting that Petitioner worked slowly and "was not a good test taker."

Blumenthal opined that Petitioner "would be a good candidate for vocational rehabilitation job placement services." He projected that job placement could take up to six months or longer and would cost about $ 15,000. He opined that Petitioner would benefit from job readiness and computer training.

Blumenthal projected that Petitioner "will earn $ 8.25 to $ 13.78 an hour based on State of Illinois Department of Economic Security Wage Data." PX 7.

Petitioner testified he received temporary total disability benefits from Respondent while he was undergoing treatment and some maintenance benefits after he concluded treatment. In 2010, he received a letter from Angie Matos, an administrator with the Department of Streets and Sanitation. Matos directed Petitioner to attend a meeting. Petitioner testified he attended this meeting in September of 2010. The meeting was held in a Streets [*23] and Sanitation building at 39th and Iron. When Petitioner walked into the room where the meeting was being held, he saw five individuals sitting at five separate tables. Matos was present. Petitioner gave the letter he had received to Matos and she directed him to start a job search. Over Respondent's objection, Petitioner testified that Matos gave him a form and told him to log ten job contacts weekly on this form and turn the form in at City Hall every Monday between 8 AM and 4 PM. Petitioner identified PX 8 as the form he received from Matos. According to Petitioner, Matos did not ask him about his educational background or skills. Nor did she provide any other instructions as to how Petitioner was supposed to look for work.

Petitioner testified he does not have a high school degree. After he met with Matos, Respondent did not offer him an opportunity to acquire computer skills or attend GED classes.

Petitioner testified that, after he met with Matos, he started looking for work at various retail stores in his area. Those stores included Target and Wal-Mart. He listed his job contacts on a form similar to PX 8 and turned the form in at City Hall each week. Since he does not have [*24] a driver's license, he had to travel to City Hall via public transportation. It took him three hours, round trip, to accomplish this.

Petitioner testified he continued looking for work and turning in the requisite forms until he received a letter from Respondent advising him that his maintenance benefits had been suspended as of September 29, 2011. Petitioner identified PX 8 as a copy of this letter. The letter bears the signature of Kirstjen Lorenz, director of Respondent's workers' compensation division. Lorenz advised Petitioner his benefits were being suspended due to non-compliance with Respondent's "Injury on Duty Job Search Program." PX 8 reflects that Petitioner's counsel and Angie Matos received carbon copies of the letter.

Petitioner testified that Respondent suspended his benefits because he failed to present the requisite forms for several weeks. On September 30, 2011, he went to City Hall and supplied the missing forms. He had the forms time-stamped that day. [PX 8 contains these forms.] Despite the fact he supplied the forms, Respondent failed to pay him maintenance benefits for the period September 29, 2011 through October 16, 2011. Respondent did resume paying him [*25] benefits at a later point.

At Respondent's request, Petitioner met with Julie Bose, a certified vocational rehabilitation counselor, on October 3, 2011, Bose questioned him about his educational background, his skills and the status of his driver's license. At Bose's direction, Petitioner enrolled in a GED course at Triton Community College at the end of 2011. Petitioner testified that Triton is about 30 to 45 minutes away from his home via public transportation. The GED class was held from Monday through Thursday, 9 AM to 12 PM each day. Petitioner also enrolled in a computer literacy class at Elmwood Park Library. This class was held each Tuesday at 1:00 PM, Petitioner testified he continued attending the GED and computer classes until Respondent terminated vocational rehabilitation efforts. During this time, he continued to go to City Hall between 1:00 and 4:00 PM every Monday to drop off completed sheets.

Under cross-examination, Petitioner testified he was not asked about his prior medical history during his initial visit to MercyWorks, [Dr. Marino's note reflects Petitioner did in fact relate that he had injured his back many years earlier.] Petitioner testified he last underwent [*26] injury-related treatment at MercyWorks in May 2010. He has been back to MercyWorks since that time for general check-ups pursuant to his pension plan. He is eligible for a pension by virtue of his age but he is not currently receiving pension benefits. He is not currently taking any medication for his low back, He

has no upcoming appointments for low back care. He is 5 feet, 9 inches tail and weighs 197 pounds. He has not injured his low back since the work accident. He has a beer maybe twice a month. He lost his driver's license due to a DUI and had no license while he was undergoing vocational rehabilitation. Respondent required him to make ten job contacts per week. Between September 2010 and October 2011 there were occasions when he failed to turn in sheets reflecting ten weekly contacts. About 70% of the job contacts he made were in person. On some occasions he wrote "not hiring" on the sheets indicating he could not obtain an interview. He repeatedly contacted the same retail outfits, such as Lowe's, Jewel, Target and Wing Stop, while looking for work. The Lowe's, Target and Jewel stores he visited are in the Brickyard Mall. Wing Stop is on Harlem.

Petitioner testified he met [*27] with Blumenthal on one occasion. Blumenthal did not make job contacts for Petitioner. Petitioner testified he told Blumenthal he did not have a valid driver's license. He also told Blumenthal he lost his license due to DUI Issues, not speeding tickets. He denied telling Blumenthal he expected to have his license again by December 2010. He did not recall telling Blumenthal he graduated from high school in 1980. After looking at Blumenthal's report, he recalled telling Blumenthal he graduated from high school in 1980 and was a "C" student. While he was undergoing vocational rehabilitation with Med Voc, he was required to make ten job contacts per week and pursue leads supplied by Med Voc. Med Voc sent him job contact information.

Petitioner acknowledged he did not provide Med Voc with attendance slips from his GED classes. [Petitioner did, however, offer into evidence records from Triton College concerning the reading and math classes he attended in early 2012, PX 11.] He has not yet obtained his GED. He again contacted various Brickyard Mall stores, including Jewel, Home Depot and Wing Stop, in April 2012,

Petitioner testified he took public transportation to the Commission. This took [*28] an hour. He arrived at the Commission at 8:00 AM. His low back pain was aggravated by sitting at the Commission.

On redirect, Petitioner testified that, when he contacted prospective employers, he asked about cashier and sales-related jobs. He did this because he worked as a cashier in the past. When he used the term "pending" on a sheet dated July 21, 2010, this meant he submitted an application and was told to check back every couple of weeks. When he wrote "no" with respect to his resume, this meant he had previously submitted a resume.

In addition to the exhibits previously summarized, Petitioner offered into evidence PX 10, a June 27, 2012 letter authored by Robert Chianelli, the assistant business manager of Local 1001. in this letter, Chianelli indicated that as of June 27, 2012, the hourly wage of a sanitation laborer is $ 32.79 "under the current collective bargaining agreement between [Respondent] and Laborers' Local 1001." Respondent did not object to PX 10.

Respondent called Julie Bose, a certified vocational rehabilitation counselor, to testify. Bose testified she has a master's degree in counseling from IIT. She has taken post-master's classes at IIT in order to maintain [*29] her certification. She owns Med Voc. Med Voc provides an array of services, including testing, retraining when appropriate, ergonomic studies and labor market surveys. She has operated Med Voc for thirteen years. She previously worked for Grzesik, another vocational rehabilitation outfit, for fifteen years.

Bose testified she first met Petitioner in October 2011. They met at a Burger King in Petitioner's neighborhood. After she met with Petitioner, she created a vocational plan and issued a report setting forth that plan. Thereafter, it was her employee, Laura Kronenberg, who interacted with Petitioner. Bose testified she never met with Petitioner again. She and Kronenberg met weekly to discuss Petitioner's progress. Bose supervised Kronenberg as necessary and wrote reports.

Bose testified she recommended a GED program to Petitioner because Petitioner totd her he did not finish high school. The plan that Bose developed consisted of GED monitoring by Med Voc until Petitioner could begin GED classes at Triton, job search efforts and computer classes.

Bose acknowledged that Petitioner has no transferable skills from his laborer job. However, Petitioner has retail experience and expressed [*30] interest in working in retail.

Med Voc requires individuals to make a minimum often job contacts per week. Five of those contacts are to be made in person. Med Voc sends out job leads weekly. Med Voc requires individuals to send E-mail confirmation of job contacts made via the Internet.

Bose testified that Petitioner's compliance was less than full at the outset and "completely deteriorated" thereafter. By April of 2012, Petitioner was failing to follow up on job leads and failing to provide Med Voc with evidence that he

was attending the GED classes at Triton. After Petitioner failed to supply signed attendance sheets, Bose contacted Triton. Triton would not release information unless Petitioner signed a release form. Bose sent this form to Petitioner (with a copy to Petitioner's counsel) but Petitioner refused to sign it. Bose was thus never able to confirm attendance, in March of 2012, Petitioner indicated he went to Menard's on West Diversey to find a job but there was no Menard's store at the address Petitioner provided.

Bose testified that, when she first met with Petitioner, he told her his driver's license had been suspended due to two recent DUIs. Since a driver's license [*31] can be very helpful to someone who is looking for work, Bose asked Petitioner what steps he was taking to regain his license. Petitioner said he did not anticipate getting his license back "anytime soon."

Bose testified that she reviewed Blumenthal's report and that Petitioner's reporting to Blumenthal was inconsistent with his reporting to her. Petitioner told Blumenthal he lost his license due to speeding tickets. Had this been true, Bose could have negotiated the tickets and eased the vocational rehabilitation process. Petitioner also told Blumenthal he graduated from high school. If in fact Petitioner is a high school graduate, there would be no reason for him to attend GEO classes. The inconsistencies impair Blumenthal's opinions concerning Petitioner's employability. Blumenthal was trying to find a security guard job for Petitioner. You need a PERC card to get such a job and you need a GEO or high school degree in order to obtain a PERC card.

Under cross-examination, Bose acknowledged she met with Petitioner only once. Bose also acknowledged that Petitioner is physically unable to resume his old job. At the outset, she asked Respondent about light duty jobs it might have available. [*32] Respondent told her it had "internal staff" to address this and that she was not to be involved in looking for alternative work within Respondent.

Bose testified that the vocational plan she formulated in this case is set forth on pages four and five of her initial report. In this plan, she described Petitioner as a "good candidate" for vocational rehabilitation. She did not prepare a vocational assessment on the designated Commission form.

On redirect, Bose testified that employers typically do not broach the subject of salary without an application having been made. She did not use the Commission form to describe her plan because the form consists of only one page and it requires Petitioner's signature. In the thirty years she has been involved in vocational rehabilitation, no claimant has signed such a form. Petitioner agreed to the plan she set forth in her initial report. Her list of possible jobs for Petitioner is not exhaustive.

In addition to the exhibits previously discussed, Respondent offered into evidence a group of reports issued by MedVoc. RX 4. Petitioner's attorney raised a hearsay objection to all of the documents in RX 4 other than Bose's initial report (separately [*33] offered as RX 2), noting that Bose never met with Petitioner after October 22, 2011 and that he had no opportunity to cross-examine the MedVoc employees who met with and evaluated Petitioner's level of cooperation after that date. The Arbitrator sustained Petitioner's objection. The Arbitrator notes that the reports at issue were co-authored by two individuals, Laura Kronenberg, B.A. and Lauren Egle, B.A., both of whom are described as "job placement specialists," There is no indication that either of these individuals is a certified vocational rehabilitation counselor.

Respondent also offered into evidence a large group of pre-printed "City of Chicago Injury on Duty Job Search Logs" completed by Petitioner. These documents run from June 4, 2010 through April 6, 2012. Each document contains the following instructions:

> "This is to document your job search now that you have reached Medical Maximum Improvement (MMI). Please fill out this form out [sic] and deliver it in person each week to the address listed below. Failure to complete and deliver this form by the end of each week may result in the suspension or termination of your disability payments."

Each form allows the person [*34] documenting his job search to list up to six prospective employers.

Arbitrator's Credibility Assessment

Petitioner was a calm and articulate witness. Respondent has employed Petitioner for 27 years, a factor which weighs in Petitioner's favor, credibility-wise,

There were discrepancies between Btumenthal's and Bose's accounts of Petitioner's education and driver's license suspension. At the hearing, Petitioner denied telling Blumenthal he finished high school and lost his driver's license due to speeding tickets. Petitioner stipulated he lost his license due to DUIs. Blumenthal's report reflects that Petitioner mentioned a DUI arrest.

The Arbitrator has considered the variances between the two reports in assessing Petitioner's credibility. On this record, the Arbitrator is unable to conclude that Petitioner deliberately misled Blumenthal. To the extent that Blumenthal relied on inaccurate information, that information could have prompted him to project higher rather than lower potential earnings.

While it is true that a DUI conviction has a negative connotation, as Bose testified, there is no evidence suggesting that Petitioner used his lack of a valid driver's license as an [*35] excuse for failing to look for work. Rather, the evidence suggests that Petitioner is comfortable with, and regularly takes, public transportation to get where he needs to go.

Arbitrator's Conclusions of Law

Is Petitioner entitled to maintenance benefits from September 29, 2011 through October 16. 2011 and from April 9, 2012 through the hearing of January 4, 2013? Is Petitioner entitled to wage differential benefits?

In his report of March 18, 2010 (PX 5), Respondent's Section 12 examiner, Dr. Singh, found Petitioner to be at maximum medical improvement and in need of permanent restrictions per the functional capacity evaluation (PX 3).

Petitioner claims maintenance from March 16, 2010 through the hearing of January 4, 2013. Respondent contends that Petitioner was entitled to maintenance during only two intervals: from March 16, 2010 through September 28, 2011 and from October 17, 2011 through April 8, 2012.

The Arbitrator finds that Petitioner was entitled to maintenance during the first disputed interval, September 29, 2011 through October 16, 2011. Before September 29, 2011, Petitioner participated in Respondent's "job search program" by reporting to City Hall every Monday [*36] and turning in the requisite sheets. On September 29, 2011, Respondent sent Petitioner a letter indicating his benefits were being terminated due to "non-compliance" with this program. Petitioner acknowledged having failed to turn in several sheets prior to September 29, 2011. He immediately remedied the situation by going to City Hall on September 30, 2011 and handing in the missing sheets. He had the presence of mind to have copies of those sheets time-stamped. PX 8. He went back to City Hall on October 3 and 24, 2011 and submitted other sheets listing contacts he made between September 26 and October 21, 2011. [See the sheets time-stamped October 3 and 24, 2011 in RX 1.] Respondent resumed the payment of maintenance on October 17, 2011 and never provided an explanation of its failure to pay Petitioner from September 29, 2011 through October 16, 2011. Since "compliance" with Respondent's program consisted solely of producing the sheets each Monday, with Respondent providing no guidance as to how Petitioner should be going about his job search, and since Petitioner took steps to supply Respondent with the missing information, the Arbitrator finds that Respondent should be held liable [*37] for maintenance from September 29, 2011 through October 16, 2011.

With respect to the second disputed period, April 9, 2012 through January 4, 2013, the Arbitrator awards Petitioner wage differential benefits but not maintenance. Respondent contends Petitioner is entitled to no benefits after April 8, 2012 based on alleged non-compliance with vocational rehabilitation. Petitioner contends he is entitled to maintenance because Respondent did not provide true vocational rehabilitation and there is no evidence of non-compliance. The Arbitrator has carefully considered these arguments. The Arbitrator agrees with Petitioner that, before October of 2011, Respondent did not provide vocational rehabilitation as contemplated by the Act. The evidence, including Petitioner's credible testimony and the forms in RX 1, leads the Arbitrator to conclude that Respondent provided no actual job search assistance before October of 2011. [See *W. B. Olson, Inc. v. IWCC. 2012 Ill.App. LEXIS 907,* in which the Appellate Court held that "vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational [*38] retraining, including education," citing *820 ILCS 305/8(a)* (West 2010) [emphasis added]. Even after Respondent decided to alter its approach and retain MedVoc, it prevented MedVoc from exploring the most obvious source of tight duty work, i.e., its own job bank,

The Arbitrator turns to the issue of whether Petitioner cooperated with MedVoc's efforts. As noted previously. Petitioner's interaction with MedVoc consisted of one meeting with a certified vocational counselor and subsequent supervised evaluations by non-certified personnel. Even if one goes beyond Bose's initial report and testimony and considers all of the rejected MedVoc reports in RX 4, there is no evidence that Petitioner consistently refused to pursue job leads or show up for appointments. In her report of April 9, 2012, Egle acknowledged that Petitioner typically submitted job

sheets, attended scheduled appointments and dressed appropriately. Egle noted that Petitioner did not always meet MedVoc's goal of ten contacts per week but conceded that Petitioner typically came close to meeting this goal, Egle expressed some concern about Petitioner's motivation but again sent Petitioner [*39] job leads on April 13, 2012, after Respondent stopped paying benefits. There is no evidence that Bose, Kronenberg, Egle or anyone else at MedVoc ever recommended that rehabilitation efforts be discontinued. Bose faulted Petitioner for failing to allow her access to his Triton College records but, in the Arbitrator's view, there is no convincing evidence that Petitioner's participation in GED classes was vital to his finding work. The MedVoc reports do not reflect that any prospective employer declined to interview or hire Petitioner because he lacked a high school degree.

Having said this, there is also no evidence that Petitioner continued to seek work on his own between early April 2012 and the January 4, 2013 hearing. [See *Roper Contracting v. Industrial Commission, 349 Ill.App3d 500, 506* (5th Dist, 2004), in which the Appellate Court upheld an award of maintenance during a period when the claimant conducted a self-directed job search] Petitioner did continue to attend classes at Triton after April 8, 2012 but only until early May. PX 11.

On this record, the Arbitrator finds it appropriate to sward wage differential benefits rather than maintenance [*40] from April 9, 2012 forward. There was never any dispute as to Petitioner's inability to resume his former laborer job. Nor is there any dispute as to how much Petitioner would be earning, i.e., $ 32.79 per hour, if he could still perform that job, PX 10. While Blumenthal and Bose did not rely on identical histories, their opinions overlapped to the extent that they both targeted cashier and customer service jobs when they evaluated Petitioner in 2010 and 2011, noting Petitioner's past retail experience. Blumenthal noted that Petitioner was earning $ 11.00 per hour when he left his part-time job at Target. Blumenthal projected earnings of $ 8.25 to $ 13.78 per hour. Bose did not criticize this projection or make a projection of her own. The Arbitrator selects $ 11.00 per hour as a reasonable wage. The Arbitrator arrives at a wage differential rate of $ 581.06 by multiplying $ 32.79 by 40 hours to arrive at $ 1,311.60, subtracting $ 440.00 [$ 11.00/hour x 40] to arrive at $ 871.60 and dividing $ 871.60 by 2/3.

In summary, the Arbitrator awards maintenance benefits in the amount of $ 758,84 per week from March 16, 2010 through April 8, 2012, with Respondent receiving credit for the $ [*41] 79,886.34 it paid in maintenance benefits prior to the hearing (Arb Exh 1), and wage differential benefits in the amount of $ 581.06 per week from April 9, 2012 through January 23, 2013 and continuing thereafter for the duration of Petitioner's disability.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDICompensabilityInjuriesNormal Exertion

3 of 100 DOCUMENTS

JILLIAN BIANCHI, PETITIONER, v. CHILDREN'S MEMORIAL HOSPITAL, RESPONDENT.

NO. 09WC 43037

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 878; 2014 Ill. Wrk. Comp. LEXIS 1043

October 8, 2014

JUDGES: Kevin W. Lamborn; Thomas J. Tyrreil; Michael J. Brennan

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 30, 2013 is hereby affirmed and adopted.

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

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

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

DATED: 08 2014

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was [*2] mailed to each party. The matter was heard by the Honorable Brian Cronin, Arbitrator of the Commission, in the city of Chicago, on June 12, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Is Petitioner's current condition of ill-being causally related to the injury?
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?

What temporary benefits are in dispute?
TTD
What is the nature and extent of the injury?

FINDINGS

On **May 19, 2009**, Respondent was operating nu under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner [*3] earned **$ 50,960.00**; the average weekly wage was **$ 980.00**.

On the date of accident, Petitioner was **27** years of age, single with **0** dependent children.

Petitioner has received all reasonable and necessary medical services -- under group insurance.

Respondent has paid all appropriate charges for all reasonable and necessary medical services -- under group insurance.

Respondent shall be given a credit of **$ 0.00** for TTD benefits, **$ 0.00** for TPD benefits, **$ 0.00** for maintenance benefits and **$ 54,917.44** for "other benefits," for a total credit of **$ 54,917.44**.
Respondent is entitled to a credit for "other benefits" paid under group insurance, pursuant to Section 8(j) of the Act.

ORDER

THE ARBITRATOR FINDS THAT PETITIONER HAS FAILED TO PROVE THAT SHE SUSTAINED AN ACCIDENT THAT AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT. THEREFORE, ILE DENIES COMPENSATION. ALL OTHER ISSUES ARE MOOT.

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 [*4] **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

December 26, 2013

Date

FINDINGS OF FACT

The Petitioner had worked for the Respondent from February 2008 until May 2009, as a Customer Service Representative in the Laboratory Call Center. The Petitioner testified that she worked Monday through Friday from 9:30 a.m. until 6:30 p.m. She testified that she had one hour of break time a day. The job consisted of answering telephone calls, making telephone calls, and computer work. The Petitioner answered and made telephone calls by using an earpiece, which she used on either ear. To answer, or initiate a telephone call, the Petitioner tapped a button on the side of the earpiece. The Petitioner testified that it would take about one second for her to reach up and tap the button on her earpiece. The Petitioner also could answer or initiate telephone calls the traditional way: by picking [*5] up the telephone receiver. As part of her job, the Petitioner used her computer to look up lab results at the request of patients or physicians. There was no testimony of her elbows being held in a flexed position or of her work-station being awkward other than an ergonomic assessment being conducted and some changes made after she left the employ.

Victoria Harris, Administrative Director for the Department of Pathology and Laboratory Medicine, testified on behalf of the Respondent. Ms. Harris testified that she hired the Petitioner in 2008 as a Customer Service Representative in the Call Center. She testified that a majority of a Customer Service Representative's duties were answering telephones and providing customer service to clients. She testified that other duties of a Customer Service Representative included faxing, labeling of reports, and patient inquiry. Ms. Harris testified that Customer Representatives used an earpiece to answer and make telephone calls. She testified that to answer or make a telephone call, the Customer Representative would reach up and tap a button on the earpiece. She testified that a Customer Service Representative would locate the requested information [*6] by inputting a patient name or medical record number into the computer. Ms. Harris testified that the average time for a telephone call would be about one minute. Ms. Harris testified as to three months of the Petitioner's call data (Respondent's Exhibit No. 11). For the month of August 2008, the Petitioner answered and placed a total or 1,465 calls, or 63.6 calls per day. For the month of September 2008, the Petitioner answered and placed a total of 1.444 calls, or 66 calls per day. The average talk time for all of her calls during September 2008 was 51 seconds. For the month of October 2008, the Petitioner answered and placed a total of 1,148 calls, or 49.9 calls per day. The average talk time for all of her calls during October was 1 minute and 16 seconds.

The Petitioner testified from memory and testified that she thought it was about 100 calls per day, incoming and outgoing, but agreed that it would take one second to tap the earpiece and that the length of time for each call varied.

Around May 2009, the Petitioner began to notice aching and numbness in her pinkies. She testified that she noticed these symptoms at work, as well as in the middle of the night. She testified that [*7] she feel shocks down the forearms, and a stabbing/burning feeling in the back of both elbows. The Petitioner testified that she notified her immediate supervisor and department supervisor of her complaints.

The Petitioner was initially seen by Dr. Shipley on May 19, 2009 at Rush Primary Care. The Petitioner was prescribed medication and an EMG of both elbows was ordered. The Petitioner at this time did not attribute her condition to any specific work activity.

The Petitioner was seen by Dr. Fernandez's Physician's Assistant on May 28, 2009. On the New Patient Information Form, the Petitioner indicated "unknown" when asked where and how the injury occurred (Respondent's Exhibit No. 4). The physician assistant recommended surgery on both elbows. The Petitioner was prescribed splinting and a Medrol Dosepak. The Petitioner was taken off work.

The Petitioner returned to Dr. Fernandez in June 2009 and was prescribed another Medrol Dosepak.

The Petitioner was seen by Dr. Fernandez on July 1, 2009. He recommended that the Petitioner undergo surgery. The Petitioner was kept off work.

The Petitioner saw Dr. Tulipan for a second opinion. There was no mention in Dr. Tulipan's records as to the [*8] cause or her condition; merely that surgery was appropriate.

On August 31, 2009, Dr. Fernandez performed left elbow surgery. The Petitioner testified that after surgery, she was having pain at the incision site, as well as more nerve pain. The burning in the elbow had dissipated, but she was still having symptoms She testified to having weakness in the left arm and limited range of motion at this time. Dr. Fernandez prescribed therapy and advised the Petitioner to wear a splint on the left arm at night.

The Petitioner started left-arm therapy on September 17, 2009.

On November 2, 2009, Dr. Fernandez performed surgery on the Petitioner's right elbow. He placed the Petitioner in a non-removable splint.

The Petitioner returned to Dr. Fernandez on November 16, 2009. He placed the Petitioner in another splint and ordered physical therapy for the right arm.

The Petitioner saw Dr. Fernandez in December of 2009 after continued therapy. The Petitioner testified that at this time she was experiencing pain and weakness in the right arm. She testified that by that point in time, the left-amt symptoms had gotten a little better, but then they started to get worse again. On the left side, the Petitioner [*9] noticed burning in the elbow, shocks on the arm, numbness and tingling in the pinky.

On February 13, 2010, Dr. Fernandez performed a second surgery on the Petitioner's left elbow.

The Petitioner returned to Dr. Fernandez on March 2, 2010. He removed the Petitioner's splint and put her back in therapy. She remained off work.

The Petitioner returned to Dr. Fernandez on March 30, 2010. He Petitioner was still in physical therapy and she remained off work. At this point in time, the Petitioner testified that she was experiencing improvement with symptoms in the right arm, but still noticed weakness and stiffness. In terms of the left elbow, the Petitioner testified that she was having weakness and stiffness as well as shooting pains and aching in the pinky. Dr. Fernandez prescribed another Medrol Dosepak and splints to wear at night.

The Petitioner was seen by Dr. Michael Vender on April 2, 2010, for an independent medical examination.

The Petitioner returned to Dr. Fernandez on July 13, 2010. He prescribed home exercises for the Petitioner.

The Petitioner again returned to Dr. Fernandez on September 7, 2010. At this time, Dr Fernandez released the Petitioner to light duty at 20 hours [*10] a week. The Petitioner testified that she found work as an Administrative Front Desk Assistant on October 18, 2010. The Petitioner testified that her job duties included greeting guests, data entry, and stocking the kitchen. She testified that she had a flare-up of symptoms, including shooting pains, numbness, tingling, and aching. The Petitioner left this employer in May 2012. When she left the employer, she was working 35 hours a week.

The Petitioner returned to Dr. Fernandez on December 2, 2010. He recommended that she continue with home exercises.

The Petitioner saw Dr. Fernandez for the last time on May 24, 2011. She testified that she was better, but still experiencing symptoms. Dr. Fernandez released the Petitioner to full duty. The Petitioner was instructed to see him if she felt she needed further evaluation or treatment.

At the time of hearing, the Petitioner admitted that she has not returned to Dr. Fernandez. The Petitioner further admitted that she has not sought medical treatment for her elbows since being released by Dr. Fernandez on May 24, 2011. The Petitioner also admitted that she was not taking any medications for her elbows.

The Petitioner testified that she is [*11] employed part time as a Physician's Assistant in an allergy practice. She testified that in performing these duties, she does use retractors.

The Petitioner testified that she still has pain in both elbows of varying degree. She testified that certain activities, such as cleaning around the house, moving furniture, carrying things, and yoga initiates some of the symptoms.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with regard to issue (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator makes the following findings of fact and conclusions of law:

The Petitioner was employed by the Respondent, Children's Memorial Hospital, for a limited period of time -- February, 2008 to May 2009.

The testimony of both the Petitioner and her Supervisor, established that she wore an earpiece on either side and that it took one second to tap the earpiece to initiate the call or to end a call. There was no testimony that the tapping of the earpiece required any force or that it was performed in an awkward manner. As to the keying, it was limited in strokes by entering into the computer the patient's name or [*12] medical record number and from there, information could be obtained from the computer and given to the inquiring medical provider or patient.

The Arbitrator notes that when the Petitioner first saw Dr. Fernandez on May 28, 2009, she was required to fill out a New Patient Information Form/Questionnaire. In that New Patient Information Form/Questionnaire, she indicated "unknown" when asked where and how the injury occurred (Respondent's Exhibit No. 4). She was unable to identify at that time any specific work activity that caused her problem. She merely indicated that site had symptoms at work as well as in the middle of the night.

Dr. Fernandez testified that he believed the Petitioner's bilateral cubital tunnel syndrome was work related. Dr. Fernandez testified that the Petitioner did not have any extrinsic risk factors such as age, increased body mass index, diabetes or tobacco use. Initially, in his deposition, he felt that her condition was not idiopathic but later in the deposition, admitted that about one-third of the cubital tunnel cases are.

Dr. Fernandez testified at his deposition that the Petitioner's extension and flexion of the elbow when she answered the telephone caused [*13] her cubital tunnel syndrome. Dr. Fernandez, however. admitted that he did not know what

work activities the petitioner was doing when she first began to experience her symptoms. Dr. Fernandez was unable to recall how long the Petitioner was on the telephone per day. Dr. Fernandez admitted that he did not know how the Petitioner initiated phone calls. He admitted that he did not know whether or not the Petitioner held her hand up to the earpiece for a minute or a second. Dr. Fernandez admitted that he did not know how long it took the Petitioner to tap the earpiece, what pressure she used in tapping it, or if the headset was on one side or both sides. Dr. Fernandez admitted that he never reviewed a job description or a video of the job performed by the Petitioner.

The Commission is not required to accept a causal connection opinion when it is based on flawed, inaccurate or incomplete histories. *Sorenson v. Indas. Comm'n, 281 Ill. App.3d 373,* (666 N.E.713 (1st Dist. 1996)

Dr. Michael Vender provided a contrary opinion, which the Arbitrator finds to be more persuasive and credible. Dr. Vender testified that the Petitioner described her job activities to [*14] him. Dr. Vender testified that he understood her main job activity was to answer telephones through the use of an earpiece. Dr. Vender testified that he did not believe the Petitioners work activities would be contributory to cubital tunnel syndrome. He testified that the Petitioner's condition was not caused by her work activities, because there were no stressful activities across the elbow that would he considered contributory to cubital tunnel syndrome. He testified that the Petitioner had intermittent elbow flexion and extension, with no force. Dr. Vender was asked if raising the elbow 400 times a day to tap the earpiece would change his opinion in any way as to causal connection, in which he replied in the negative. Dr. Vender testified that a great majority of cubital tunnel cases were idiopathic. Dr. Vender testified that touching the earpiece represented nothing more than routine motion of the arms that is present throughout the day.

The Arbitrator finds the Petitioner failed to prove that she sustained an accidental injuries arising out of and in the course of her employment. In so finding, the Arbitrator relied on the testimony of the petitioner and her supervisor as to [*15] the amount of telephone calls that she would make and take and the time it took to initiate the earpiece and the length of leach call. The Arbitrator also relied on the testimony regarding the keying activities finding that the Petitioner, in using the computer, would activate same by limited keying of the patient's name or medical record number and then obtaining said information from same. The Arbitrator would note that this process is unlike that of a transcriptionist or secretary who is constantly typing, but consists of limited keying with thought process.

The Arbitrator, like Dr. Michael Vender, finds that reaching up with one's arm extended to tap an earpiece one to two seconds at a time, would not be considered to be repetitive and clearly nothing which is forceful. The testimony was that this activity consisted of two-thirds of the Petitioner's workday, which would indicate that there was substantial downtime between calls. The Petitioner's supervisor testified from documented evidence as to the number of calls and length of calls as opposed to the Petitioner testifying from memory. The Petitioner, when confronted with the supervisor's testimony and documentation concerning [*16] the number of calls and length of calls, did not question same.

Based on the foregoing, the Arbitrator finds the Petitioner failed to prove that on May 19, 2009, she sustained an accident that arose out of and in the course of her employment by the Respondent.

Therefore, compensation is hereby denied. All other issues are moot.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental Injuries

2 of 100 DOCUMENTS

ANTHONY JONES, PETITIONER, v. CITY OF CHICAGO, RESPONDENT.

NO. 12WC 37009

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 880; 2014 Ill. Wrk. Comp. LEXIS 1057

October 6, 2014

JUDGES: Kevin W. Lamborn; Thomas J. Tyrell; Stephen J. Mathis

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issue of permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator only to the extent of reducing the benefits awarded under Section 8(e) of the Act for injuries Petitioner sustained to his left leg.

The Decision of the Arbitrator is attached hereto and made a part hereof. The Decision of the Arbitrator was filed with the Illinois Workers' Compensation Commission on March 14, 2014, and, in said decision, Arbitrator Mason concluded Petitioner lost 25% use of his left leg due to injuries sustained to his left knee on August 22, 2012. In arriving at her decision, Arbitrator Mason applied the criteria for determining permanent partial disability as is set forth in Section 8.1b of the Act. The Commission takes no issue with the conclusions arrived at by Arbitrator Mason in her application of Section 8.1b with the exception to the evidence of disability corroborated by the treating medical records.

In support of her findings, Arbitrator Mason noted Petitioner's testimony as [*2] to the lingering effects of his injury with respect to his work activities as well as to non-work activities. Petitioner testified he now works more slowly and deliberately and has continues to have difficulty with stairs and ladders. Outside of the work environment, Petitioner testified that he no longer rides a bicycle and avoids picking up his granddaughter. The Commission, in reviewing Petitioner's medical records and testimony and comparing the two, finds Petitioner engaged in embellishment.

The Commission notes Petitioner's complaints were more pronounced when he was examined by Dr. Michael Gross, his choice for an AMA examination, and by Dr. Shane Nho, Respondent's AMA examiner, than they were when he was examined by his own treating physician, Dr. Michael Maday, and his physical therapists at ATI. Before Drs. Gross and Nho. on October 30, 2013, and December 17, 2013, respectfully, Petitioner demonstrated diminished range of motion in his left knee. Dr. Maday, however, found the range of motion of Petitioner's left knee to be full as early as February 20, 2013, and either full or essentially full on subsequent examinations. Petitioner's physical therapists, the individuals [*3] most familiar with the condition of Petitioner's knee, apparently found Petitioner's range of motion of his left knee to be so unremarkable that they did not even address it in their reports. Similarly, Petitioner made complaints of tingling above and behind his left knee, of numbness and stiffness in the morning, of his knee popping when stretching and of his knee swelling when negotiating stairs to Dr. Gross. Dr. Nho wasn't provided with a history of tingling, numbness, stiffness or knee popping. Dr. Nho only recorded Petitioner as complaining of his knee swelling but that swelling was not attributed to any particular activity. Neither Dr. Maday nor the physical therapists took a history from Petitioner of his experiencing tingling, numbness or popping. In one instance, a physical therapist did note Petitioner complaining of a little stiffness in his knee. The only constant findings among the treating and examining medical professionals were complaints of pain, particularly with negotiating stairs, and mild atrophy of the left leg.

The Commission also notes the two complaints Petitioner testified to having outside of work, not being able to ride a bicycle and having to avoid picking [*4] up his granddaughter, are not found in his medical records.

The records the Commission chooses to rely on to ascertain the condition of Petitioner's left knee is the July 11, 2013, discharge report from ATI and the September 25, 2013, progress note taken at Midland Orthopedic. The discharge report indicated that Petitioner was discharged to return to full duty work with a pain intensity of 3/10. The same report also indicated Petitioner was told that he will continue to have "a little pain" in his knee. The records from Midland Orthopedic, created approximately two months after Petitioner's discharge from ATI, documented only Petitioner having "some pain" and "some difficulty" with the stairs. The apparently relatively low level of pain Petitioner is experiencing is corroborated by Petitioner indicating on Dr. Nho's intake form that he treats his condition with Advil and Tylenol and in his testimony that he doesn't take prescription medication.

The Commission takes the position that Petitioner was more forthcoming concerning the true condition of his left knee with Dr. Maday and physical therapists than he was with Dr. Gross, Dr. Nho or Arbitrator Mason and, in doing so, finds his [*5] left knee not be as permanently disabled as did Arbitrator Mason. Accordingly, the Commission reduces the permanent partial disability award by 2 1/2%, finding Petitioner sustained a 22 1/2% loss of use of his left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 712.55 per week for a period of 48.375 weeks, as provided in § 8(e) of the Act, for the reason that the injuries sustained caused the 22 1/2% loss of use of the left leg.

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 $ 34,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 06 2014