STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Martin Melanie,
Petitioner,
vs.

NO: 15 WC 29983

At&t aka At&t Services Inc ,
Respondent,

16IWCC0609

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 25, 2016, is hereby affirmed and adopted.

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

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

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

DATED: SEP 22 2016
o022516
DLG/mw
045

David L. Gore

Stephen Mathis

Mario Basurto

FINDINGS

On the date of accident, **1/6/15**, Respondent *was* operating under and subject to the provisions of the Act.

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

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* causally related to the accident.

In the year preceding the injury, Petitioner earned **$59,836.24**; the average weekly wage was **$1,150.70**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**. Respondent shall be given credit for STD benefits paid from 7/24/15 through 11/12/15.

Respondent is entitled to a credit of **$7,864.27** under Section 8(j) of the Act.

ORDER

Having found the petitioner did not sustain an accidental injury that arose out of and in the course of her employment by respondent on 1/6/15, the Arbitrator finds the petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

2/14/16
Date

ICArbDec19(b)

FEB 25 2016

Petitioner testified that the nonslip strip on the step was 1/8 inch. The part where she claims she tripped had chipped away. Petitioner claims that her foot caught on the part of the strip were it was chipped away.

Approximately 2 days after the incident petitioner went to the area of the stairwell where she fell and took pictures of the step she fell on, as well as pictures of other stairs in the stairwell where the strip was raised. Petitioner then took additional pictures of the same stairwell 2 months ago. She noted that these photos showed that the non-slip strip had been removed from the step she tripped on.

On 1/15/15, Haynes called Worker's Compensation and filed a claim with respect to petitioner's injury.

Petitioner tried self treatment until July of 2015. When she had not realized any real improvement by then, she made an appointment with Dr. Bruns, a chiropractor. Petitioner presented to Dr. Bruns on or about 7/1/15. Between 7/1/15 and 9/22/15 petitioner saw Dr. Bruns at least 40 times, with petitioner's last 20 or so appointments showing no discernible improvement. During this period, petitioner's discomfort was noticeable 60% of the time, and her discomfort was no better than 6 out of 10, and on a couple visits was 7 out of 10.

On 8/8/15 petitioner presented to Dr. Bruns. He authorized her off work from 7/24/15 through 11/12/15. Dr. Bruns referred petitioner to Dr. Sureka at Midwest Orthopedics. Dr. Sureka ordered physical therapy. No physical therapy records were offered.

Two right sided L4-L5 transforaminal epidural steroid injections were performed by Dr. Sureka on 8/18/15 and 9/9/15. Petitioner's complaints were related to her right low back that at times goes into her thigh. Petitioner reported that she had epidural injections in the past with good benefit. Dr. Bell performed a third injection on 10/8/15. On 10/23/15 petitioner followed-up with Dr. Bell. She reported that the injection helped her pain by about 75%, but she was starting to get some recurrence of her pain. Petitioner complained of pain in her right low back with some occasional radiation down her right leg, but not usually past the right knee. She reported no pain on the left.

On 11/11/15 petitioner underwent an MRI of the lumbar spine. The L5-S1 disc showed severe loss of height and desiccation. No significant dorsal annular bulging was noted. Mild bilateral foraminal stenosis greater on the LEFT related to spondylitic spurring, mild bilateral facet arthritis, and patent central canal was also noted. The paraspinal soft tissues were within normal limits. The visualized sacrum was within normal limits. The nerve roots were free within the confines of the thecal sac. Mild

On 11/23/15 petitioner underwent a Section 12 examination performed by Dr. Edward Goldberg, at the request of the respondent. She provided a consistent history of the accident. Petitioner reported some lumbar problems 4 years ago for which she underwent 2 epidurals. She stated that she was asymptomatic after these epidurals until 1/6/15. Dr. Goldberg reviewed the records of Dr. Bruns, which included reports from Dr. Sureka and Dr. Bell, and performed a physical examination. Dr. Goldberg diagnosed an aggravation of asymptomatic lumbar stenosis at L2-L3 and L3-L4 from the work related accident. He was of the opinion that he could not comment upon whether it was permanently aggravated if she was not done treating. Dr. Goldberg opined that the therapy and chiropractic care had been appropriate. However, he recommended no additional chiropractic care. He opined that she could be maintained on a home exercise program. He recommended a right L3-L4 transforaminal epidural injection for her radicular pain that was in the L3 distribution stopping at the knee. If this did not provide relief he said she might benefit from a right L2-L3 and L3-L4 decompression. He opined that she could continue working her normal job. He opined that she had not yet reached MMI.

Following the Section 12 examination by Dr. Goldberg, respondent would not authorize a visit to Dr. O'Leary. As a result, petitioner continued to treated with Dr. Bruns through 1/22/16, and underwent over 40 additional chiropractic treatments. No treatment reports from Dr. Bruns after 9/23/16 are included in Dr. Bruns records, despite the fact that these treatments are identified in his medical bill.

Dr. Bruns drafted a letter dated 1/27/16 to Damon Young, petitioner's attorney. He noted that he was currently treating petitioner 2 times a week. This treatment includes chiropractic adjustments along with myofascial release, as well as lower cross exercises. Dr. Bruns noted that he had referred petitioner to Midwest Orthopedics, and due to the lack of authorization to schedule a surgical evaluation, her orthopedic treatment was placed on hold. He opined that her current care was reasonable and necessary and still related to the injury on 1/6/15. He further opined that her treatment had been prolonged due to the inability of the petitioner to receive the orthopedic treatment and evaluation that were recommended.

Petitioner testified that she is currently working her regular duty job.

Dawn Haynes, petitioner's supervisor on 1/6/15, was called as a witness on behalf of respondent. Haynes testified that she is responsible for investigating accidents. She testified that she has known petitioner for 12-13 years, and did receive an email regarding the incident on 1/7/15. Haynes admitted that she did not actually talk to petitioner about the incident. She stated that this was because Richard Stoneburner stepped in and she talked to him. Haynes testified that 2-3 days after the accident she and

on the 4th, 5th, or 6th step, she claims her foot got caught where a small piece of the 1/8" non-slip strip was and she fell forward. She testified that she grabbed the railing as she was falling and pulled her back. She did not completely fall. Petitioner then continued walking up the stairs to the second floor and retrieved her phone. She then took the elevator down to the first floor. Petitioner always had the option of taking either the stairs or the elevator when going from the first to the second floor. Petitioner never testified that these stairs were only for employees use. She also testified that she only went up and down them once a day.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner did not sustain an accidental injury that arose out of and in the course of her employment by respondent on 1/6/15. The arbitrator finds it significant that the petitioner had already signed out of work, had already walked down the final stairway and was just about out the door when she realized she had forgotten her personal cell phone. Petitioner was not carrying anything other than her purse. The arbitrator finds the petitioner's decision to walk back up the stairs was solely for her own personal benefit. The arbitrator also finds it significant that petitioner never testified that the stairwell was not accessible to the general public. She also clearly testified that she had other access to and from the ground floor and the second floor where she worked, that being an elevator. Petitioner was not instructed by her employer to use the elevator or the stairwell. The choice was hers.

Additionally, the arbitrator notes that the step on which petitioner alleged she fell did have a small section of the nonslip strip missing. However, the picture shows that the strip was not raised or buckled, and in fact even where the piece was missing, the height of the strip was exactly the same as that around the perimeter of the strip, namely 1/8".

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 1/6/15.

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?

Having found the petitioner did not sustain an accidental injury that arose out of and in the course of her employment by respondent on 1/6/15, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Hufnagl,

Petitioner,

vs.

NO. 14 WC 15052

Village of Alsip,

Respondent.

16IWCC0633

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 8, 2016 is hereby affirmed and adopted.

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

16IWCC0633

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 30 2016
SJM/sj
o-9/22/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JASON B. GARRETT,

Petitioner,

16IWCC0587

vs.

NO: 14 WC 3167 & 15 WC 18366

LIBERTY MUTUAL GROUP, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) of the Act having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, permanent partial disability, medical expenses both current and prospective, and the Arbitrator's denial of Petitioner's Motion to Consolidate Petitioner's claims 14 WC 3167 and 15 WC 18366, and being advised of the facts and law, supplements 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.

Initially, the Commission notes that the Arbitrator provided a very detailed summary of the issues presented. As noted above, her decision is attached to and made part of this decision. In addition, the Commission is not changing the ultimate outcome of her decision. Therefore, an extremely detailed account of the issues of Petitioner's current condition of ill-being is not required in this decision. Finally, in this decision, the Commission only addresses the issues of accident/causation and the denial of the consolidation of claims. Accordingly, the Commission will analyze Petitioner's medical treatment only as it relates to the issues of accident and causation.

Findings of fact and Conclusions of Law

1. Petitioner called Lisa Raydant who testified she worked for Respondent for 20 years and that she "quit" on July 31, 2012. From 1998 to 2006 she was Service Manager in the Springfield area, from 2006 to 2008 she was Assistant Regional Service Manager, and she was Branch Manager from 2008 to 2012. Ergonomic assessments were made for new employees, transferred employees, and were performed periodically thereafter. As manager she performed these assessments. She was given a form to follow but otherwise had "pretty much" no training.

2. Ms. Raydant knows Petitioner, eventually became his immediate sales manager, and supervised him. Petitioner told her that he was having issues with his back. She did not remember exactly when he first mentioned it, but she visited him in his home office in 2009; "his knees were up around his ears." "He is a very tall guy and it didn't look like he was set up correctly as far as that goes. His monitor was too low for him so [she] did get monitor risers for him." The form she used indicated the monitor should be at eye level and Petitioner's was not. He was "twisted" and leaning forward when she was there. The desk was not adjustable. Petitioner was the only sales representative working from home because Respondent closed its Springfield office.

3. "Lead days" are days a sales representative is assigned to follow-up on leads from the internet on an as soon as possible basis. Not responding to leads on a timely basis caused problems. Each representative would get one lead day per week on a rotating basis. The representative would start at 8 am and was pretty much tied to their desks to get the leads and respond to them. If a representative did not respond quickly he/she would eventually be removed from the program and it generated a lot of commissions.

4. On cross examination, Ms. Raydant testified she never worked for Respondent as a sales representative; however, she did often accompany them on appointments and watch them work in the office. She did not have free access to Petitioner's home. She talked to Petitioner about his knees being around his ears and the way his head was looking at the low monitor, but did not recall talking to him about being twisted. On lead days, Petitioner would have been able to stand or sit as desired. She was only at Petitioner's home twice, once in 2009 and once in 2011.

5. On redirect examination, Ms. Raydant testified the 2 times she was at Petitioner's home she was there about three hours each. She never did an ergonomic assessment on Petitioner. She assumed he had been so assessed when he moved into the home office.

6. Petitioner called Alysha Davis-Barth. Ms. Davis-Barth testified she is a physical therapist. She has an M.A. and Ph.D. in physical therapy. She has performed about 25 to 30 ergonomic assessments. To the best of her knowledge no particular licensing is needed to be able to perform an ergonomic assessment.

7. Ms. Davis-Barth was provided a packet including photos of Petitioner's work space, an ergonomic assessment performed by an occupational therapist, and depositions of that therapist as well as those of Dr. Payne and Dr. VanFleet. She noted that the photos showed that Petitioner had to rotate to the left in order to use the keyboard and see the monitor; there was no leg space to the left to allow his chair to turn, there was not sufficient clearance for his legs to go underneath the desk so he had to push his chair back requiring him to lean forward to reach the keyboard, and Petitioner's shoulders were angled left and his hips and knees were pointed straight forward resulting in torsion or twisting of the trunk while working at the station.

8. Ms. Davis-Barth explained that "forward flexion and torsion causes an increased pressure on the discs and a breakdown of the static protective tissues around the spine and discs." If the protection of the spinal structures fails the disc can herniate. Numerous studies have found that flexion and rotating both increase inter discal pressure and "the combination of those compounds the increase in pressure." It also opens the facet joints reducing their protection and leaving discs more vulnerable to herniation. Sitting causes significantly greater pressure on the disc than standing. She characterized the ergonomic of the work station as "poor" on a scale commonly used in occupational therapy that includes rating of poor minus, poor, and poor plus. Repeated exposure to a poor ergonomic work place accumulates over time.

9. On cross examination, Ms. Davis-Barth testified she did not perform an ergonomic assessment of, and did not see, Petitioner's workplace. She did not go to his home and did not observe other chairs that were there. Petitioner approached her and hired her to perform an ergonomic evaluation. She talked with Petitioner about his job activities for about 20 minutes. She knew that Petitioner was diagnosed with a herniated disc and that what she observed of his work station could have led to a disc herniation. It appears from the photos that Petitioner could have moved his computer to the right on his desk. Ms. Davis-Barth was not aware of any studies that have evaluated body habitus and the onset of disc herniation. Greater height and weight would probably put more pressure on discs; however, skinny people may be susceptible because of lack of muscle structure. Strengthening the muscles can help prevent disc injuries.

10. On redirect, Ms. Davis-Barth testified she understood that the onset of the herniation occurred when he started to get up from his chair after working in that chair for seven years. She would not trust an ergonomic assessment performed over the telephone. She opined that "prolonged sitting in the flexed and rotated position" caused the disc herniation. Somebody in such an awkward position for extended periods of time for a number of years "is much more likely to herniate a disc than somebody who has not been in poor posturing and just stood up from a chair."

11. Petitioner testified he worked for Respondent since September 27, 1997. He started as personal sales representative and was promoted to resident sales representative in 2005.

12. In late 2006 he was asked whether he wanted to continue to work for Respondent from a home office. He dedicated a room in his home as an office and had to send pictures of the set up to Respondent. He bought the house in 2006 and the desk was already there. The docking station and chairs were sent to him by Respondent. Nobody from Respondent helped him set up the office.

13. Petitioner also testified his job was "quite diverse." He went out to solicit clients, petition existing clients, and service existing clients. Mainly he was responsible to acquire new business for Respondent. Lead days were important for all sales representatives. After they closed the Springfield office Respondent instituted lead days in which all leads generated in a certain day were sent to a single agent. He started working leads exceptionally early because leads could be generated the night before. August 29th, the date of the alleged accident, was his lead day.

14. On that day he started probably between 7:30 and 8 a.m. He worked until he was injured between 3:30 p.m. and 4:30p.m. It was a busy day and he was at his desk the entire day prior to his injury. He got up to use the restroom once. His wife brought him lunch because he was on the phone. While he was on the phone he would be imputing data at the same time. He had to twist his body to the left to access the computer and lean forward to talk to the client. He was "always twisted" the entire day. He could not move the monitor because there was no room due to the extensive paperwork. He was not aware of the risk he was in. Petitioner began to have back pain early in the day, but it progressively got worse. At one point he needed to get some paper and could not get up because of intense pain in his back and left leg. His wife had to help him get up.

15. The accident was on a Thursday. He stayed in bed all day Friday. On Saturday he was traveling with his wife to Marion. He was lying flat in the passenger seat. When they arrived, Petitioner went to bed but could not get any sleep or rest because of the pain. He drove to an ER at about 1 a.m. It was only about three miles. They administered injections and Petitioner's wife had to come and pick him up.

16. Petitioner followed up with Dr. Payne, who performed surgery. The surgery helped him stand straighter and walk better. After he was weaned off pain medication, he noticed a lot of pain down the left leg; it was weak and would give out nearly daily. He still has that issue. He was going up stairs and his left leg gave out. He twisted to grab the handrail and injured his back again. He had a second surgery.

17. Petitioner further testified he began to have problems with his back related to the chair shortly after he started working from home. He had no such problems when he was working in the office. He informed Respondent that the chair was hurting his back by e-mail dated August 7, 2007. They sent a technician to replace the hydraulic ram on the chair. That repair did not alleviate his pain.

18. By e-mail dated November 14, 2006, he had asked to have the chair he used in the office sent to his home. That chair had been specifically ordered for him after an ergonomic assessment. Respondent performed two ergonomic assessments; one at the Springfield office and one at his home after the injury. He asked Lisa Raydant for an in-person assessment in late 2010 because his back was hurting and that he thought it was related to his desk and chair.

19. Petitioner believed he began to treat for his back in 2011, he thought with his principle care physician. He later treated with Dr. Western, who administered ESIs at L5-S1. He felt better after the injections, but he "took it easy" nevertheless. He was later diagnosed with a herniated disc at L2-3 for which he had a discectomy.

20. The Sunday before his injury, Petitioner gave a eulogy in Marion, which was probably a 2 hour 45 minute drive each way. The drive and standing to give the eulogy did not cause problems with his back.

21. Petitioner last worked on September 27, 2013, which was the date of the first surgery. He had scheduled it for that day so he could finish up his work for the quarter. He cannot perform his previous job because sitting, standing, and walking are all painful.

22. On cross examination, Petitioner agreed that he began to have back problems in 2007 and saw a chiropractor prior to seeing Dr. Payne. He did not remember whether he previously discussed with doctors the cause of his back complaints. He agreed that on November 2, 2011, he reported to Dr. Payne that on June 1, 2011 he injured his back golfing. There was an MRI taken shortly after that visit. Dr. Payne was the doctor who referred him to Dr. Western.

23. Petitioner denied that when he moved to his home office he was either offered a desk or had the opportunity to request a desk from Respondent. He set up his home office. He agreed that he sent an e-mail to a representative of Respondent indicating that he had a desk he could use. He was responding to a query whether he had a desk. He did not recall sending an e-mail asking for a new desk. He also did not send any e-mails about his chair after 2007.

24. Petitioner testified he himself performed two ergonomic assessments while office operations manager in 2005, but he is "not even close" to being familiar with the process of those assessments. He requested an ergonomic assessment from Ms. Raydant, but did not get one. He requested the assessment by phone and not e-mail. He had a telephone conversation with Rachel Weygandt regarding an ergonomic assessment.

25. On redirect, Petitioner testified he complained about his chairs on dates other than those memorializes by e-mails. He had no training in performing ergonomic assessments and he would simply fill in information on a form.

26. After he attended the doctors' depositions he referred to the treatment notes and found them "incomplete or there was an assumption made by the doctor and that's what he reported as fact."

27. On re-cross examination, Petitioner testified that although he attended the deposition of Dr. Payne he did not attempt to correct the medical records because he "wouldn't know the first thing about doing that."

28. On re-redirect examination, Petitioner testified that Dr. VanFleet was incorrect when he reported that Petitioner said he was injured while working at his desk in 2011; at that time he was injured swinging a golf club. He told Dr. VanFleet that he was working in his office since 2011. Dr. Payne was incorrect in stating he hurt his back getting up; it hurt throughout the day.

29. Monica Garrett, Petitioner's wife of 24 years, testified Petitioner did not have problems with his back before they moved into their current residence in 2006. Petitioner looked uncomfortable at the desk; he could not get his legs underneath the desk so he had to reach across the desk and to go back and forth to his computer continuously. Petitioner had back problems prior to "the 29th" but "he was fine. He had some kind of a back shot and it seemed to help a lot."

30. "On the 29th" she was working and Petitioner told her he was very busy and to try not to disturb him. She went up there to ask if he wanted lunch; she made him grilled cheese. She delivered it and returned downstairs to continue working. Later, "he hollered down for" her. He was sitting at his desk and said he could not get up. She helped him get into bed and he stayed there through the next day. When they returned to Marion, she did not want Petitioner to stay alone due to his medications. He sat flat on the passenger side. When they arrived at Marion he laid down on her mother's bed.

31. Rachel Weygandt was subpoenaed by Respondent for which she worked from October 2012 to April 2015; she currently worked for another insurance company. She was administrative assistant for Brittany Brickmann, who was Petitioner's supervisor, and who trained the witness how to perform safety assessments. Ms. Weygandt also took some tele-courses with Respondent's ergonomics expert. She was "deemed a safety specialist for the office." She conducted safety assessments per Respondent's policy.

32. Ms. Weygandt conducted a work station assessment regarding Petitioner on April 25, 2013. In such an assessment she was to go over the proper procedures to maintain the desk and the way things should be situated to have a safe environment. On the form, employees are informed that if they notice anything unsafe they should report it to their managers or the witness. Her assessment of Petitioner's station was unique because it was done over the phone. She cleared that procedure with her boss.

33. Ms. Weygand believed Petitioner was provided a form to follow. She filled out the form completely based on Petitioner's responses to the questions in the form. It is similar to the procedure when she is with an employee in person. She sent Petitioner a copy of the form as completed.

34. Ms. Weygandt remembered this particular assessment because of the uniqueness of the circumstances. She specifically remembered reiterating the last element noted in the form that if there was anything noteworthy concerning his work station he should bring it to their attention. She did this to be sure he fully understood because she did not have much interaction with Petitioner. He did not mention any such thing then or at any time before she left Respondent's employment. During the process Petitioner did not mention any back/leg pain, or problems with his chair/desk/monitor. She did not believe any more formal evaluation was necessary because Petitioner "was always very forthcoming with anything that he needed" and if he needed something he would have mentioned it. If he had expressed any problems she would have worked to correct them.

35. On cross examination, Ms. Weygandt testified she did not ask Petitioner any questions that were not on the form because she did not believe they were necessary based on his responses. She did not see the workstation or take any measurements of it.

36. Brittany Brickmann was called by Respondent for which she works as senior territory manager. Before May 2015, she was senior branch manager managing the Geneva and Peoria offices. She was Petitioner's supervisor when she managed those offices from July 2012 to May 25, 2015. The Springfield office was closed by then. She took over that position from Lisa Raydant.

37. Besides her training, Ms. Brickmann had numerous ergonomic assessments because she moved to many different locations. She also assigned her assistant, Ms. Weygandt, to perform ergonomic assessments. Petitioner reported that he was receiving back treatments in 2013, but he did not report any work injury, indicate his condition was related to his office equipment, or ask for an ergonomic assessment at that time. Later he told her he thought it was related to his work station but he did not want to file a claim; he simply wanted to get his condition taken care of. She referred him to human recourses. Ms. Brickmann also testified that Petitioner could "absolutely" have come to her with any ergonomic problem. There were discussions via conference calls about the means of reporting ergonomic problems.

38. Petitioner never asked for a new chair or desk. He did ask for an ergonomic assessment to see if he needed a new chair after the alleged date of accident. Part of Ms. Brickmann's work duties included providing office equipment. If there were a request for new furniture, it would be something she could help with. Ms. Brickmann identified an e-mail she sent on August 31st. In it she mentioned that Petitioner reported his back was uncomfortable, but there was no indication that he reported a work injury.

39. On cross examination, Ms. Brickmann agreed that in her training by Respondent she was taught that ergonomic assessments were important. A reason they are important is to set up an ergonomic environment to prevent injuries. When Petitioner reported his back hurt on August 30th he indicated he thought it was because of the setup of his workstation.

40. Petitioner testified in rebuttal that the telephone ergonomic assessment performed by Ms. Weygandt took no more than two-three minutes and he clearly told her that he had to twist his body to the left to access the computer. His home workstation had always been set up that way. He did not sign or even see the assessment performed by Ms. Weygandt. The only one he saw and signed was the one done when he worked in the Springfield office. In her assessment she indicated that the requirement that the keyboard and monitor be centered with the employee's body so that the employee did not have to move from side to side, were met.

41. On cross examination, Petitioner testified that he was not aware that his monitor was badly positioned because he knew nothing about ergonomics; his job was to sell insurance and service customers. He sent pictures to Respondent and heard nothing back. He became aware the monitor should be moved only after a 3rd party assessment.

42. Ms. Weygandt testified in surrebuttal that her telephone ergonomic assessment took about 15 minutes; "you can't go through that any less than that." During that assessment, Petitioner never told her he had to bend and twist in the chair. On cross examination, Ms. Weygandt testified that she sent Petitioner a copy of the completed form. However, none of the workplace assessments have to be signed either by her or the employee.

43. The medical records reveal that on November 4, 2011, Petitioner presented to Dr. Payne, who knew Petitioner for a long time trap shooting across Southern Illinois. Petitioner was 6'6" and 365 lbs. He reported left sciatica for about four months. He remembered a golf swing in which he felt immediate pain and he gradually felt the onset of the sciatica. He was able to take Ibuprofen and referee high school varsity soccer games. He had been to a chiropractor which was somewhat helpful.

44. Dr. Payne noted positive SLR and ordered an MRI and ESI. X-rays showed moderate to severe diffuse degenerative changes most prominent at L4-5 and L5-S1. The MRI showed multilevel degenerative disc disease, superimposed on multilevel congenitally short pedicles, resulting in severe left neuroforaminal stenosis at L4-5 secondary to disc extrusion. In December 2011, Dr. Western administered an ESI at L5-S1 after evaluation.

45. Petitioner returned to Dr. Western on May 6, 2013. He had done quite well after the injection in December 2011. He reported the return of pain, which Dr. Western thought was similar to what he had in 2011. He reported a high pain level. SLR was positive of the left and negative on the right. Dr. Western ordered another ESI at L5-S1, which was performed on May 9th.

46. Petitioner returned to Dr. Western on May 13th and reported no benefit from the latest injection. Petitioner reported no new issues or injuries. Dr. Western prescribed Gabapentin, prednisone, Flexeril, and a new MRI.

47. The new MRI showed mild endplate osteophyte and small left lateral disc protrusion causing moderate neural foraminal stenosis at L4-5. However, the principle pathology noted was a large left post-lateral disc extrusion at L2-3 compressing the L3 nerve root

48. Petitioner's condition continued to worsen. On September 3, 2013, Petitioner reported a sudden worsening of his pain over the weekend. "He was just sitting at his desk on Friday doing a lot of work on the computer when he stood up, sudden pain worsening, left lower extremity radicular pain." He could not stand straight or find a position that relieves the pain. He was on the verge of being admitted for pain control. Dr. Payne ordered a "STAT MRI" and would schedule surgery ASAP. The MRI showed interval worsening of L3 nerve compression and additional chronic degenerative changes. Dr. Western administered another ESI at L3-4.

49. On September 12, 2013, Dr. Payne noted that Petitioner's L2-3 herniation was much larger with inferior migration of his fragment, which means he would have to take off a fair amount of L3. Petitioner's symptoms were still severe. Dr. Payne performed L2-3 laminectomy/microdiscectomy for herniated disc and spinal stenosis on September 30, 2013.

50. On October 17, 2013 – Petitioner was doing "really good" two weeks postop. Petitioner "was concerned about going to work because he has to sit for long periods of time and that seems to be what aggravated it before so he would like to be off work until the next visit." This notation appears to be the first mention in the medical records of Petitioner complaining that sitting at work aggravated his condition.

51. About a month later, Petitioner reported continued dull thigh pain and a lot of axial back pain, worse while sitting. He "can only sit in the chair for five minutes." Dr. Payne ordered physical therapy and a new MRI to check for residual/recurrent disc. The MRI showed only postop changes and thoracolumbar degenerative changes.

52. On December 26, 2013, Petitioner still had axial and left radicular pain. Petitioner talked "more about his radicular pain, how it started after at the end of the day he had been at his desk for seven or eight hours leaning forward, working at a computer, *etc*. When he got up to leave he could not stand straight." Dr. Payne noted that leaning forward in a chair is a position that puts some of the greatest pressure on discs. He then opined "obviously he has had herniation there before and problems with his back, but those have resolved without surgical intervention. Clearly, before we did surgery, he had a very significant change in disc herniation in the lumbar spine, so [he thought] there is a link there between the seating position at work and his back problems."

53. On January 16, 2014, Petitioner presented to Dr. Payne because he had to go into work for a while to set up his office. "They were getting him a new chair and a new desk. He was sitting there for a couple of hours, and all of the pain came rushing back. He has pain in the left leg again." Petitioner thought his symptoms were bad enough to warrant a new MRI, which Dr. Payne ordered.

54. On February 6, 2014, Petitioner reported that when he got out of his car the previous week he felt a severe/sharp pain that "almost knocked him to the ground. "He went in to his job to set up his new chair and desk and had severe back pain after one hour work." Dr. Payne diagnosed worsening left leg radicular pain and again noted they needed a new MRI. The MRI appeared to show no change at L2-3, stable foraminal protrusion at L4-5, and mild degenerative stenosis secondary to bulging protrusion at T12-L1.

55. Petitioner continued to treat with Dr. Payne but showed little improvement. On September 11, 2014, Petitioner returned to Dr. Payne reporting a new problem. He was going up stairs two days ago when his left leg gave out. He twisted to grab the railing and "kind of fell down the stairs." He had very bad axial back pain which was worse than he ever had before. His leg was "a little worse." Dr. Payne ordered a new MRI. The MRI showed multilevel degenerative changes most notably at L2-3 with a large central disc protrusion with subarticular extension causing severe central canal stenosis. There was also multilevel moderate to severe neural foraminal encroachment and mild central canal stenosis at T12-L1.

56. Petitioner did not improve with conservative treatment for the recurrent herniated disc. On December 22, 2014, Dr. Payne performed laminectomy at L2, transforaminal interbody fusion L2-3, posterior fusion L2-3, with instrumentality and bone graft for recurrent disc herniation at L2-3 and spinal stenosis.

57. Dr. VanFleet testified by deposition on June 25, 2014. He examined Petitioner on March 12, 2014, reviewed medical records, and issued a report. Subsequently, he was provided additional MRI films and issued an addendum report. Dr. VanFleet recited the history Petitioner reported. He had low back pain in 2011 after sitting for a long time. He was treated with injections and Ibuprofen and it resolved. He had a recurrence in August 2013. He was sitting in his chair by his desk for a long period of time and as he stood up he had significant pain across the back and down into his left leg. Petitioner eventually had surgery at L2-3 and had minimal improvement of back pain, but still had pain down the left leg. He required Gabapentin and Flexeril and was still not able to work.

58. On examination Petitioner was 6'6" and 380 lbs, and with a BMI of 46.3; he would be considered morbidly obese. He had difficulty with both flexion and extension. Reflexes, strength, and sensation were normal; he had no neurological deficit. He viewed an MRI from February 18, 2014 which noted postsurgical changes, degenerative disc disease at L2-3, and no focal neurological compression at L4-5 or L5-S1.

59. Subsequently he viewed MRI films from May 21, 2013 and November 27, 2013. The May MRI showed the very large left-sided extrusion at L2-3, but the previously noted disc extrusion at L4-5 was not evident. The diagnostic studies showed that Petitioner had long-standing lumbar degenerative disc disease prior to the instant injury. Morbid obesity is a contributing factor in degenerative disc disease. It has a significant impact in terms of degeneration and rate of degeneration as gravity puts greater pressure on the discs because of the additional mass. There could also be a genetic factor.

60. Dr. VanFleet opined that the incident of August 29, 2013 as Petitioner described did not contribute in any way to Petitioner's preexisting degenerative disc disease. "The fact that somebody is sitting or standing during the course of the day, it doesn't matter where they are, if you happen to have it at work." The preexisting condition was "the most important determinant in developing this condition." The simple act of sitting in a chair without motion would not cause a disc prolapse.

61. It was Dr. VanFleet's understanding that the onset of back pain occurred as Petitioner got out of a chair. That "certainly could" change the pressure on the spine. The movement would cause a change in intradiscal pressures, and which disc is involved could be dependent on how the person bends. The mechanism of getting out of that chair should be no different from that of getting out of a dinner table chair. Dr. VanFleet did not recall Petitioner indicating there was any defect in the chair.

62. On cross examination, Dr. VanFleet testified he did not remember whether he reviewed an ergonomic assessment. In all likelihood if he reviewed one he would have mentioned such in his report. He did not see any photographs of the workstation. He had no information about any complaints of his sitting position or workstation. Dr. VanFleet did not denote any dishonesty on Petitioner's part, and if he had he would have mentioned it.

63. Dr. VanFleet conceded that if Petitioner were leaning forward while seated such a position could lead increased intradiscal pressure because of gravity and body mass. Petitioner's obesity would also be detrimental in that respect. Workstations would have more detrimental effects on the cervical spine as opposed to the lumbar spine. Manual workers tend to have more lumbar rather than cervical conditions.

64. Dr. VanFleet was aware of the study of Alf Nachemson, who did a classical study on intrathecal disc space pressures. If he remembered correctly there were four positions which ranged from least to greatest disc pressure: (1) supine; (2) standing upright; (3) sitting; and (4) sitting and leaned forward holding weights.

65. Erin Steinacher testified by deposition on September 16, 2014. She had been an occupational therapist for three years and has an M.A. in occupational therapy and an M.A. in body ergonomics. She was asked to perform an ergonomic assessment at Petitioner's home.

66. Ms. Steinacher noted that she thought the desk was too low for Petitioner to fully fit underneath the desk because he was 6'6". In addition, there was "a cabinet built into the desk where it went all the way in. He could not put his feet properly all the way underneath the desk without having to be out a little bit so his legs fit under there."

67. Petitioner's knees were above 90 degrees which puts more pressure on the hips, and he did not have a keyboard area so he had to put his arms up and over the desk and have his wrist extended. Because of the position of the computer, he had forward flexion of his neck, low back, and upper back.

68. The positions she observed are not recommended ergonomically; they can cause strain on the neck, back, and spine if experienced for prolonged periods. His shoulders should be over his hips. There was a small lumbar support in the chair, but she did not believe it was sufficient to have him sit straight with the proper lumbar curvature.

69. Ms. Steinacher recommended risers to lift the height of the desk or a new desk, a higher chair because his hips would still be too low, and another lumbar support. On questioning about twisting and turning, Ms. Steinacher indicated the twisting/turning was not a problem; it was the body position itself which causes problems.

70. When Petitioner sat at the station he "looked crunched," and "definitely more flexed in every direction." 12 of the 14 positions she checked were not optimal. She rated the workstation as "fair minus." She thought the most egregious aspect was the inability of Petitioner to get his legs completely underneath the desk to be able to move closer to the desk.

71. On cross examination, Ms. Steinacher testified that she was under the impression that Petitioner "had a back surgery that was due to stress over time." She did not need any medical background to perform an ergonomic assessment. She did not review medical records. She had no idea who set up the work station or who was responsible for its maintenance.

72. The desk was standard and did not appear to be in any state of disrepair. She did not believe the chair was defective. Petitioner could get up and stretch, but he may have had difficulty when he was on the phone because of the cord. He made it sound like he was on the phone 2/3 of the time. There is no rating below poor, such as a poor minus.

73. Dr. Payne testified by deposition on February 19, 2015. He had known Petitioner socially for a long time trap shooting together and as a patient for about five years for treatment of his back. Petitioner sold insurance and spent long hours working on a computer and had been working at home for seven years.

74. Dr. Payne saw pictures of the home office and they discussed his sitting position and how he spent "a lot of time at his desk turned to the side in a flexed position." That can exert detrimental "pressures in the low back and stuff." Twisting causes some fibers in the annulus to become tense and others to become lax, "and it's thought that that predisposes to herniation." There are anatomical studies about orientation of fibers and where they are stressed; the greatest pressure was caused sitting flexed forward at the waist. However, Dr. Payne did not "know of any study that describes a certain position where people have more disc herniations."

75. When he saw Petitioner in June 2013, Petitioner was being treated for a L2-3 herniation, with anti-inflammatories and ESIs were considered. He did not want to have surgery at that time. When he saw Petitioner on September 3, 2013, "he was significantly worse;" so much worse that he was "basically teetering on the edge of needing to be admitted to the hospital for pain control." The aggravation of symptoms began while sitting at his desk. His pain progressively worsened during the long day working at his desk.

76. In looking at a new MRI, Dr. Payne "thought his disc was a lot bigger," and was the cause of Petitioner's increased pain. Dr. Payne performed laminectomy/discectomy surgery in September 2013 because of "the bigger disc." After that surgery, Petitioner continued to have leg pain. A new MRI showed a recurrent disc herniation at L2-3, so he performed a second surgery, a fusion, in 2014.

77. Dr. Payne indicated that the initial herniation caused a weak point in the annulus which made the new herniation more likely. Dr. Payne agreed that it was fair to say that "the injury he sustained sitting at his desk was a factor in the fusion." Dr. Payne opined that the way Petitioner was sitting in his chair was a "bad ergonomic position." L2-3 is in the upper lumbar spine and upper spine surgeries comprise less than 5% of the discectomies he performs. However, he did not think that Petitioner's sitting position had anything to do with the fact that the herniation was in the upper rather than lower spine.

78. On cross examination, Dr. Payne testified there are various causes of herniations including simply normal degenerative processes. He thought that when he saw him in 2011, Petitioner related his back pain to golf. Such activity can cause a disc herniation. He ordered an MRI at that time. It showed a mild diffuse disc bulge with mild central canal stenosis but no significant neuroforaminal stenosis at L2-3. "A disc bulge is kind of a normal middle-age finding." He really did not consider that finding abnormal for a 40 year old. Dr. Payne agreed that it did show that there was "something going on there."

79. Dr. Payne also testified he reviewed previous medical records. He agreed that on May 1, 2013 Petitioner complained of radiating radiating into the left leg to his principle care provider, who referred Petitioner to Dr. Western. Dr. Western's May 6, 2013 note did not indicate a mechanism of injury. He ordered an MRI which showed the large disc herniation at L2-3. Dr. Payne thought that condition caused Petitioner's radiculopathy.

80. The disc had worsened from 2011 to 2013 from a disc looking middle-aged to one with a large herniation. Dr. Payne had no documentation that Petitioner reported a mechanism of injury when he saw him on June 4, 2013, but he reported he gave up his refereeing of soccer, an activity which could cause of aggravate a herniation.

81. When Dr. Payne saw Petitioner on September 3, 2013 he reported a sudden worsening of his symptoms after moving from a sitting to standing position. Such an action may or may not place greater stress on discs. The act of getting up from a chair could be the same as getting up from a toilet or dining room chair. The act of rising from a seated position would be the same. He and Petitioner talked about Petitioner's work station on several occasions but Dr. Payne could not remember the exact dates.

82. On redirect examination, Dr. Payne testified he thought Petitioner's work station was terrible; the forward flex with a twist is the worst position for the back. He thought Petitioner herniated his disc while sitting and it got more painful when he put traction on the nerves.

83. On re-cross examination, Dr. Payne testified that people who sit in a terrible position sitting at a desk leaning forward do not automatically develop a herniated disc. One can herniate a disc while standing up. According to his notes Petitioner noticed the aggravated pain when he stood up.

84. Petitioner also submitted into evidence published articles. The article *Low Back Pain Development Response to Sustained Trunk Axial Twisting* in the 2013 European Spine, investigated the issue whether sustained axial truck twisting has an effect on the development of low back pain. The results appear to support such an association.

85. The finding in this 2013 study appeared to be mostly muscular in nature. However, it was also written: "It is not clear which of the viscoelastic tissues were active and underwent creep in their investigation. The facet capsule may be one of the major tissues, since facet joint is thought to be served as a critical component to resist the torsion during axial truck twisting. Each of the other tissues, such as dorsolumbar fascia, posterior ligaments, supraspinatus and intraspinatus ligaments, is probably one of the active tissues in the FRP (flexion relaxation phenomenon) response and probably is subjected to creep as well. Another important issue is the IVD (intervetebral disc). The sheer stresses and movement created by spinal twisting within discs might elicit a shrinkage on spine by making the nucleus pulposus loose (*sic*) some fluid like twisting a cloth full of water. Moreover, spinal shrinkage itself could indeed elicit change in FRP response according to our recent investigation."

86. Petitioner also submitted the Article *Low Back Pain Development Response to Sustained Trunk Axial Twisting* in a 1980 Journal of the American Physical Therapy Association, which appears to be a primer for physical therapists to identify low back conditions and provide appropriate physical therapy.

87. The most relevant portion of this 1980 article refers to intradiscal pressure. On the issue of bending and torsion, the authors indicate that the combination of movements such as twisting, bending, and bending with rotation increases stresses and strains on discs which alone can account for a disc injury. The stresses are magnified in a degenerated disc. The authors cite a study that indicates sitting causes 1/3 greater disc pressure than standing and leaning forward 20 degrees increases the pressure by 30%. The article also includes the Alf Nachemson chart cited by Dr. VanFleet and elsewhere in the record; with the most relevant aspect being that sitting upright exerts a force of "140" and sitting leaning forward exerts a force of "185."

88. In analyzing work activities, the authors concentrated on lifting and pushing/pulling. However, they also note that exposure to truck rotation is an important consideration. Rotation of three degrees can disrupt annulus fibers at their weakest point and at 15 degrees a total breakdown of the annulus. Discs and facets each receive 50% of the torsion. Flexion, opening the facet joints, followed by rotation is dangerous because the discs are not protected by the facets. The authors also discuss the importance of proper lumbar support in chairs and the height of the chair should allow adequate thigh support as well as comfortable placement of the feet. Frequent change of position is important to vary the compressive load on a degenerated disc.

The Arbitrator found that Petitioner failed to prove accident basically because he did not provide any evidence of his precise work activities that could lead to his alleged repetitive trauma injury of his lumbar spine. Rather, he concentrated on the set up of his workstation and the theory that sitting in his chair resulted in the breakdown of the protective structure of his back resulting in the disc herniation. The Arbitrator also noted that Petitioner had similar symptoms in 2011 from golfing and found that the condition never completely resolved. She also noted that Petitioner did not initially relate his condition to his work activities. Finally, she seemed to discount the testimony of both doctors because they did not have a sufficient understanding of Petitioner's job activities. Petitioner argues the evidence that there was accident and causation was overwhelming, and stresses that three out of four "medical professionals" opinions supported causation.

The Commission agrees with the determination of the Arbitrator and affirms her decision. The Arbitrator was correct that Petitioner did not present evidence regarding his specific work activities that could have caused or aggravated his lumbar spine position. However, Petitioner's claim for compensability is based on his theory that working at an ergonomically improper workstation all day, every day, for seven years caused his disc herniation. Assuming that theory of compensability his specifying his work activities, such as how much of the time he was on the telephone or imputing data, may not have been entirely dispositive of the issues of accident/causation. Therefore, the Commission will address the argument that Petitioner's evidence sustained his burden of proving that the ergonomic condition of his workstation itself caused or aggravated his condition of ill-being.

16IWCC0587

Petitioner presented evidence that his work station may not have been optimal. He also presented evidence that a poor ergonomic work station may be a contributing factor in aggravating a preexisting degenerative disc condition. Nevertheless, the Commission finds that Petitioner did not sustain his burden of proving that his allegedly ergonomically improper work station actually aggravated **his** preexisting degenerative disc disease thereby causing **his** herniation.

The Commission does not consider proof of a bad ergonomic condition and a particular condition of ill-being is sufficient prove a compensable accident. Because there was no evidence directly relating Petitioner's work station to his herniation, a finding that Petitioner's work station was the cause of his herniation necessarily would be based on conjecture or speculation, in which the Commission is not permitted to engage. Therefore, the Commission affirms the Decision of the Arbitrator that Petitioner failed to sustain his burden of proving a repetitive trauma accident resulting in a condition of ill-being of his lumbar spine.

Petitioner filed two Applications for Adjustment of Claim. 14 WC 6167 was filed on January 14, 2014 and alleged injuries to the lumbar spine from repetitive trauma with a manifestation date of August 29, 2013. 15 WC 18366 was filed on June 4, 2015 and alleged injuries to the lumbar spine from a discrete traumatic event also with an accident date of August 29, 2013. The mainframe indicates that Petitioner filed a motion to consolidate the claims on June 30, 2015 and that that motion was denied on July 24, 2015. Petitioner filed a Petition for Review on both claims; therefore the Commission currently has jurisdiction over both. The Commission notes that the claims involve the same claimant, the same employer, and the same allegedly injured body part. The only difference between the claims is the theory of compensability, with 14 WC 6167 alleging repetitive trauma and 14 WC 18366 alleging discrete trauma. The Commission agrees that these claims should be consolidated.

The record clearly delineates Petitioner's alleged discrete traumatic event; his arising, or attempting to arise, from his chair on August 29, 2013. Petitioner testified that he needed to get some paper and could not get up because of intense pain in his back and left leg. Dr. VanFleet testified Petitioner indicated that he was sitting in his chair by his desk for a long period of time and as he stood up he had significant pain across the back and down into his left leg. Dr. Payne testified that when he saw Petitioner on September 3, 2013 he reported a sudden worsening of his symptoms after moving from a sitting to standing position. Getting up from a seated position is clearly an activity members of the general public engage in numerous times on a daily basis. Dr. Payne and Dr. VanFleet both testified the mechanism of getting out of that work chair should be no different from that of getting out of any other chair.

Petitioner has not sustained his burden of proving that his work activities placed him at any greater risk of injuring himself by arising from a seated position than that of any member of the public in general. The act of arising out of a chair itself is not an "accident" compensable under the Act. Therefore, Petitioner has not met his burden of proving he suffered a compensable work-related discrete traumatic accident on August 29, 2013 causing injury to his lumbar spine.

16IWCC0587

In conclusion, Petitioner has not sustained his burden of proving either a discrete traumatic accident on August 29, 2013 or a repetitive traumatic accident causing a condition of ill-being of his lumbar spine manifesting itself on August 29, 2013. Therefore, compensation is denied on both claims.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claims, 14 WC 6168 and 15 WC 18366, are consolidated on review.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner has not sustained his burden of proving a repetitive traumatic accident causing a condition of ill-being of his lumbar spine manifesting itself on August 29, 2013 and compensation in 14 WC 6168 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner not sustained his burden of proving either a discrete traumatic accident on August 29, 2013 causing a condition of ill-being of his lumbar spine and compensation in 15 WC 18366 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: SEP 13 2016

Ruth W. White

Charles J. DeVriendt

RWW/dw
O-8/16/16
46

Joshua D. Luskin

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

16IWCC0587

GARRETT, JASON B
Employee/Petitioner

Case# 14WC003167

LIBERTY MUTUAL INSURANCE
Employer/Respondent

On 9/8/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.27% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b), 8(a)

JASON B. GARRETT,
Employee/Petitioner

v.

LIBERTY MUTUAL INSURANCE,
Employer/Respondent

Case # 14 WC 3167

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **7/24/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/29/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $**80,471.04** ; the average weekly wage was $**1,547.52**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**33,126.92** for other benefits, for a total credit of $**33,126.92**.

Respondent is entitled to a credit under Section 8(j) of the Act for any bills paid.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 8/29/13. Petitioner's claim for compensation is denied.

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

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

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

Signature of Arbitrator

8/28/15
Date

ICArbDec19(b)

SEP 8 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 42 year insurance agent, alleges he sustained an accidental injury to his low back due to repetitive work activities, that arose out of and in the course of his employment and manifested itself on 8/29/13.

Petitioner began working for respondent on 9/28/97. He started as a personal sales representative. In 2005 petitioner became a resident sales representative. His duties included helping new hires, trainees, and overseeing office operations. He was responsible for monthly safety checks, monthly meetings, and fire extinguishers. In October of 2006, petitioner moved his office to his home. He dedicated one of the rooms in his home to his office. Petitioner took pictures of his home office in December of 2006 at the request of Administrative Assistant, and emailed them to the Administrative Assistant. Petitioner also took pictures of his desk on or about his alleged injury date (PX38-42). Petitioner testified that the desk he used was in his house when he purchased the house in 2006. He testified that respondent sent him the docking station and all the chairs. He stated that no one helped him set up the office.

Petitioner described his job description as a salesman as being quite diverse. He testified that he would go out and solicit clients and service existing clients. He was also responsible for new customers. He would gather business through marketing groups. Petitioner testified that if a person was closing on a house he would sit on the phone for hours reviewing stuff in the house and value of the home and evaluating risk.

On 12/9/07 petitioner signed and completed an ergonomic assessment. The evaluator recommended a slight movement of the monitor to stay center of the body.

Lisa Raydant worked for respondent for 20 years. On 7/13/12 Raydant resigned her employment with respondent. From 1988-2006 Raydant was a service manager. From 2006-2008 she was assistant regional service manager in Springfield. From 2008-2012 she was a branch manager. Raydant was the manager of ergonomic studies. She was not trained to do ergonomic studies. She just followed the form. Raydant performed ergonomic assessments on new employees, transfer employees, and random studies. Raydant was immediate sales manager over petitioner. She was aware of petitioner's low back issues.

In November 2006 petitioner moved from respondent's sale office to his home office. In an email dated 11/14/06 to Cheryl Popielarz, petitioner reported that he had measured his home office and had roughly 266 ft. of space, which he indicated was very large for his needs. With respect to his desk, he reported that he had one that he could use. He indicated that he did not have a chair similar to the one

from the office. He wrote that about two years ago respondent had special ordered him an office chair that was more suited to his height and weight. He questioned whether he could take that one to the house. Petitioner claims he had trouble with the chair only at his home office, and conveyed that via email to respondent. Respondent sent a technician out who fixed the chair. No further emails regarding this issue were offered into evidence as part of RX4.

Petitioner testified that he started having problems with his back in mid 2007.

In April of 2009 Raydant visited petitioner's home. Petitioner told her that he was uncomfortable and his desk was low. She noted that petitioner is very tall. She stated that the form she followed indicated that the monitor had to be at eye level and it was not. She also stated that petitioner was twisted and leaning forward, and the desk was unadjustable. As a result, she got petitioner risers for his desk and corrected his monitor level. Raydant testified that she was in petitioner's home another time in 2011 but did not do an ergonomic assessment of petitioner.

Raydant described Lead Days. She testified that representatives are assigned a day of the week to work leads and call the contacts within approximately 15-30 minutes. She testified that when reps are working Lead Days they are essentially tied to the office, but not their desk, so they could respond quickly. She testified that they can go to lunch and have appointments as long as they handled the leads in a timely manner. If a rep did not respond timely to the leads they might be removed from the program.

On 11/4/11 petitioner presented to Dr. Payne with a five-month history of back pain, following an injury to his back while playing golf on 5/1/11. Dr. Payne noted that he has known petitioner for a long time, and that they used to travel to trap shoots together all over southern Illinois. Petitioner complained of significant pain for the past four months. He reported that his pain started gradually and he underwent chiropractic care that did not result in any lasting improvement. He also complained of pain in his left leg. An x-ray of the lumbar spine that day revealed moderate to severe diffuse degenerative changes most prominent at the L4 – L5 and L5 – S1 levels. Petitioner told Dr. Payne that he gets sharp pain, numbness, and tingling that starts in the buttocks on the left side, and shoots down the back of the leg over the hamstrings down to the gastrocnemius. He stated that it has radiated to his foot a couple times. Petitioner gave a history of swinging the golf club and experiencing immediate pain in his back, that has persisted. He also reported that over the past 48 hours he started getting radiating pain into his left lower extremity. Dr. Payne assessed lower back pain and lumber radiculopathy. He ordered an MRI of the lumbar spine and an epidural steroid injection for petitioner. An MRI of the lumbar spine performed 11/15/11 revealed multilevel degenerative changes superimposed on multilevel congenitally short

particles. Also noted was resulting severe left neuroforaminal stenosis at L4 – L5, secondary to a left neural foramina disc extrusion.

On 11/21/12 petitioner presented to Dr. Western complaining of pain in the left leg following an injury on 5/1/11 when he twisted his back playing golf. He reported that simply walking hurts his back. He stated that he was working "somewhat". On 12/8/11 petitioner underwent an L5 – S1 transforaminal epidural steroid injection on the left.

Rachael Weygant, a marketing assistant for respondent, was called as a witness on behalf of petitioner. Weygant was Administrative Assistant for Brinkman from October of 2012 through April of 2015. Weygant was trained in safety assessments. She also did telecourses with Ergonomics Team. Upon completion of her training she became a Safety Specialist, and did work station assessments per company policy. Weygant did a workstation assessment over the phone with petitioner on 4/25/13 that lasted 15 minutes. She read over each question with petitioner and she noted his responses on the form. She relied solely on petitioner's responses to complete the form. She testified that had petitioner reported some problems with his workstation setup she could have made adjustments because she had tools and aids at her disposal. Weygant testified that all conditions of the workstation assessment were met based on petitioner's responses. She testified that petitioner brought no problems to her attention. Weygant testified that the completed form was sent to petitioner, and his signature is not required on the form. She testified that petitioner reported no back or leg pain and no problems with his chair, desk or monitor. She stated that petitioner was always forthcoming with what he needed and stated that he did not need anything, and if he had she could have corrected it. Petitioner testified that Weygant's ergonomic assessment lasted only 2-3 minutes and he told her he had to twist to the left to access the computer. He testified that he was not in pain on the day of the ergonomic assessment. Petitioner denied he got a copy of the ergonomic assessment. Petitioner testified that he did not know his monitor was in a bad position.

Petitioner next followed up with Dr. Western on 5/6/13 for evaluation of his back and left leg pain. Dr. Western noted that petitioner had L4 – L5 lateral recess stenosis and L4 – L5 foraminal stenosis secondary to disc bulging, some congenitally shortened pedacles, and degenerative arthritis. Petitioner reported no new injuries or issues. He reported pain in the lateral leg to his knees, that was achy, and occasionally sharp. He also complained of buttocks pain and occasionally getting some numbness all the way down into his foot. He stated that bending, walking, and sitting aggravate him. Petitioner reported that he has a mostly sit down job. Dr. Western examined petitioner and assessed a high level of pain. He took petitioner off work for at least three days before a repeat injection. He prescribed Vicodin. On

5/9/13 petitioner underwent a L5 – S1 transforaminal epidural steroid injection on the left. On 5/13/13 petitioner stated that he got no relief from the epidural injection. He complained of pain in the left lower extremity in the L5 distribution from his knee to his ankle, and burning on the bottom of his foot. On physical examination petitioner was more comfortable in a slightly forward flexed posture. Petitioner had some decreased sensation in his lateral lower leg, L5 – S1, more S1 distribution possibly. His straight leg raise was positive. A repeat MRI was ordered. Dr. Western started him on gabapentin, prednisone, and Flexeril.

On 5/21/13 petitioner underwent a repeat MRI of his lumbar spine. The impression was largely left posterolateral disc extrusion with inferior migration at L2 – L3, compressing the left L3 nerve root. On 5/22/13 petitioner returned to Dr. Western who noted that he had a large L2 – L3 left paracentral disc herniation causing lateral recess stenosis. He further noted that the disc material migrates behind the L3 vertebral body. Petitioner reported that when he is more active the leg does feel weaker, and he has a hard time with bowel movements and increased pain with Valsalva maneuvers. Petitioner stated that he was taking 2 hydrocodone every 6 to 8 hours and it was only helping minimally. He reported that he took himself off the prednisone because it elevated his blood sugars, and was not sure if the flexeril was working. Following an examination Dr. Western's impression was that petitioner had a large L2 – L3 disc herniation on the left side causing the lateral recess stenosis and that his L3 symptoms appeared to be affecting some of the lower nerve roots as well. Dr. Western talked about surgery versus a second epidural injection. Petitioner decided to go ahead and undergo a repeat injection. Dr. Western noted that if it was unsuccessful in relieving a significant amount of petitioner's pain, that he would send petitioner to a spine surgeon for a surgical evaluation. On 5/23/13 petitioner underwent the left L3 – L4 transforaminal epidural steroid injection. Dr. Weston's postoperative diagnosis was left lower extremity radiculopathy secondary to left L2 – L3 disc herniation with left lateral recess stenosis.

On 6/4/13 petitioner returned to Dr. Payne regarding his left side disc herniation at L2 – L3. He complained of weakness in his quadriceps, a lot of pain down the left leg, and numbness and tingling below the knee. He also complained of real sharp pain that shoots up in the groin, into the trochanter and buttocks on the left side only. Petitioner stated that he had been using Aleve 660 mg, and 2 hydrocodone in the morning, and another 2 at night. Petitioner stated that he gave up referring soccer, and took himself off the call schedule for the fall. Dr. Payne reviewed the MRI that showed a large disc herniation of the left side at L2 – L3. Petitioner stated that he wanted to try anti-inflammatories and pain medications for another month, and wanted to avoid back surgery. Dr. Payne talked to petitioner about a discectomy at

L2 – L3. Since he was prediabetic, and the oral steroids had been raising his blood sugars, Dr. Payne decided to continue conservative treatment.

Prior to 8/29/13, despite all his treatment for his lumbar spine to this date, including the discussion of surgery, petitioner never reported to any healthcare provider that he had any problems with his back while working.

On 8/29/13 petitioner was assigned Lead Day. He stated that some leads might come in overnight and the faster he contacted them the better chance of getting the business. Petitioner testified that he started between 7:30-8:00 am that day. He testified that he worked all day at his desk and may have gotten up once to go to the bathroom. He claims he was twisted at his desk all day long. He claimed that he did not have room on his desk to move his computer. Petitioner stated he started having pain in his back early that day, and that it got progressively worse throughout the day. He testified that he could not stand up by 3:00 pm when he went to fetch some paper. He stated that his left leg and low back were so sore he could not get up on his own and had to call his wife to help him up.

Petitioner did not report his alleged injury to respondent on 8/29/13. Petitioner did not mention it until his daily call to Brittaney, at the end of his workday on 8/30/13. At the end of the call he stated that he told her that he hurt his back at his desk the day before. She asked if he wanted to report the injury and he said yes. Petitioner testified that he stayed in bed all day Friday and went to the emergency room on Saturday in Marion, Il, where he was because he went with his wife to go through her grandma's belongings. He stated that she drove him there while he laid in the passenger seat. When he could not sleep that night he testified that he drove himself three miles to the emergency room.

At the emergency room at Heartland Regional Medical Center in Marion, Illinois 9/2/13, petitioner had complaints of lower back pain, and a history of the same. He reported his onset of symptoms as two days ago, and stated that the symptoms came on gradually. He reported that his symptoms had increased from their onset, and were located in his left lower back. He described his symptoms as dull and aching, and moderate intensity. Petitioner was given medication and discharged from care in a stable, satisfactory, and improved condition. He made no mention that these complaints were related to his work activities.

On 9/3/13 petitioner returned to Dr. Payne with respect to his back pain. He also had complaints of left leg weakness. Petitioner reported a sudden, severe worsening of his pain over the weekend. He stated that his left anterior thigh was worse than it had ever been before. He stated that he was just sitting

at his desk on Friday doing a lot of work on the computer and when he stood up, he experienced sudden severe worsening in the left lower extremity radicular pain. Dr. Payne noted that petitioner's pain was in the same dermatomes that it had been in the past when he had his disc herniation at L2 – L3. Petitioner stated that this pain was actually worse and he was having constipation. He stated that he could not stand up straight, and could not find any position that relieved his pain. He reported that he had a couple shots of Dilaudid and then switched over to some oxycodone tablets, and his previous hydrocodone. Dr. Payne gave him a prescription for Percocet, Flexeril and Colace. He also told petitioner to continue his Medrol Dosepak, that he had. Dr. Payne ordered a repeat MRI.

On 9/10/13 petitioner underwent a repeat MRI of the lumbar spine. The impression was interval worsening of L3 nerve root compression from a large left lateral L2 – L3 disc extrusion. Additional chronic degenerative changes were noted. That same day petitioner underwent a left L3 – L4 transforaminal epidural steroid injection. Dr. Western's postoperative diagnosis was large left L2 – L3 disc herniation with fusion done on the L3 vertebral body causing a left lateral recess stenosis and a left lower extremity radiculopathy.

On 9/12/13 petitioner wrote an email to Britney Brinkman stating that "I delayed my trip down south in order to attend to the some issues here at home. If you have time later this morning we can do the measurements for ergonomic assessment. I am moving my operation around a little bit because just to sit and type this note only serves to aggravate my condition. I will discuss that with you and we talk later. If you have time between 930 and one that would be great."

On 9/12/13 petitioner returned to Dr. Payne. Dr. Payne noted that petitioner's disc herniation at L2 – L3 was much larger than it had been in the past, and his symptoms were still severe. Dr. Payne scheduled petitioner for an L2 – L3 microdiscectomy. Dr. Payne noted that petitioner was diabetic and heavyset so there would be a 5 to 10% chance of an infection.

On 9/26/13 Erin Steinacher, an occupational therapist, completed an ergonomic assessment of the petitioner's work place at the request of the respondent. She found several issues with the petitioner's workplace and opined that it was "fair minus", and noted that these issues could lead to back problems and increased spinal pressure. Steinbach did not review any of petitioner's medical records. She testified that anyone can adjust a computer monitor. She did not notice any defects in the operation of the desk or chair. She also testified that there was nothing in petitioner's workplace to preclude him from getting up or stretching as needed.

On 9/30/13 petitioner underwent a laminectomy at L2 – L3 and microdiscectomy at L2 – L3 performed by Dr. Payne. Petitioner's preoperative diagnosis was herniated nucleus pulposus at L2 – L3, and spinal stenosis at L2 – L3. Petitioner followed up postoperatively with Dr. Payne. This treatment included physical therapy. On 11/14/13 Dr. Payne noted that petitioner was still getting anterior thigh symptoms that was a kind of dull pain. He also reported a lot of axial back pain, worse with sitting. He stated that he could only sit in a chair for about five minutes. Dr. Payne ordered physical therapy.

On 12/26/13 petitioner returned to Dr. Payne. He stated that he was still getting axial back pain as well as his left lower extremity radicular pain. He reported that he was going to physical therapy three times a week. Dr. Payne talked to petitioner about trying to get back to work part-time. However petitioner stated that his job is a sales job, and if he does not make his quotas, he really does not get paid. So petitioner stated that he was really not able to go back part-time. Petitioner reported to Dr. Payne how his radicular pain started at the end of the day. He reported that he had been at his desk for seven or eight hours leaning forward, working at a computer, etc. When he got up to leave, he stated that he was unable to stand straight and experienced severe pain down the left leg. Petitioner reported that after that he had a work space expert come in and help him with positioning at his desk. Dr. Payne noted that sitting in a chair, and leaning forward in a chair puts some of the highest pressure on discs as far as positions go. He was of the opinion that prolonged sitting could be a link to petitioner's disc herniation of the lumbar spine. He noted however that petitioner had herniations there before and problems with his back, but believed that those had resolved without surgical intervention.

On 1/16/14 petitioner went into work for a while after receiving a new chair and a new desk. He stated that after sitting for a couple hours, all the pain just came rushing back.

On 1/31/14 petitioner filed his Application For Adjustment Of Claim with respect to an alleged date of accident of 8/23/13, claiming a repetitive trauma injury to his back. Petitioner signed the application for adjustment of claim on 1/10/14.

On 2/6/14 petitioner returned to Dr. Payne complaining of worsening pain down the left lower extremity. He reported that it was down the anterior thigh into the medial calf. He stated that it does not always go to the foot, but sometimes does. He stated that when he got out of his car last week he had such severe sharp pain as he exited his vehicle that it almost knocked him to the ground.

Dr. Payne had petitioner undergo a repeat MRI of the lumbar spine. He was of the opinion that petitioner had epidural fibrosis with no evidence of recurrent disc herniation. He referred petitioner to Dr. Narla for pain management. Dr. Payne continued petitioner off work.

On 3/7/14 petitioner presented to Dr. Narla for pain management. Petitioner gave a history of lumbar back pain for two years. He stated that he ended up with a severe pain radiating into the left leg in August 2013 and underwent surgery in September 2013. He reported a 50% improvement postoperatively. Dr. Narla noted that an MRI from May 2013 showed a left-sided significant disc herniation at L2 – L3, and a disc bulge at T12 – L1. Dr. Narla noted that petitioner's pain was mostly the same as prior to the operation. Dr. Narla began petitioner on gabapentin.

On 3/12/14 petitioner underwent a Section 12 examination performed by Dr. Timothy Van Fleet, at the request of respondent. Petitioner provided a history, and Dr. Van Fleet performed a physical examination and reviewed notes from Dr. Payne, Dr. Western, and from Memorial Physician Services Office. He also reviewed an MRI film dated 2/18/14, and other MRI reports. Petitioner gave a history of being an insurance producer for respondent. He stated that his pain began in 2011. Petitioner complained of pain, which he reported was due to sitting for a long period of time in his chair at work. In 2011 petitioner was seen by Dr. Western and underwent some injections. He stated that he was also treated with ibuprofen and his symptoms improved. Petitioner reported a recurrence of his back pain in August 2013. He reported that on 8/29/13 he was sitting in his chair at his desk for a long period of time and when he went to stand up, he had significant pain across the back and down into his left lower extremity. He noted that the pain was quite substantial. Petitioner was ultimately seen and treated by Dr. Payne, who performed a left L2 – L3 discectomy on 9/30/13. Petitioner reported minimal improvement in his pain following surgery. He also continued to report difficulties with pain radiating down into the left lower extremity. Petitioner stated that he currently takes gabapentin and Flexeril for relief of his symptoms. He stated that he was unable to work because he did not feel as though he could sit.

Dr. Van Fleet noted that petitioner was morbidly obese. He also noted that petitioner's surgical history was consistent with a previous meniscectomy and a lumbar microdiscectomy. He noted that petitioner is a diabetic, but does not smoke or drink. Dr. Van Fleet noted that petitioner is 6'4" and weighs 380 pounds, and his BMI was 46.3. On examination he noted some difficulty with both flexion and extension. All other tests were normal. Dr. Van Fleet reviewed the MRI of petitioner's lumbar spine dated 2/18/14 which showed no evidence of any focal neurologic compression, and degenerative disc signal intensity at the L2 – L3 level. Dr. Van Fleet's diagnosis was that petitioner was morbidly obese

and was post lumbar discectomy. Dr. Van Fleet was of the opinion that petitioner's refereeing of high school soccer games did not have any impact on his back condition. He was of the opinion that petitioner's weight had every bit to do with his underlying condition, and had led to his difficulties both at work, as well as away from the workplace. He was of the opinion that petitioner's weight creates a significant hazard for his lumbar disc spaces, especially with sitting, as this loads his disc spaces more considerably than either standing or lying down. He was of the opinion that if petitioner was closer to an ideal body that he would likely not have the difficulties that he currently reports. Dr. Van Fleet saw no changes between the 11/15/11, 5/21/13, and 11/27/13 MRIs. Dr. Van Fleet noted that the petitioner had postsurgical changes which he estimated to be related to the 8/29/13 incidents. He believed that petitioner's need for surgery was related to his morbid obesity and significant loading of his disc spaces. He could not determine if the petitioner sustained a lumbar disc prolapse as a result of sitting in his chair at work. Dr. Van Fleet was of the opinion that his current diagnosis and petitioner's reported pain for the lumbar spine was a result of the 8/29/13 incident. However, he was of the opinion that petitioner had long-standing difficulties with his back, that are not entirely related to his workplace, but related more towards his home environment and his morbid obesity. Dr. Van Fleet opined that petitioner is at a greater likelihood of sustaining an injury to the disc space while attempting to referee a soccer game than sitting at work. Dr. Van Fleet was of the opinion that since petitioner is a very large individual, that getting out of any chair certainly can create a situation that is hazardous to his disc space, but not necessarily mutually exclusive to his workplace. He was of the opinion that petitioner is at risk in a car, out of the car, sitting around the dinner table, as well as sitting down at night and relaxing. Dr. Van Fleet was of the opinion that petitioner had reached maximum medical improvement with respect to his low back, and could return to full duty work with no restrictions.

On 4/1/14 Dr. Van Fleet drafted an addendum report, specifically addressing the differences between the MRIs on 11/15/11, 5/21/13, and 11/27/13. Dr. Van Fleet was of the opinion that the 11/15/11 MRI showed evidence of disc degeneration at the L4 – L5 level with evidence of lateral recess stenosis at the L3 – L4 level. He further noted that the L4 – L5 level showed a far lateral disc extrusion involving the neural foramina on the left hand side. Dr. Van Fleet was of the opinion that the MRI film dated 5/21/13 of the lumbar spine showed evidence of disc degeneration at the L4 – L5 level, and the far lateral disc was no longer evident. He was further of the opinion that petitioner's MRI of 11/27/13 showed a very large left-sided L2 – L3 disc extrusion that was not evident on his previous films. The L2 – L3 disc was protruded posterior to the body of L3 on the 11/27/13 MRI study. Dr. Van Fleet was further of the opinion that the study demonstrated postsurgical changes on the left side at the L2 – L3

level without evidence of any kind of focal neurologic compression. He was of the opinion that the interval surgery was successful in decompressing the lateral recess in the central canal of the L2 – L3 disc.

On 4/24/14 petitioner underwent a Functional Capacity Evaluation. Petitioner demonstrated the ability to work in the mid range of the medium physical demand level for all lifts and carries. The therapist noted that the position of a Sales Representative at Liberty Mutual is a sedentary position. It was noted that while petitioner met the standing and walking requirements required for the position, deficits in his sitting ability may limit his ability to return to work in this capacity. It was recommended that petitioner may benefit from a modified station, including ability to stand as needed, a higher desk chair, and/or standing workstation. Prognosis for petitioner's returning to work was guarded, unless modifications could be made.

On 4/29/14 Dr. Payne gave petitioner permanent restrictions and released him on an as needed basis. He increased petitioner's gabapentin and continued petitioner on hydrocodone and Flexeril. He suggested a stationary bicycle exercise program. Dr. Payne was of the opinion that petitioner is in the mid range of medium physical demand level for all lifts and carries, 21 to 50 pounds. He also was of the opinion that petitioner meets the light physical demand level with material handling tasks, limited seating, kneeling, overhead work, and walking. He was of the opinion that petitioner may benefit from modified work. Dr. Payne released petitioner on an as needed basis. Petitioner continued to treat with Dr. Narla.

On 6/19/14 petitioner returned to Dr. Payne stating that his back had been bothering him more lately. He stated that he was able to sit for around 30 to 45 minutes and then has to get up and change positions and stretch out his back. He reported persistent radicular pain. Following an examination Dr. Payne was of the opinion that petitioner was as good as he was going to get. Dr. Payne talked with petitioner about working part-time, maybe four hours a day. Dr. Payne believed that petitioner had reached maximum medical improvement, and that they should see if petitioner could get his job back with some restrictions.

On 6/25/14 the evidence deposition of Dr. Van Fleet, an orthopedic spine surgeon, was taken on behalf of respondent. Dr. Van Fleet reported that petitioner told him that he had some back pain beginning as far back as 2011. He further testified that petitioner told him that he was habitually sitting for long periods of time in his chair at work. Dr. Van Fleet noted that petitioner gave him a history that on 8/29/13 he was sitting in his chair at his desk for a long period of time, and when he went to stand up

he had significant pain across the back and down the left lower extremity. Dr. Van Fleet noted that petitioner had done extensive rehab of physical therapy and core strengthening, but continued to have quite a bit of pain on a fairly regular basis. Dr. Van Fleet testified that petitioner gave him a history that he had prior back problems dating back to 2011, and that these complaints were due to sitting for long periods of time. Dr. Van Fleet noted that after reviewing petitioner's MRIs that petitioner had evidence of restricted range of motion about the lumbar spine which one may anticipate with a multilevel degenerative process that may be symptomatic. Dr. Van Fleet found no significant reflex changes or any neurologic deficits.

Dr. Van Fleet opined that the treatment petitioner had was reasonable and necessary. He further opined that morbid obesity and a predisposing genetic condition are contributing factors to lumbar degenerative disc disease. Dr. Van Fleet opined that the alleged accident on 8/29/13 did not contribute in any fashion to the petitioner's underlying degenerative disc disease. He was of the opinion that that was an entirely pre-existing condition. He was of the opinion that everybody sits or stands during the course of the day, no matter who they are, and if you happen to have it at work, that is not a contributing factor because you have to be standing or sitting at some location. Dr. Van Fleet was of the opinion that petitioner's getting out of his chair at work was the same as anybody getting up from any seated position to a standing position. Dr. Van Fleet opined that petitioner's act of getting out of his work chair is substantially similar to an activity that a member of the general public would do. Dr. Van Fleet opined that petitioner does not have any real structural issue, but rather only subjective pain. Dr. Van Fleet opined that for anybody with multilevel degenerative disc disease, altering positions between sitting and standing is fine. Dr. Van Fleet opined that the simple act of sitting in a chair does not cause a lumbar disc prolapse. He opined that anything can cause a lumbar disc prolapse, and that sitting in a chair would not cause a lumbar disc prolapse unless there was an impending disc prolapse already in evolution.

On cross-examination Dr. Van Fleet testified that he performs 95% of his Section 12 examinations for respondent. Dr. Van Fleet opined that he had no issues with any of the opinions of Dr. Payne in the reports that he read. Dr. Van Fleet testified that he did not base his opinion on an ergonomic assessment. He also testified that he had no knowledge regarding petitioner's workstation or his seated position, and did not see any functional capacity evaluation. Dr. Van Fleet was of the opinion that if petitioner was in a seated position leaning forward that could potentially lead to increased intradiscal pressure that is seen with people in the upper right or in the seated position, because of gravity and body mass. Dr. Van Fleet was of the opinion that workstations tend to be more difficult on individuals necks than on their lumbar

spines. He opined that people that have more sedentary type work are more prone to cervical disorders, and people who have more laborious type of jobs tend to have more lumbar related conditions. Dr. Van Fleet noted that Alf Nachemson's classic study on intrathecal disc space pressures states that laying down has the least intradiscal pressure, standing up has an intermediate intradiscal pressure, and sitting and leaning forward with or without weights in the hands provides the most at risk position for the disc space. Dr. Van Fleet was of the opinion that prior to 8/29/13 petitioner did not seek out any surgical opinion regarding L2 – L3.

On 6/27/14 Dr. Narla was of the opinion that a stimulator would not be of any use in petitioner. He was of the opinion that petitioner might be at maximum medical improvement as far as medications are concerned. Dr. Narla gave petitioner a home exercise program.

On 7/16/14 petitioner filed an amended Application For Adjustment Of Claim with respect to this case. Petitioner amended the date of accident from 8/23/13 to 8/29/13. Petitioner signed this Application on 6/24/14.

On 9/8/14 petitioner fell while going up the stairs. On 9/11/14 he returned to Dr. Payne. He reported that while he was going up the stairs his left leg gave out, he twisted and tried to grab the stair railing and kind of fell down the stairs. He experienced immediate back pain, very bad. He stated it was worse than previously.

An MRI performed 10/3/14 showed multilevel degenerative changes, most severe at L2 – L3 with a large central disc protrusion with subarticular extension causing severe central canal stenosis. Also noted was multilevel moderate to severe neural foramina encroachment, and mild central canal stenosis at T12 – L1. On 10/7/14 Dr. Payne ordered another course of physical therapy. On 10/21/14 Dr. Narla performed a L3 – L4 foraminal epidural injection with contrast. Petitioner did not receive any relief. On 11/18/14 Dr. Payne discussed operative treatment alternatives as well as continued observation and treatment with pain medications. Petitioner stated that he wanted to proceed with surgical intervention. Dr. Payne recommended a transforaminal lumbar and her body fusion at L2 – L3.

On 12/22/14 petitioner underwent a laminectomy at L2, transforaminal lumbar interbody fusion with cage at L2 – L3, posterior fusion at L2 – L3, segmental instrumentation at L2 – L3, allograft bone, local autograft bone, and iliac crest aspirate on the left. This procedure was performed by Dr. Payne. Petitioner's postoperative diagnoses were spinal stenosis at L2 – L3, and recurrent herniated nucleus pulposus at L2 – L3. Petitioner followed up postoperatively with Dr. Payne. On 1/6/15 Dr. Payne noted

that petitioner was back to his baseline level of radicular pain. On 2/3/15 petitioner noted that he had increased his activity and was walking up to 2 miles a day. He stated that it takes him about 40 minutes to walk 2 miles. Petitioner stated that he could sit for about 30 minutes before he has to get up and stretch his back and walk around. On 3/30/15 Dr. Payne wrote a Health Status Form indicating that petitioner needed to change positions from sitting to standing every 15 minutes. He stated that petitioner could only work two hours per day.

On 5/12/15 Sarah Boyle, Senior Disability Case Manager II with respondent, drafted a letter to petitioner's attorney Matthew Rokusek, informing him that petitioner had been paid a total of $33,126.92 in short-term disability payments, from 10/7/13 through 3/30/14.

On 7/15/15 petitioner underwent a second functional capacity evaluation at the request of Dr. Payne. It was determined that petitioner met the light physical demand level for above shoulder lifts and carries, and the sedentary physical demand level for below the waist lifts. It was noted that petitioner's true limitations in sitting and standing work, and walking abilities may limit his ability to fully meet these physical demand levels fully. Petitioner's prognosis for improving his current abilities, postural deficits, returning to work full duty, and prior level of functioning were identified as guarded.

Petitioner offered into evidence two photos of his desk and office at home (P17 and PX18). He testified that these pictures were taken in 2006, but his desk, chair and office were the same in 2013. The pictures indicate that petitioner's chair is in the middle of the desk, with his monitor and keyboard to the left of his chair on the desk.

Alysha Davis Barth, a 13 year physical therapist, was called as a witness on behalf of petitioner. Barth works for Advanced Physical Therapy as a physical therapist and has done 25-30 ergonomic assessments, none for petitioner. She testified that one does not need to be certified to perform ergonomic assessments. She testified that to be a certified ergonomic assessment specialist she had to be a medical professional and take courses. Barth testified that she reviewed photos of petitioner's workstation (PX17, PX18). She assessed that based on these photos that petitioner's computer workstation was set up on an angle and he would have to rotate left to use the keyboard and terminal. She noted that there appeared to be no leg room under the desk to turn the chair to the left. She believed petitioner would need to rotate at his trunk. She also testified that petitioner's chair was away from the desk because he could not get his knees under the desk, and as a result he leaned forward to reach the keyboard. Barth was of the opinion that by sitting in this position when petitioner turned it caused stress in his discs, breaking down the protective structures of the discs. She was of the opinion that if one sits

in an awkward position and the protective structures of the discs break down the discs can herniate. She was of the opinion that this could happen with as little as 20-30 degrees of flexion.

Barth testified that she did not do an ergonomic assessment of petitioner's workstation, and only met petitioner when he came in her workplace and hired her to do an evaluation. She stated that her report was only based on a review of the photos and depositions, and not any medical reports. Barth only talked to petitioner for about 20 minutes about his job duties. Barth testified that petitioner told her that he sustained a disk herniation a year ago while playing golf. Barth agreed that many things can cause a disk herniation including genetics, repetitive trauma, and age. She also testified that any sitting can cause the breakdown of protective structures in flexed and rotated positions. Barth testified that petitioner could have moved his computer so that he was not rotated and in a better position.

Currently, petitioner testified that he has difficulty sitting in any position, standing for more than a few minutes, and any walking. Petitioner testified that he does everything with difficulty. He testified that sitting, standing, and walking is painful, and he cannot do his job. Petitioner testified that prior to his alleged accident date he treated with a chiropractor .

Petitioner testified that he never requested a new desk from respondent. He testified that respondent does not control his house or have access to it without permission. Petitioner testified that he set up his own home office and was in charge of ergonomic assessements, and had done some himself. He testified that he only filled out the form and recorded information. He made no recommendations. Petitioner claimed he asked Lisa to have an ergonomic assessment done, but it never was.

Petitioner's wife, Monica Garrett, was called as a witness on behalf of petitioner. She denied that petitioner had any back problems before 2006. She testified that petitioner looked uncomfortable at his home workstation and could not get his legs under the desk. She testified that he reached over to the desk and rotated. She admitted that petitioner had back problems before the alleged injury.

Brittany Brinkmann, Senior Territory Manager, was called as a witness on behalf of respondent. Before 5/25/15 petitioner was Brinkmann's direct report from July of 2012-5/25/15 while she was a Senior Branch Manager. Brinkmann testified that she was the one who directed Weygant to perform petitioner's ergonomic assessment. Brinkmann testified that from July of 2012 to 8/29/13 petitioner told her he was getting injections for his back and he would have to get off work for surgery. She testified that during this period petitioner never reported any work injury. She testified that the first she learned of petitioner's alleged injury was when she came to trial. She testified that petitioner never asked her for a

new desk. She stated that he did not ask for an ergonomic assessment until after the alleged date of injury. She testified that at that point Human Resources hand an external vendor, Cascade, take care of it. She testified that if petitioner had requested a new desk she could have helped him with that request.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner is alleging injuries to his lumbar spine due to repetitive work activities that arose out of and in the course of her employment by respondent and manifested itself on 8/29/13.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming injuries to his lumbar spine, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

Petitioner claims 8/29/13 was the date on which his symptoms became more acute a work when he could not get up out of his chair at 3:00 pm when he went to fetch some paper. Petitioner testified that he sat at his desk all day, except when he went to use the bathroom.

The Supreme Court held that compensation can be found in a case where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction. However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

In the case at bar the arbitrator finds the petitioner has failed to place into evidence any specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc. Most of petitioner's testimony and evidence focused on whether or not sitting in a chair and twisting could cause the breakdown of the protective structures of the spine over time, thus resulting in a disc herniation. Petitioner also spent a lot of time talking about his workstation setup, but did not spend much time providing evidence concerning his work activities, such as the frequency, duration and manner in which he performed his job.

Petitioner, weighing 380 pounds, 6'4" tall, and having a BMI index of 46.3, was a found to be morbidly obese. Petitioner worked for respondent since 1997. In October of 2006 he moved his office to his home. At that time respondent indicated that he wanted the chair he had in the office, but declined a new desk, stating that there was one that came with the house that he was going to use. At one point petitioner reported that he was having trouble with his chair and a technician came out and fixed it.

A lot of evidence was offered with respect to the ergonomic assessment of petitioner's home office. In April of 2009 petitioner reported that he was uncomfortable and his desk was low. As a result, Raydant went to petitioner's home, completed an ergonomic assessment, and got raisers for petitioner's desk, and corrected his monitor level. On 4/25/13 Weygant performed an ergonomic assessment of petitioner's workstation set up with him over the phone. She testified that it took about 15 minutes, and she read petitioner each question, and noted his responses on the form. Having had petitioner respond that each condition was met, she took no further action with respect to his workstation. She indicated that had petitioner indicated that any condition was not met she had the tools to correct any issues that existed. All further ergonomic assessments did not occur until after the alleged injury.

Petitioner testified that his work duties were diverse, but spent no time detailing his specific work duties. As far as his daily work duties were concerned, the only duties he discussed were Lead Days. On lead days, one agent is assigned to handle all the leads that come in that day. The agent is expected to follow-up on the leads within 15-30 minutes. If the agent did not follow-up in timely manner they risked being removed from the rotation of Lead Days. Raydant testified that there was no requirement that the agent handling Lead Day remain at their desk all day, or even remain in their office, as long as they respond to the leads in a timely manner.

Petitioner testified that 8/29/13 was his Lead Day. He stated that he sat down at his desk between 7:30-8:00 am, and did not get up until 3:00 pm, other than to go to the bathroom. Petitioner testified that when he tried to get up at 3:00 pm to fetch some paper, he could not get up and his wife had to help him up. Petitioner provided no details as to how many leads he had to follow-up on that day or any other day. He also provided no details as to what he actually was doing that day while he was at his desk. The actual amount of work he processed that day is unknown. It is also unknown how often he was working on his computer or just sitting at his desk, or was talking on the phone. Petitioner also did not testify as to the time he went to the bathroom, but offered no credible evidence to sustain a finding that he had any trouble getting up out of his chair to go to the bathroom that day. As such, it is unknown how long petitioner was actually sitting at desk before he was unable to get up.

In addition to the failing to provide any credible evidence as to his diverse duties on 8/29/13, petitioner failed to offer into evidence any credible evidence as to his diverse duties on any given day. The petitioner failed to offer into evidence with respect to how often he worked at home; how often he was in the field visiting existing or potential clients; how many clients he had; how often he was on the computer each day; how often he did paperwork each day; how long he was on the phone each day; how long he sat at his desk each day; etc. Bottom line is petitioner provided no specific and detailed information concerning his work activities, including the frequency, duration, or manner in which he performed them. Instead petitioner spent most of the time focusing on the fact that he could not get out of his chair on 8/29/13 after working Lead Day, without any specific and detailed information of what he did on that day or any other day.

The Supreme Court has also held that it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. In the case at bar, when petitioner first sought treatment for his injuries at the emergency room of Heartland Regional Medical Center in Marion, IL on 9/2/13, he reported complaints of lower back pain, and a history of the same. He reported

the onset of his symptoms as two days ago, with a gradual onset. He made no mention of an alleged injury at work on 8/29/13.

Petitioner told Dr. Payne on 9/3/13 that he was just sitting at his desk on Friday doing a lot of work on the computer, and when he stood up he experienced sudden severe worsening in his preexisting left lower extremity radicular pain. Dr. Payne was of the opinion that petitioner's pain was in the same dermatones that it had been in the past when he had his disc herniation at L2-L3.

The arbitrator finds the credible record shows that neither Dr. Payne, Dr. Western, or Dr. Van Fleet had a detailed and accurate understanding of petitioner's work activities. At most, the arbitrator finds the petitioner gave a history of sitting at his desk for many hours on 8/29/13 and then had difficulty getting up from his chair. Petitioner provided no specifics regarding his work duties on a daily basis.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 8/29/13. The arbitrator also finds it significant that petitioner had sustained a disc herniation while playing golf on 5/1/11 that never resolved prior to the alleged injury on 8/27/13. In fact, the credible medical records show that within just 2-3 months of the alleged injury the petitioner had diagnostic evidence of a large left posterolateral disc extrusion with inferior migration at L2-L3, compressing the left L3 nerve root; weakness in his quadriceps; a lot of pain down his left leg; numbness and tingling below the knee; real sharp pain shooting up in the groin into the trochanter and buttocks on the left side; difficulty with bowel movements; increased pain with Valsalva maneuvers; a pattern of taking 2 hydrocodone every 6-8 hours that only worked minimally; inability to referee soccer games; as well as failed conservative treatment and 2 recommendations for possible surgery, that were only being delayed because of complications that might arise due to his preexisting diabetes. The arbitrator also finds it significant that when petitioner got up to go the bathroom at some time during the day on 8/29/13 he had no problems getting up and doing so. Therefore, the arbitrator finds that the petitioner, contrary to what he claimed, was not sitting at his desk for 7 1/2 to 8 hours on 8/29/13 before being unable to get up out of his chair when he tried at 3:00 pm.

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?
L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his lumbar spine due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 8/29/13, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

16IWCC0633

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andrew Hufnagl
Employee/Petitioner

Case # 14 WC 15052

v.

Consolidated cases: D/N/A

Village of Alsip
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Molly C. Mason, Arbitrator of the Commission, in the city of Chicago, on 1/19/16. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☐ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

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

N. ☒ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of the claimed accident, 2/27/14, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did not sustain an accident that arose out of and in the course of employment. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

The parties stipulated Petitioner provided Respondent with timely notice of his claimed accident. Arb Exh 1.

In the year preceding the injury, Petitioner earned $146,640.00; the average weekly wage was $2,820.00.

On the date of accident, Petitioner was 40 years of age, married, with 2 children under 18.

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

Respondent is entitled to a credit of $21,336.60 under Section 8(j) of the Act.

ORDER

Accident

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner failed to prove he sustained accidental injuries that arose out of and in the course of his employment. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

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

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

Molly C Mason

Signature of Arbitrator

2/8/16
Date

FEB 8 - 2016

16IWCC0633

Andrew Hufnagl v. Village of Alsip
14 WC 15052

Arbitrator's Summary of Disputed Issues

The primary disputed issues are accident and causation, with Petitioner claiming his right-sided hernia, diagnosed on March 27, 2014, stemmed from lifting-related paramedic duties he performed a month earlier.

Arbitrator's Findings of Fact

Petitioner testified he has worked as a firefighter/paramedic for Respondent for 18 ½ years. He has held the rank of lieutenant for almost 10 years. Since the fall of 2003, he has held a second job as a fire science/EMS coordinator, at Moraine Valley Community College. He described this job as administrative and non-physical in nature.

Petitioner testified he first underwent paramedic training in 1992. At that point, he attended a four-month course. After successfully completing this course, he underwent additional training at Advocate for one year. He holds a paramedic license and regularly attends continuing education courses.

Petitioner testified his job duties for Respondent vary widely from routine "well being" checks and lock-outs to medical emergencies and fires. He has responded to a number of different calls during his career.

Petitioner testified he began experiencing sporadic dull aching in his left lower quadrant in early 2014. He "blew off" these symptoms at that point and did not seek care. In February 2014, he started experiencing severe acute pain in his right lower quadrant while having sex with his wife.

Petitioner testified his work schedule consisted of 24 hours "on" followed by 48 hours "off." On February 26, 2014, he started a 24-hour shift at 4 AM. He made various calls throughout February 26th and into the early morning hours of February 27th. Four of those calls were of a paramedic nature. Two of the four calls involved the same individual, an obese man who was well known to the department. Petitioner testified that, at about midnight on February 26th, he and three other paramedics went to this man's home on Kildare after the man reported being unable to get into bed. Petitioner testified the man weighed 300 to 350 pounds. He and the three other paramedics had to struggle to lift the man off the floor and get him into bed. [Records produced by Respondent in response to Petitioner's counsel's FOIA request include a partially redacted report showing that Petitioner responded to a call shortly after midnight on February 27, 2014 with that call involving providing assistance to an invalid. PX 4.] About four hours later, at 4 AM on February 27th, they responded to a second call at the same home, after the man called in and reported shortness of breath. They helped the man get into a "stair chair" and down stairs, via a home lift, and then transferred him to an ambulance.

Petitioner described a "stair chair" as weighing about 35 pounds. It is narrow and can be maneuvered more easily in stairwells than a conventional chair.

Petitioner testified he also responded to a fire call during his February 26-27, 2014 shift. Before responding to that call, he was required to don about 50 pounds of required equipment within 90 seconds, per department regulations.

Under cross-examination, Petitioner acknowledged he did not experience any symptoms during or immediately after his February 26-27, 2014 shift. He had no difficulty performing his regular job duties after that shift.

Petitioner testified he experienced right lower quadrant pain while having sex with his wife on the evening of February 27, 2014. His 40th birthday fell on that date. He and his wife joked about the symptoms being related to turning 40.

Petitioner testified he experienced another episode of "alarming pain" several days later, again while having sex with his wife.

Petitioner testified he did not have a primary care physician during this time period. On March 7, 2014, he saw an occupational physician, Dr. Moisan, for a pre-scheduled examination for work purposes. Per department regulations, he was required to undergo such an examination on an annual basis once he turned 40. Petitioner testified he told Dr. Moisan about both the dull left-sided and acute right-sided symptoms he had been experiencing. The doctor then examined him. Under cross-examination, Petitioner expressed the belief that Dr. Moisan "missed" a right-sided hernia during this examination. Petitioner testified that Dr. Moisan released him to full duty.

PX 3 consists of certified records from Dr. Moisan. The Arbitrator notes that PX 3 contains only 23 pages of records, including some duplicates, despite the fact that the certification page refers to 82 attached pages. Some of the 23 pages, including a history form, are dated March 7, 2014 but none set forth any abdominal/groin examination findings. The history form reflects that Petitioner complained of abdominal pain but denied any difficulty with job performance or any illness/injury requiring medical attention since the last examination. The 23 pages include the results of vision/hearing testing and blood work performed on March 7, 2014 but they do not include the doctor's history or examination findings of that date. Petitioner returned to Dr. Moisan on March 18, 2013, with Petitioner voicing no complaints on a history form, but no examination findings are included in the exhibit.

Under cross-examination, Petitioner acknowledged he did not report any injury to Dr. Moisan. He indicated that, when he saw Dr. Moisan, he did not know the cause of his symptoms.

Petitioner testified that Dr. Moisan referred him to Dr. Vasdekas, a general surgeon. Petitioner testified he saw Dr. Vasdekas on March 27, 2014. A handwritten history bearing that

date reflects that Petitioner was being seen for "evaluation of a possible hernia, left lower abdomen." It also reflects that Petitioner complained of intermittent left abdomen pain of six months' duration, "excruciating pain at the base of [the] penis before and after sex," with that pain starting "approx. one month ago" and a change in bowel habits. The history contains no mention of work activities or a work-related incident.

On examination, Dr. Vasdekas noted a right inguinal hernia. He recommended that Petitioner undergo a CT scan and a colonoscopy for his left sided-symptoms and then undergo a surgical repair of the hernia. He wrote out a note describing the etiology of the left-sided abdominal pain as "unclear." He wrote out a second note prescribing a right inguinal hernia repair. He did not comment on the etiology of the hernia. PX 5a. RX 2.

Under cross-examination, Petitioner acknowledged he did not tell Dr. Vasdekas about the lifting-related activities he performed on February 26th and 27th. Dr. Vasdekas told him his hernia was "definitely due to heavy lifting." Petitioner denied performing heavy lifting at any time other than when working for Respondent. He is not adept at home repairs and does not work on his car.

Petitioner testified that, on March 28, 2014, the day after he learned he would need a hernia repair, he prepared two documents, including a Form 45 and a "to/from" memo addressed to his supervisor, Chief Styczynski. Petitioner testified he was required to complete both forms at that time since he was the shift commander. On the Form 45 (PX 1), he indicated he sustained accidents at 00:24 and 04:11 on February 27, 2014 while lifting/moving a large, heavy patient. He described his injury as "abdominal discomfort that has caused pain." He indicated he had been diagnosed with a hernia. He acknowledged the hernia was "not immediately felt or noticed" after the lifting. PX 1. In the memo, he indicated he had been experiencing occasional abdominal pain in late February or early March and mentioned this pain to Dr. Moisan at his annual physical on March 7, 2014. He also described his subsequent visit to Dr. Vasdekas and the doctor's surgical recommendation. He went on to state:

> "I cannot point to a specific incident or circumstances that led to the pain/discomfort. I do not recall having severe pain during or after a call. After thinking about the incidents that I responded to, one address stood as a potential cause for the hernia. In the very early hours of February 27, 2014 (00:24), we responded to [address omitted by Arbitrator] for a lift assist. Upon arrival a very large, heavy patient was on his bedroom floor. He was unable to get into his bed. The crew lifted the patient up, held him up, until his bed could be brought over to him. The patient was dead weight and offered no assistance. The crew could not physically carry the patient to the bed, so the bed was brought to the patient. the crew had used a lot of physical effort to assist this citizen.

> On this first incident, I was on the patient's left side helping to lift him up and off the floor.
>
> Later the same morning (04:11 hrs.), the same patient wanted to be transported to the hospital. The crew took the patient out of his bed, placed him in a stair chair and removed him from the residence. The residence is too small for a stretcher to fit into the front door and a backboard will not make it out the front door. The patient, as before, was not much help. The crew had to physically exert themselves trying to remove the patient from the residence.
>
> On the second incident, I assisted the patient from the bed and I was the person who was manipulating him throughout his home and down the residence's chair lift, in our stair chair.
>
> I am not sure the hernia is directly related to the two incidents at _____ Kildare. However, those two incidents are the only calls that I can remember having to exert so much energy and effort. Additionally, the pain/discomfort did become noticeable shortly after those two calls for assistance."

PX 2.

Petitioner testified he gave PX 1 and PX 2 to Chief Styczynski on March 28, 2014. The chief left to make a call. On his return, he directed Petitioner to go home.

Petitioner underwent the recommended abdomen/pelvis CT scan on April 1, 2014. The scan was essentially negative. PX 6. RX 2.

Petitioner testified that, on April 2, 2014, he received a call from Christine Dapper of the Public Risk Fund. Dapper secured his permission to record their conversation. She asked him a series of questions which he answered. Petitioner described his testimony as consistent with the information he provided to Dapper. [Neither party offered any recorded statement into evidence.]

Petitioner underwent the recommended colonoscopy on April 7, 2014. PX 7. RX 2.

On April 10, 2014, Dr. Vasdekas released Petitioner to resume light duty, with no lifting over ten pounds. PX 5A.

PX 3 contains a handwritten note dated April 28, 2014, apparently authored by Dr. Moisan and bearing Petitioner's name, stating: "it is possible that lifting caused or contributed to his inguinal hernia."

Dr. Vasdekas performed a right inguinal hernia repair at Silver Cross Hospital on April 30, 2014. PX 8. RX 2. The "history and physical records" section of the hospital records describes Petitioner's chief complaint as "right inguinal hernia." This section also states: "patient states work related incident." PX 8, p. 3 of 99. In his operative report, Dr. Vasdekas diagnosed a "right inguinal hernia" and described "evident floor weakness." He did not comment on etiology. PX 8, pp. 28-29.

On May 15, 2014, Dr. Vasdekas described Petitioner as "progressing well." He advised Petitioner to begin increasing his activity level. RX 2.

On June 17, 2014, Dr. Vasdekas noted that Petitioner was starting to increase his activity level and was still experiencing some discomfort. The doctor noted no abnormalities on examination. He directed Petitioner to follow up in one month. RX 2.

On July 8, 2014, Dr. Vasdekas noted that Petitioner complained of sharp, right-sided lower groin pain of one week's duration. The doctor noted no abnormalities on examination. He advised Petitioner to apply ice to the affected area and return in two weeks. RX 2.

On July 22, 2014, Dr. Vasdekas described Petitioner as "doing well" and voicing no complaints. He released Petitioner to full duty as of July 27, 2014. RX 2.

Petitioner testified he returned to Dr. Moisan thereafter, with the doctor approving his return to work. Petitioner testified he resumed full duty on August 7, 2014, after taking a pre-scheduled vacation.

At Respondent's request, Petitioner saw Dr. Palacci for purposes of a Section 12 examination on February 24, 2015. In her report of that date, Dr. Palacci indicated she reviewed various records, including the operative report and records from Drs. Moisan and Vasdekas. She recorded the following history:

> "[Petitioner] states that on February 27, 2014, he experienced a sharp 9 out of 10 pain in the right groin with a burning sensation radiating into the right scrotum during sexual intercourse. He denied seeing or feeling an inguinal bulge. He experienced occasional left lower quadrant pain in the past. He denied any work injuries or trauma. He denied any nausea or vomiting. He denied any inguinal pain while lifting at work prior to and after this incident."

Dr. Palacci noted that Petitioner denied any current complaints and reported being able to perform all work and non-work activities. On examination, she noted a well-healed scar of the right groin with no evidence of bulge or hernia. She described the hernia repair as successful.

Dr. Palacci addressed causation as follows:

> "[Petitioner] is a 40-year-old firefighter employed by the Village of Alsip who reported sharp right groin pain on February 27, 2014 during sexual intercourse. He denied any work accidents or injuries. He was subsequently diagnosed with a right inguinal hernia and underwent a hernia repair on April 13, 2014, performed by Dr. Vasdekas . . .
>
> Based on review of the medical records, history and physical exam, Mr. Hufnagl has a diagnosis of a right inguinal hernia, which was successfully repaired. In my opinion, given to a reasonable degree of medical certainty, [Petitioner] did not sustain a work accident, as he developed pain while at home and denied any specific work trauma or injury. He has even denied any inguinal or abdominal pain during work hours. In addition, none of the treating records of Dr. Moisan or Dr. Vasdekas ever document a work-related incident."

Dr. Palacci further explained that "direct hernias," such as Petitioner's, "are acquired and caused by weakening of the abdominal muscles over time with weakness in the floor of the inguinal canal. This weakness can be due to inherent connective tissue abnormalities in many cases, although some may occur due to deficiencies in the abdominal musculature resulting from chronic overstretching or injury or possibly drug effects."

Referencing the AMA 6th Edition Guides, and citing the absence of any palpable defect at the surgical site, Dr. Palacci classified Petitioner's condition as "Class 0." She indicated this class "does not require further adjustment" and accordingly rated Petitioner's impairment as 0%, indicating this "is typical for a successful hernia repair." Palacci Dep Exh 2.

Petitioner testified he used his group insurance to pay his medical expenses.

Petitioner denied having hobbies of a physical nature. He is required to stay in good shape and works out at the fire station. He continues to perform his regular duties for Respondent. He occasionally notes dull aching on the right side of his abdomen. This aching is new. He attributes it to the mesh used during the hernia repair. When Dr. Palacci asked him if he had an accident he said no because he conceives of an accident as a motor vehicle collision or other sudden event. He also denied any traumas when he saw Dr. Palacci. He thinks of a trauma as a gunshot wound, stabbing or other injury requiring a visit to a trauma center.

Under cross-examination, Petitioner acknowledged he did not report any injury or accident to Respondent between his February 26-27, 2014 shift and March 28, 2014. During that time, he did not think his symptoms were work-related. It was only after Dr. Vasdekas diagnosed a hernia that he concluded the symptoms stemmed from his job with Respondent. It was at that point that he looked back at his log books to determine which calls had involved strenuous lifting. He acknowledged it falls to him, since he is a shift commander, to tell employees to report work injuries promptly. He believes Dr. Moisan "missed" the hernia on March 7, 2014. In his view, it would be "preposterous" to think that sexual activity caused the hernia. But for his previously scheduled vacation, he would have resumed full duty on July 28, 2014. Other than the occasional right-sided aching, he has no other physical problems attributable to the hernia. He is not scheduled to follow up with any physician in connection with the hernia.

On redirect, Petitioner testified that a "jump bag" weighed 42 pounds as of his February 26-27, 2014 shift. His daughters are currently 3 and 12 years old. His 3-year-old weighed between 10 and 15 pounds as of his February 26-27, 2014 shift. He did not lose any time from his second job at Moraine Valley. He obtained Respondent's okay to continue performing this job. Dr. Vasdekas released him to resume full duty as of July 27, 2014. [RX 2.] He took a pre-planned vacation thereafter, through August 6, 2014.

Under re-cross, Petitioner acknowledged that neither Dr. Moisan nor Dr. Vasdekas drew a link between his hernia and any particular call he made while working for Respondent.

No witnesses testified on behalf of Respondent at the hearing.

Respondent offered into evidence Dr. Palacci's evidence deposition of August 25, 2015. The doctor, an osteopath, testified she obtained board certification in internal medicine in 2005. RX 1 at 6. She was last involved in direct patient care in December 2013. As of the deposition, her practice consisted of performing Social Security disability evaluations. RX 1 at 6-7. She devotes about one-third of her practice to medical-legal work. RX 1 at 7.

Dr. Palacci testified she reviewed records from Dr. Moisan, Dr. Vasdekas, Silver Cross Hospital and Palos Community Hospital in connection with her examination of Petitioner. RX 1 at 8-9. The records reflected a diagnosis of a hernia. RX 1 at 9. Dr. Moisan's note of March 7, 2014 does not contain any history of an injury. RX 1 at 9-10. Dr. Vasdekas's initial note of March 27, 2014 also contains no history of an injury. RX 1 at 10. In his operative report of April 30, 2014, Dr. Vasdekas noted a "direct inguinal hernia with evidence of floor weakness." RX 1 at 11.

Dr. Palacci testified that none of the records she reviewed indicated that the hernia stemmed from a work-related accident. RX 1 at 12.

Dr. Palacci testified that, on February 24, 2015, Petitioner provided a history of 9/10 pain in his right groin with a burning sensation radiating into his right scrotum during sexual

intercourse. Petitioner denied feeling or seeing any inguinal bulge at that time. Petitioner denied any work injuries or trauma. Petitioner "even stated that he didn't have any inguinal pain even while lifting at work" prior to or after this incident. RX 1 at 13. Petitioner denied any nausea or vomiting associated with his groin pain. Such symptoms might give rise to concern for complications associated with hernias. Symptoms associated with hernias can range from a dull, pulling sensation to sharp pain. Sometimes the pain can radiate into the scrotum. RX 1 at 14. The pain can worsen by the end of a day, especially for people who do a lot of standing or perform labor. RX 1 at 14.

Dr. Palacci found it significant that Petitioner denied experiencing inguinal pain while working on February 27, 2014. She assumes that, by denying any trauma, Petitioner was including heavy lifting in his definition of "trauma." RX 1 at 14-15.

Dr. Palacci testified that Petitioner denied any complaints at the time of the examination. He had resumed full duty as a firefighter. RX 1 at 16.

Dr. Palacci testified there are several risk factors for hernias. The only identifiable risk factor in Petitioner's case is that he is a male Caucasian. RX 1 at 16-17.

Dr. Palacci opined that Petitioner did indeed have a right inguinal hernia and that the hernia repair was successful. She found no evidence that the hernia resulted from the work activities Petitioner performed on February 27, 2014. She found Petitioner to have reached maximum medical improvement. RX 1 at 18.

Dr. Palacci testified that the operative report described Petitioner as having a "direct inguinal hernia." This diagnosis, along with the "operative findings of a weakened inguinal canal floor," told her that Petitioner "probably had some kind of inherent connective tissue abnormalities that caused weakening of the fibromuscular tissue in the abdominal wall." RX 1 at 19.

Dr. Palacci testified she performed an impairment rating after examining Petitioner. She relied on the sixth edition of the AMA Guides in so doing. The diagnosis of a "right inguinal hernia that was successfully repaired" placed Petitioner in "class zero." By definition, a "class zero is zero percent impairment." RX 1 at 26, 28. She found Petitioner's "functional history grade modifier" to be zero because Petitioner had no complaints. However, she did not need to consider this because Petitioner's diagnosis placed him in class zero. RX 1 at 26.

Under cross-examination, Dr. Palacci testified she reviewed a cover letter from Respondent's attorney in addition to medical records. She used the cover letter only as a general guideline. RX 1 at 29-30. She completed her report within a few days of examining Petitioner. RX 1 at 30. She did not retain her notes. She has admitting privileges at St. Joseph Hospital. RX 1 at 31. She last treated patients in December 2013. RX 1 at 32. She devotes two thirds of her current practice to Social Security disability evaluations and one third to medical legal work. RX 1 at 32. About 60 to 80 percent of the medical legal work comes from insurers

or respondent attorneys. RX 1 at 33. She is not sure whether Dr. Vasdekas communicated with Dr. Moisan. RX 1 at 35. She is also not sure about the etiology of Petitioner's left-sided complaints. The CT scan showed no evidence of a left-sided hernia. RX 1 at 38. Petitioner told her he began experiencing pain at the base of the penis while having sex on February 27, 2014. She put this in her report. Dr. Vasdekas's initial note reflects a one-month history of this pain. RX 1 at 39. Her report does not reflect that she reviewed any recorded statement given by Petitioner to a claim representative. RX 1 at 41-42. As a firefighter, Petitioner would perform lifting. RX 1 at 46. She did not ask Petitioner about his specific duties. RX 1 at 47. Whether a hernia is related to firefighting duties depends on the scenario and risk factors. RX 1 at 47. Dr. Vasdekas was looking for a left-sided condition initially, based on Petitioner's complaints, but ended up finding a right-sided hernia. RX 1 at 48-49. Not everyone who has an inguinal hernia notices the hernia immediately. RX 1 at 49-50. A hernia could possibly stem from strenuous activity such as lifting. RX 1 at 52. Most hernias result from congenital defects. RX 1 at 55. She is not aware of the specific work activities Petitioner engaged in during the month before his hernia was diagnosed. RX 1 at 56-57. It is possible that Petitioner's work activities could have caused a defect leading to the need for hernia surgery but "there are still a lot of unknowns." Petitioner was "evaluated for GI issues" and maybe had some other gastrointestinal complaints that could have increased his intra-abdominoanal pressure. RX 1 at 57. The work activities cannot be eliminated as a cause but Petitioner denied any inguinal pain during those activities. Abdominal pain is different from inguinal pain. The abdominal pain Petitioner was experiencing was on the opposite side of the hernia. RX 1 at 58-59. She has performed maybe thirty examinations of firefighters claiming hernias. RX 1 at 61. She would not disagree with the period of time that Petitioner was kept off work following the mesh hernia repair. RX 1 at 62. She cannot say with absolute certainty that the hernia was unrelated to Petitioner's work activities. RX 1 at 64. A person who undergoes a mesh repair faces a possible risk that the mesh will separate, causing a recurrence. RX 1 at 64.

On redirect, Dr. Palacci testified she definitely asked Petitioner how he injured himself, with Petitioner indicating he experienced a sharp pain during sexual intercourse on the night of February 27th. RX 1 at 68. She specifically asked him if he experienced any work injuries or traumas. When he said no, there was no need for her to press further. RX 1 at 69.

Under re-cross, Dr. Palacci testified it would have been typical for Petitioner to move large individuals, using stair chairs and stretchers, and maybe fight fires. Petitioner probably would not identify such activities as traumas since he routinely performed them. RX 1 at 71. She did not review the Form 45 or the accident report in connection with her examination. RX 1 at 73.

On further redirect, Dr. Palacci testified that, in light of Petitioner's history and the contemporaneous records, the Form 45 and accident report do not prompt her to change her opinions. RX 1 at 76.

Arbitrator's Credibility Assessment

Petitioner's lieutenant status and lengthy tenure with Respondent weigh in his favor, credibility-wise.

The Arbitrator does, however, question Petitioner's attempt to link his right-sided hernia, diagnosed on March 27, 2014, with lifting activities he performed during a shift a month earlier. Petitioner testified he (alone and as part of a team) had to lift and carry an obese individual at two points during that shift. Petitioner freely acknowledged, however, that he did not experience any symptoms while or shortly after performing those activities. He became symptomatic on the night of February 27, 2014, while having sex with his wife on his 40th birthday. He next experienced the symptoms, which he described as "alarming pain," a few days later, again during sex. He insisted that it was the work-related lifting of February 26-27, 2014 rather than the sexual activity that caused his symptoms yet, when he related the symptoms to Dr. Vasdekas on March 27, 2014, he linked them to sex. The doctor's note of that date contains no mention of work, let alone the calls Petitioner made on February 26-27, 2014. Petitioner testified that Dr. Vasdekas told him his hernia stemmed from heavy lifting but this is not documented in the doctor's initial note. Rather, it appears to the Arbitrator that it was Petitioner, rather than any physician, who decided to target the lifting he performed on February 26th and 27th as a cause after learning of the need for surgery that would clearly result in some lost time.

Petitioner testified he provided a recorded statement to a representative of the Public Risk Fund on April 2, 2014. Respondent did not offer a transcript of this statement into evidence. The Arbitrator would typically question this but notes that, even if the transcript reflected Petitioner told the representative he experienced symptoms while or shortly after performing lifting on February 26-27, 2014, that would conflict with his sworn testimony.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on February 27, 2014 arising out of and in the course of his employment?

Initially, the Arbitrator considers the effect of Section 6(d)(f) of the Act. This section provides, in relevant part, as follows:

> "Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards

> or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter, EMT or paramedic. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning the condition or impairment with the Illinois Workers' Compensation Commission."

This section has an obvious application to the instant case. Petitioner alleges a hernia and had worked as a firefighter/paramedic for more than 5 years as of the date he filed his Application. The question for the Arbitrator to resolve is whether the presumption in favor of compensability was successfully rebutted.

The Arbitrator, having found that Petitioner was less than credible as to certain issues, and having considered the timeline and all of the evidence, finds that the statutory presumption was rebutted in this case. In so finding, the Arbitrator relies on the following: 1) Petitioner's candid admission that he did not experience any symptoms while or immediately after performing the tasks he retrospectively targeted as the cause of his hernia; 2) Petitioner's apparent failure to offer into evidence all of Dr. Moisan's certified records; 3) the fact that Dr. Vasdekas's initial history contains no mention of work, let alone a specific work activity, as the cause of Petitioner's complaints; 4) the opinions expressed by Respondent's examiner, Dr. Palacci.

The Arbitrator has also compared this case with another firefighter hernia case recently decided by the Commission, Timothy Capua v. Lisle-Woodridge Fire Protection District, 2015 Ill. Wrk. Comp. LEXIS 170 (March 9, 2015). The facts of both cases are very similar, with one significant exception.

In Capua, as in the instant case, the claimant was symptomatic for a period before being diagnosed with a hernia and did not report any injury to his employer until after he was diagnosed and referred to a surgeon. The claimant, like Petitioner, did not link his abdominal symptoms to work, let alone any specific work activity, when first evaluated by a physician.

In Capua, the arbitrator found that the claimant failed to establish accident and causation. The Commission (Tyrrell, Brennan and Lamborn) reversed, citing the "rebuttable presumption" language of Section 6 and the claimant's testimony that "he felt a pain in his abdomen after pulling [a] 35-foot ladder out of about 5 inches of mud" while fighting a fire. The Commission characterized this testimony as credible, further noting that the claimant described his pre-existing abdominal swelling as increasing significantly after he extricated the ladder from the mud. It is that credible testimony and sequence of events that are missing from the instant case.

The Arbitrator also considers the analysis and result in Curtis Simpson v. City of Peoria, 2015 Ill.Wrk.Comp. LEXIS 37, a case decided by the Commission approximately a year ago. While Simpson involves a firefighter claiming a myocardial infarction rather than a hernia, it is instructive because, as in the instant case, the symptoms manifested after a non-work activity. In Simpson, the claimant experienced chest pain at home, after cleaning his garage and moving some items. He was diagnosed with a heart attack shortly thereafter. The arbitrator found the case compensable and awarded permanency benefits. [The arbitrator's decision is not available online.] The Commission (Basurto, Mathis and Gore) reversed. Initially, the Commission cited the "rebuttable presumption" language of Section 6(f) along with decisions in which the appellate courts analyzed presumptions arising outside the realm of workers' compensation. The Commission relied on Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452 (1983) for the proposition that "if a strong presumption arises, the weight of the evidence brought it in to rebut it must be great." The Commission went on to say that because the presumption created by Section 6(f) is statutory, "it requires stronger evidence to overcome." The Commission found that the employer successfully rebutted the presumption "by providing strong evidence through its experts' opinions, along with Petitioner's own health history, work history and Petitioner's own testimony to show there were other causes of Petitioner's cardiovascular problems and his condition is not related to his employment as a firefighter."

The Commission's analysis did not end there. Again citing Franciscan Sisters, the Commission went on to address the question of whether the claimant "met his burden of proving by a preponderance of the evidence that his heart attack was related to his employment." In other words, the Commission felt compelled to analyze the evidence as it would in an ordinary case in which no presumption applied. The Commission concluded that the claimant did not meet this burden since the activity giving rise to the symptoms was "personal in nature." The Commission assigned greater weight to the opinions of the claimant's expert than to those of the claimant's.

The Arbitrator, following the Commission's lead in Simpson, takes her analysis beyond the confines of Section 6(f) and finds that Petitioner failed to prove, by a preponderance of the evidence, that his hernia stemmed from any work activities performed during his February 26-27 shift. A classic "chain of events" analysis is inapplicable since Petitioner denied experiencing symptoms while or immediately after performing those activities. The treatment records do not contain mention of those activities. Instead, they coincide with Petitioner's sworn testimony that he experienced the symptoms during sexual activity. Petitioner did not offer any medical opinion, to a degree of reasonable certainty, that the activities he performed on February 26-27, 2014 were a cause of his hernia. Dr. Moisan merely opined that it was possible that non-specific lifting could have caused or contributed to the hernia. Similarly, Dr. Palacci conceded merely that it was possible Petitioner's work activities could have contributed to the development of the hernia.

The Arbitrator, having found that Petitioner failed to prove a compensable work accident, views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Marsh,

Petitioner,

16IWCC0593

vs.

NO: 14 WC 18122

G & D Integrated,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2015 is hereby affirmed and adopted.

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

16IWCC0593

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 $13,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 16 2016
KWL/vf
O-9/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0593

JOHN MARSH
Employee/Petitioner

v.

G&D INTEGRATED
Employer/Respondent

Case # 14 WC 18122

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Geneva**, on **July 16, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

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

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

16IWCC0593

FINDINGS

On **April 2, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**33,819.76**; the average weekly wage was $**650.38**.

On the date of accident, Petitioner was **30** 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 $**14,593.25** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**14,593.25**.

ORDER

Prospective Medical Benefits

Respondent shall authorize and pay for Petitioner's left knee surgery, as recommended by Dr. Jason Hurbanek, in accordance with Section 8(a) and subject to Section 8.2.

Temporary Total Disability & Claimed Overpayment

Respondent shall pay Petitioner temporary total disability benefits of $**433.59** from **April 16, 2014** through **July 16, 2015**, or **65-2/7** weeks, as provided by Section 8(b) of the Act. Respondent is entitled to a credit for TTD benefits previously paid in the amount of $**14,593.25**. Based on the foregoing, no TTD overpayment was made.

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

December 3, 2015
Date

ICArbDec19(b)

DEC 4 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION

John Marsh,	)	**16IWCC0593**
Petitioner,	)	
v.	)	**No. 14 WC18122**
G&D Integrated,	)	
Respondent.	)	

FINDINGS OF FACT

Petitioner testified that on April 2, 2014, he was working for Respondent as a Diesel Technician. This job required him to drive in his service vehicle site to site to repair trucks. On this day, Petitioner testified, as he was climbing into the back of the service vehicle, he felt a pop in his left knee. There were two rungs of stairs on each side and just one handle. He had to grab the handle and twist himself into the vehicle. He was not sure if he bumped the knee on the back deck or if it just popped on its own. After he felt the pop, Petitioner continued, he felt a "really warm fuzzy pain."

After he felt the symptoms in his left knee that day, Petitioner saw Respondent's Safety Officer who was at the location. The Safety Officer told Petitioner to contact his Supervisor. Petitioner then contacted his Supervisor who directed him to a man in Human Resources. The HR man instructed Petitioner to go to Occupational Health in Aurora, which is affiliated with Mercy Hospital.

On April 2, 2014, Petitioner presented to Charles G. Woodward, M.D., at Presence Mercy Medical Center. Dr. Woodward recorded the following HISTORY OF PRESENT ILLNESS:

John relates that this morning he was climbing from one portion of his truck to the other, heard and felt a pop on the left knee. He has had some mild but increasing pain in the last few days. This is a considerable increase in pain. He relates that standing with the knee fully extended is not painful but that any walking does bring on some pain and that climbing is very painful. (RX 5)

Upon examination, Dr. Woodward noted swelling over the left tibial tubercle that is very tender to touch and palpation. The x-rays revealed sequela of Osgood-Schlatter disease. The doctor identified a small piece of detached bone measuring approximately 1 cm. by 8 mm., easily visible on the lateral view from the tibial tubercle. Clinically, he opined, this piece of bone possibly has detached recently and may be the source of John's pain; at this time it seems that a small piece has broken off. Dr. Woodward released Petitioner to light-duty work. (RX 5)

On April 15, 2014, Petitioner treated with Robert T. Semba, M.D., at Parkview Orthopaedic Group ("Parkview"). He complained of left knee catching, locking, and giving way. He had difficulty walking, a significant limp and moderate effusion. Dr. Semba's initial assessment was possible ACL tear or medial meniscal tear. Dr. Semba ordered an MRI scan. Petitioner refused medication. Petitioner was kept off work for the first time. (PX 1)

On April 24, 2014, Petitioner underwent an MRI on his left knee. The MRI showed a subcortical cyst involving the anterior tibia with surrounding marrow edema at the level of the patellar tendon. Henry J. Fuentes, M.D., saw Petitioner that day at Parkview and recommended physical therapy. (PX 1)

On April 29, 2014, Petitioner returned to Dr. Semba, who felt that the MRI showed tibial plateau bone bruising. Petitioner's pain increased with vigorous walking or stairs. Dr. Semba recommended more physical therapy. Petitioner was kept off work. (PX 1)

On May 8, 2014, Petitioner began physical therapy at Parkview. The plan was nine visits over three weeks. (PX 1)

On May 22, 2014, Petitioner sought a second opinion at Hinsdale Orthopaedics from Jason Hurbanek, M.D. He complained to the doctor of pain in the medial and lateral left knee, 6/10 in severity. He reported that the knee felt unstable and buckled. He was wearing a knee sleeve. Dr. Hurbanek reviewed the left knee MRI and noted the presence of some signal at the anterior tibial tubercle. Dr. Hurbanek diagnosed Petitioner with a left knee patellar tendon strain. Conservative treatment was recommended along with physical therapy. Naproxen was prescribed. Petitioner was kept off work. (PX 2)

On July 17, 2014, Petitioner returned to Dr. Hurbanek and complained of dull, sharp pain. His knee pain increased with therapy and using stairs. Swelling at the tibial tubercle was noted with tenderness. The MRI was reviewed again. Dr. Hurbanek's assessment was left tibial tubercle pain. A corticosteroid injection was given for diagnostic and therapeutic purposes. Dr. Hurbanek noted that, if the injection failed, he would recommend an open excision of the ossicles at the tibial tubercle with a small patellar tendon repair. Physical therapy was continued. Petitioner was kept off work. (PX 2)

On August 21, 2014, Petitioner returned to Dr. Hurbanek and reported that the corticosteroid injection relieved his pain for about five days. He had two hours of instant relief. Dr. Hurbanek recommended surgical removal of the tibial tubercle ossicles. Petitioner elected to proceed. Dr. Hurbanek kept him off work and sought workman's compensation approval. (PX 2)

On August 28, 2014, Coventry sought a utilization review by William Hagemann, M.D., a board-certified orthopedic surgeon. Dr. Hagemann determined that based on the clinical information submitted for this review and using evidence-based, peer-reviewed

guidelines, this request is non-certified. Dr. Hagemann apparently non-certified the surgery due to a lack of documentation as to whether the patient "received the diagnostic cortisone injection and additional therapy." Dr. Hagemann also non-certified the surgery because the "medical necessity for an open tibial tubercle debridement as opposed to an arthroscopic procedure has not been established." (RX 2)

On September 19, 2014, Petitioner returned to Dr. Hurbanek and reported knee pain at 6/10. Dr. Hurbanek again explained that his symptoms are secondary to his tibial tubercle bone spurs and that he would benefit from the removal of those ossicles with partial patellar tendon repair. He was kept off work until surgery completion. (PX 2)

On October 27, 2014, Petitioner underwent a Section 12 examination by Dr. Kevin Walsh with DuPage Medical Group. He found that Petitioner was tender to palpation at the tibial tubercle with a slight prominence due to his old Osgood-Schlatter disease. Dr. Walsh further found Dr. Hurbanek's surgical recommendation to be reasonable. However, Dr. Walsh opined that Petitioner's condition is causally related to the pre-existing condition and was not caused by the work injury. Dr. Walsh further opined:

Certainly, climbing in and out of a service truck, per se, does not cause an ununited tibial tubercle ossicle to necessarily become symptomatic. If the patient does go on to have surgery, more likely than not, it is for the pre-existing condition which never fully united at the time of the skeletal maturity, rendering the patient susceptible to pain and discomfort. The work event did not cause the ununited tibial tubercle ossicle, nor is it at all likely to have aggravated or accelerated the tibial tubercle ununited fragment. The patient simply developed pain and discomfort while in the workplace due to his ununited tibial tubercle ossicle. There is no causal relationship between the patient's proposed surgery and the work event. (RX 1)

Dr. Walsh placed Petitioner at MMI for any work injury, released him to return to work as tolerated and found his prognosis to be fair. (RX 1)

Petitioner testified that he spent five to six minutes with Dr. Walsh.

On July 16, 2015, Petitioner testified that he continues to experience pain and discomfort in the anterior part of his left knee below the kneecap, especially when climbing stairs or squatting. Petitioner denied any prior medical treatment for his left knee. However, Petitioner testified that about a week or week and a half before the accident, his left knee was a little sore. He attributed such soreness to climbing in and out of the truck 50-80 times a day to retrieve parts and tools. Petitioner testified that before the accident, he did not treat for and was not diagnosed with Osgood Schlatter disease. Petitioner also testified that he wants to proceed with surgery that Dr. Hurbanek has prescribed for his left knee.

16IWCC0593

CONCLUSIONS OF LAW

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds the following:

When an employee with a pre-existing condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. The Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the pre-existing condition or whether the pre-existing condition alone was the cause of the injury. Generally, these will be factual questions to be resolved by the Commission. However, the Commission's decision must be supported by the record and not based on mere speculation or conjecture. If there is an adequate basis for finding that an occupational activity aggravated or accelerated a pre-existing condition, and, thereby, caused the disability, the Commission's award of compensation must be confirmed. Sisbro, Inc. v. Indus. Comm'n, 207 Ill.2d 193, 797 N.E.2d 665 (2003)

Claimant in Sisbro, who had a history of Type II diabetes, stepped down out of a truck and into a pothole and twisted his right ankle while working for respondent. As a result, claimant experienced pain and slight swelling in the ankle, which resolved within a few days. Eleven days post-accident, claimant visited his podiatrist, Dr. Reed, for preventative foot care in relation to his diabetes. Claimant had no pain or swelling in the right ankle at that time, but reported the injury to Dr. Reed, who advised claimant to notify him if his condition changed. Over the next few weeks, claimant's ankle began to swell repeatedly and would not resolve. Soon thereafter, claimant was diagnosed with Charcot osteoarthropathy and was ordered to stay off the foot. In support of claimant's claim, Dr. Reed testified that based on a reasonable degree of medical certainty, the trauma that initiated the onset of Charcot in claimant's right ankle was the work-related, pothole-twisting injury.

In the case at bar, it is true that Petitioner did not present any expert opinion that his current condition of ill-being of his left knee, which was symptomatic as many as 7-10 days prior to the April 2, 2014 accident, is causally related to such accident.

Yet, the facts in Sisbro are distinguishable from the case at bar. In Sisbro, claimant did not treat for his twisted ankle on the date of accident, and his symptoms resolved after a few days. Subsequently, 2-3 weeks after the accident, claimant's ankle began to swell repeatedly and would not resolve.

In the case at bar, Petitioner treated for his left knee symptoms at a clinic to which Respondent sent him on the date of accident. Dr. Woodward, who is associated with such clinic, wrote that Petitioner heard and felt a pop on his left knee that morning while climbing from one portion of his truck to the other. He also wrote that Petitioner has had some mild increasing pain in the knee the last few days but that this is a considerable increase in pain. Dr. Woodward noted that x-rays of the left knee reveal a small piece of

bone that detached recently and opined that this may be the source of Petitioner's pain. Dr. Woodward's impression was a fracture of the left tibial tubercle. Petitioner has experienced consistent complaints of left knee pain and swelling since the accident. Petitioner is seeking surgery to remove the bony fragment that Dr. Woodward identified on the date of accident.

Prior to the accident, Petitioner was able to perform the full duties of a Diesel Technician for Respondent. Following the accident, Petitioner was released to light-duty work by Dr. Woodward and was subsequently taken off work completely by his other treating physicians.

The Arbitrator notes that there is no evidence of any prior medical treatment to the left knee.

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. International Harvester v. Indus. Comm'n, 93 Ill. 2d 59, 63-64 (1982)

Dr. Walsh opined that Petitioner's current condition of ill-being is related to his pre-existing Osgood-Schlatter Disease. Although Osgood-Schlatter Disease usually resolves with adulthood, Dr. Walsh opined, patients will occasionally develop an ununited tibial tubercle ossicle from the old Osgood-Schlatter Disease. As Dr. Walsh noted, Petitioner's present tibial pain is due to a symptomatic ununited tibial tubercle ossicle from his Osgood-Schlatter Disease. He further opined that the work injury did not cause the ununited tibial tubercle ossicle nor did it in all likelihood aggravate or accelerate the tibial tubercle ununited fragment.

Respondent does not dispute that on April 2, 2014, Petitioner sustained an accident that arose out of and in the course of his employment. Dr. Walsh opined that the surgery Dr. Hurbanek has prescribed is a reasonable treatment option. Although Respondent disputes causation, they do not offer an alternative diagnosis. Dr. Walsh opined that Petitioner has a symptomatic, ununited left tibial tubercle ossicle and that he simply developed pain and discomfort while in the workplace due to such ossicle. Dr. Walsh's opinion suggests that it was coincidental that Petitioner's ununited left tibial tubercle ossicle became symptomatic while he was climbing and twisting to get up on the service vehicle and "heard and felt a pop on his left knee."

When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. General Electric Co. v. Indus. Comm'n, 89 Ill.2d 432, 434, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982)

16IWCC0593

Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Rock Road Construction v. Indus. Comm'n, 37 Ill.2d 123, 127, 227 N.E.2d 65 (1967)

Petitioner's testimony is consistent with the histories of present illness, as recorded by Petitioner's treating physicians. The Arbitrator finds Petitioner to be credible.

The Arbitrator finds the treating records, particularly RX 5, and the testimony of Petitioner to be more persuasive than the opinions of Dr. Walsh. The Arbitrator finds that on April 2, 2014, Petitioner sustained an accident to his left leg that aggravated his pre-existing condition of ill-being.

Based on the facts and the law, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident of April 2, 2014.

In support of his decision with regard to issue (K) "Is Petitioner entitled to any prospective medical care?", the Arbitrator finds the following:

Dr. Jason Hurbanek has recommended surgical excision of the ossicle with partial patellar tendon repair. As explained above, this condition was rendered symptomatic as a result of Petitioner's work injury. Petitioner testified that he wishes to proceed with the recommended surgery.

As the Arbitrator has found for Petitioner on the issue of causation, he finds that the surgery Dr. Hurbanek has recommended is reasonable, necessary and related to the accident of April 2, 2014.

Therefore, the Arbitrator finds that Respondent shall authorize and pay for such surgery, in accordance with Section 8(a) and subject to Section 8.2 of the Act.

In support of his decision with regard to issues (L) "What temporary benefits are in dispute? TTD" and (O) "TTD Overpayment," the Arbitrator finds the following:

Since September 19, 2014, Dr. Jason Hurbanek has kept Petitioner off work until surgery, which has not yet occurred. (PX 2) Respondent made TTD payments to Petitioner until November 1, 2014, the date of Dr. Walsh's Section 12 report. Petitioner testified that he last received a TTD payment on November 18, 2014. Petitioner testified that his symptoms have gradually increased since his Section 12 examination and that he has not worked.

Given his findings and conclusions on the issue of causation, the Arbitrator finds that Petitioner is entitled to TTD benefits from April 16, 2014 through July 16, 2015.

Respondent is entitled to a credit in the amount of $14,593.25 for TTD benefits previously paid.

The Arbitrator finds that there is no TTD overpayment to date, given his findings and conclusions on issue (L).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDRZEJ PAWINSKI,

Petitioner,

vs. NO: 13 WC 41281

AT&T,

Respondent,

16IWCC0623

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of nature and extent of Petitioner's 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.

FACTUAL BACKGROUND

Petitioner has worked for AT&T for 14.5 years as a lines person placing cable, carrying ladders, working off ladders, working off climbing hooks, and climbing and placing poles. (Testimony p. 12) On March 11, 2012, he was working on the west side of Chicago. During that time, someone told him a line was down. In an effort to see which line was down, he went into a gangway. (Testimony p. 13) In the gangway, he was attacked and beaten unconscious. (Testimony p. 13-14)

Petitioner came under the care of Dr. Nirav Shah for treatment of his right shoulder and left leg. Dr. Shah treated his shoulder and left knee between July 16, 2012, and May 13, 2013. (Testimony p. 15) On August 28, 2012, Dr. Shaw performed surgery on his right shoulder. (Testimony p. 16) After surgery Petitioner went to physical therapy. (Testimony p. 16) Dr. Shah performed left knee surgery on February 12, 2013. (Testimony p. 17) After knee surgery he went

back to Accelerated Rehab through May 10, 2013. Thereafter, he returned to work as a line person. (Testimony p. 19)

Petitioner testified that his right arm is shorter than his left, and he cannot raise it beyond 2/3 to 3/4 of the way up compared with the left. (Testimony p. 24) Sometimes three of his fingers go numb – the little, ring, and middle. If he gets symptoms where he gets numbness in his shoulder and pinching pain and he'll take over-the-counter medication like Bayer aspirin. (Testimony p. 25) After a hard day of climbing at work, off the hooks, he feels pain in his knee for which he takes over-the-counter Bayer aspirin and ices it after work. (Testimony p. 26)

For his psychological state, the doctors help him with the medication, but there are certain parts or certain areas where they try to send him to work and he tells his boss he doesn't feel comfortable. (Testimony p. 27) If he's told he has no choice and goes there, he's deathly afraid. He shakes and sweats when he goes into those areas, and he just looks around and looks behind his back all of the time and he can't concentrate on his job. He notified his job that that happens and said he would like not to go in those areas because of what happened to him. (Testimony p. 28)

ANALYSIS

In determining an award of PPD, the Commission shall base its determination on the following:

i) A PPD impairment report prepared by a physician licensed to practice medical in all of its branches;
ii) The occupation of the injured employee;
iii) The age of the employee at the time of the injury;
iv) The employee's future earning capacity; and
v) Evidence of disability corroborated by the treating medical records.

Respondent sent Petitioner for an AMA impairment rating. The physician, Dr. Karlsson, found a Class 0 impairment regarding Petitioner's leg, and found a Class 1 impairment of the right shoulder and gave Petitioner a corresponding impairment rating of 4% loss of man as a whole. (Respondent Exhibit 1) In considering the remaining factors, Petitioner was only 30 years old at the time of the accident, with several more working years ahead of him. He was working in a physically demanding job as a cable splicer when he was assaulted and knocked unconscious. He is currently working as a line man, which per Petitioner's testimony, may be even more physically demanding. (Transcript p. 12) Petitioner's medical records corroborated his injuries and he was consistent with his complaints throughout his treatment. Additionally, Petitioner appeared to be a compliant patient. Although Petitioner was released MMI to full-duty, he complains of some residual issues to his shoulder and knee. (Transcript pgs. 25-26)

Based on the entire record before the Commission, and our analysis of the statutory factors in assessing permanent partial disability awards, the Commission modifies the Arbitrator's ruling, and hereby decreases the PPD award from 35% to 22.5% loss of use of Petitioner's left leg, and 18% to 12.5% loss of the person as a whole for injuries to the right

shoulder area of the body. The Commission affirms the Arbitrator's ruling with regards to the PPD award of 10% loss of the person as a whole for psychological injuries.

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)(12) of the Act, for the reason that the injuries sustained caused the 22.5% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 62.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained to the right shoulder caused the 12.5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 50 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 10% loss of the person as a whole for psychological injuries.

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

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

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

DATED: SEP 29 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

CJD/dm
O: 9/13/16
49

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $**712.55**/week for **75.25** weeks, because the injuries sustained caused the **35%** loss use of the **left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner additional permanent partial disability benefits of $**712.55**/week for **90** weeks, because the injuries sustained caused the **18%** loss of the person as a whole **for injuries to the right shoulder area of the body**, as provided in Section 8(d) 2 of the Act.

Respondent shall pay Petitioner additional permanent partial disability benefits of $**712.55**/week for **50** weeks, because the injuries sustained caused the **10%** loss of the person as a whole **for psychological injuries**, as provided in Section 8(d) 2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **July 11, 2012** through **November 16, 2015**, and shall pay the remainder of the award, if any, in weekly payments.

FINDINGS OF FACT

Petitioner Andrzej Pawinski was 30 years old and working for Respondent as a cable splicer on July 11, 2012 when he was attacked by an unknown assailant wielding an unknown object. (PX2.) He was struck from behind and knocked unconscious. (PX4.) Petitioner was discovered lying down on the ground by a coworker. (PX2.)

That same day, Petitioner was boarded and collared and taken to John H. Stroger Jr. Hospital. He had forehead abrasions, tenderness to palpation in his right shoulder, and midline tenderness in his cervical spine at C5-C6. Head and cervical spine CTs disclosed no acute processes, and right shoulder films were negative; Petitioner was ambulatory with no leg or hip pain. (PX2.)

Petitioner saw Dr. Nirav Shah at Parkview Orthopaedic Group. He complained of numbness and tingling in his hand, and pain in the anterolateral aspect of his right shoulder as well as deep in the shoulder. Petitioner reported that he was currently taking Ibuprofen and muscle relaxant. Dr. Shah noted no past medical history whatsoever other than a right knee arthroscope done in 2008. (PX4.)

Petitioner reported that he was having nightmares and mental difficulty coping with the attack. Dr. Shah noted that Petitioner was exhibiting symptoms of post-traumatic stress disorder. He stated: "From a psychiatric standpoint he has had some significant nightmares since this work comp injury as well as difficulty dealing with this mentally and crying occasionally." (PX4.)

Dr. Shah diagnosed Petitioner with possible labral instability, tear and/or impingement of the right shoulder; acute peripheral neuropathy or possible neurapraxia or traction injury occurring in the axillary posterior of the brachial plexus; and possible posttraumatic stress disorder. Dr. Shah took Petitioner off work. Dr. Shah ordered an MR-arthrogram of Petitioner's right shoulder, referred Petitioner to Dr. Russell Glantz for an EMG nerve conduction study, and referred Petitioner to Dr. Singh for psychiatric evaluation. (PX4.)

On August 28, 2012, Petitioner underwent surgery with Dr. Shah at Palos Surgicenter. Examining Petitioner under anesthesia, Dr. Shah visually confirmed an anterior load shift of 1+ and posterior load shift of 1+ compared to 0+ on the contralateral side. Using an arthroscope, he then visually confirmed a Bankart tear extending down to the 5 o'clock position; a type 2 posterior-superior SLAP tear posterior to the biceps anchor insertion; and significant synovitis-bursitis. Dr. Shah completed a Bankart repair followed by a SLAP posterior-superior labral repair, installing 5 BioComposite PushLock anchors and shaving the bone to provide a healthy surface for healing. Dr. Shah then completed a synovectomy and acromioplasty to address the synovitis-bursitis. (PX4.)

Petitioner returned to Dr. Shah for a follow-up examination, two days post-surgery. Dr. Shah discussed the surgical findings with Petitioner and instructed Petitioner to begin rehabilitation the following week. (PX4.)

On September 5, 2012, Petitioner presented for his first visit. Petitioner reported that he was performing home exercises daily and that his status was improving with intermittent pain. Petitioner was instructed to continue using an ultra sling at all times until 4 weeks post-surgery, with exceptions only for home exercises, physical therapy, and showering. Petitioner was scheduled for physical therapy 2 times per week for the next month, and instructed to continue home exercises 3 to 5 times per day. Petitioner remained off work. (PX4.)

Petitioner returned to Dr. Crawford. Petitioner reported that the nightmares had mostly stopped, but that he had one for the first time in 2 to 3 weeks. Petitioner reported that he still couldn't sleep. He would nap for 1 to 2 hours, then watch tv until he dozed off, but could only get 2 to 3 hours of sleep. He reported hallucinating and seeing shadows, as well as episodes of dizziness. Petitioner reported that he felt "empty," and had stopped socializing with others outside of his family. He reported that he was sad, and that he was finding it difficult to feel happy. Petitioner cried when he spoke about the trauma, and reported that this happens 2 to 3 times per day, about the same as before the surgery. He stated that he felt something was wrong with him. Dr. Crawford noted no evidence of delusions, but stated that Petitioner did seem to be having brief flashbacks. (PX9.)

Dr. Crawford noted Petitioner's decrease in disturbing dreams, but stated that this might be related to the analgesics he received for his surgery. Dr. Crawford noted Petitioner's persistent feelings of sadness and vulnerability. Dr. Crawford opined that Petitioner's episodes of dizziness might perhaps be secondary to the Prazosin. Dr. Crawford ordered a hold on the Prazosin for the next 3 weeks. Dr. Crawford prescribed Petitioner Celexa 20 mg and Oleptro. (PX9.)

Petitioner returned to Dr. Shah for follow-up. Dr. Shah opined that Petitioner was doing well. Dr. Shah found that Petitioner's range of motion, strength and endurance were improving, though Petitioner was not yet back at full strength. He opined that Petitioner was not yet at MMI. Dr. Shah instructed Petitioner to undergo thrice weekly physical therapy sessions for the next 8 weeks. Dr. Shah returned Petitioner to work on restricted duty. (PX4.)

Petitioner returned to Dr. Crawford. Petitioner reported some improvement; he was now sleeping 6 hours per night. He was no longer experiencing nightmares, though he did hear his name being called when no one was there. He still did not want to be in crowds. Dr. Crawford assessed Petitioner with PTSD and prescribed Lexapro 20 mg. (PX9.)

Petitioner followed up with Dr. Crawford on November 8, 2012. Petitioner reported that his sleep had improved; he was now sleeping 6 to 8 hours per night. With one exception, he was not experiencing nightmares, and no longer heard his name being called when no one was there. He was still uncomfortable in the store, but was able to go to the store. Petitioner's mood was "bland," with difficulty feeling happy. Dr. Crawford assessed

On January 14, 2013, PMI Diagnostic Imaging took an MRI of Petitioner's left knee. In the intercondylar notch, the radiologist noted abnormal signal intensity and appearance of the anterior cruciate ligament, possibly representative of a partial-thickness intrasubstance tear or chronic full-thickness ACL tear. The radiologist also noted a questionable small tear of the posterior horn of the lateral meniscus near its root attachment, meniscal degeneration, patellar tendinosis, and joint effusion. (PX4.)

Petitioner returned to Dr. Shah on January 17, 2013, complaining of pain over the anterior aspect of his left knee, pain directly with kneeling, and popping on the anterior aspect of the knee.Dr. Shah observed that Petitioner's complaints all seemed to originate from anterior to the patella and just distal to the patella. Dr. Shah reviewed Petitioner's left knee MRI. He stated:

> MRI of the left knee shows findings consistent with pre-patellar bursitis, proximal Insertional patellar tendonitis, possible ACL sprain, partial tear that appears to be chronic and a possible small tear along the lateral meniscus and patellar tendinosis and small joint effusion. MRI findings show a possible chronic injury to his ACL, possible small tear lateral meniscus, patellar tendinosis, joint effusion and pre-patellar bursitis. (PX4.)

Dr. Shah examined Petitioner's shoulder; he observed full range of motion, full strength, and well-healed scars. Dr. Shah examined Petitioner's left knee; he observed thickened bursitis anterior to the kneecap and just distal to the patella, with pain elicited over the patellar tendon and tenderness to palpation over the medial patellofemoral joint and anterior medial joint line. He noted Lachman test results of 0+ and firm, with varus valgus stress testing producing results of 0 to 30 degrees, 1+ and firm, no posterior drawer. (PX4.)

Dr. Shah stated that Petitioner's knee had not improved. He opined that Petitioner had failed conservative treatment. He stated that Petitioner was having pain with squatting and kneeling; he opined that Petitioner's knee condition was aggravated by work conditioning, physical therapy, and kneeling. (PX4.)

Dr. Shah recommended surgery consisting of left knee open pre-patellar bursectomy, patellar tendon debridement, arthroscopy and possible partial meniscectomy. He released Petitioner to work with restrictions of no kneeling. (PX4.)

Petitioner underwent surgery at Orland Park Surgical Center on February 12, 2013. Pre-operatively, Dr. Shah diagnosed Petitioner with left knee prepatellar bursitis, left knee patellar tendinitis, left knee painful Hoffa fat pad syndrome, and left knee painful plica syndrome. Dr. Shah evaluated Petitioner's patellofemoral joint arthroscopically, where he observed mild grade 1 chondromalacia. An open procedure followed. He resected Petitioner's ligamentum mucosum. Dr. Shah then observed that Petitioner had a thickened and scarred Hoffa fat pad, as well as painful medial plica in the patellofemoral joint. Dr. Shah excised both the fat pad and the plica. Next, Dr. Shah observed thickened prepatellar bursa and fibrotic bursa in the patella; Dr. Shah excised these, performing a complete prepatellar bursectomy. Dr. Shah observed grayish discoloration in Petitioner's patellar tendon consistent with patellar tendinitis and patellar tendinosis; he performed patellar debridement until he reached healthy tendon edges, then performed a tendon repair. Post-operatively, Dr. Shah diagnosed Petitioner with left knee prepatellar bursitis, left knee patellar tendinitis, left knee painful Hoffa fat pad syndrome, and left knee painful plica syndrome. (PX4.)

Two days post-surgery, Petitioner presented to Dr. Shah's office for follow-up. Petitioner stated that he was experiencing a significant amount of pain the day prior despite taking Norco 5, but that his pain was controlled much better on Norco 10. Petitioner reported having a lot of swelling and tightness in his knee, with pain anteriorly over the patellar tendon. (PX4.)

where his feelings were coming from. Dr. Crawford assessed Petitioner with PTSD and anxiety disorder; he prescribed Petitioner Lexapro 20 mg and Trazodone 50 mg. (PX9.)

Petitioner followed up with Dr. Crawford on October 21, 2013. (PX9.) Petitioner reported that he had been unable to sleep for several weeks, and was feeling increased anxiety. (PX9.) Petitioner stated that he had been working and productive, but that he had been reassigned to a location with less-than-ideal conditions and his numbers were bad in August. (PX9.) Petitioner stated that he had been placed under closer supervision, and that he felt he was being punished. (PX9.) Petitioner denied having bad dreams, but reported that he occasionally awoke feeling that someone was standing over him or walking past. (PX9.) His appetite remained good, and he remained able to go out in crowds; he remained cautious but not hypervigilant. (PX9.) Dr. Crawford assessed Petitioner with PTSD and anxiety disorder, with anxiety aggravated by current management practices; he prescribed Petitioner Trazodone 50 mg, Lexapro 20 mg, and Melatonin. (PX9.)

Petitioner followed up with Dr. Crawford on January 6, 2014. Petitioner reported that he had been suspended for 3 days after being hit from behind while at Popeyes at lunch. Petitioner stated that he had not missed any days of work prior to this. Petitioner reported feeling sick; he stated that he had retained an attorney. Petitioner reported no changes in sleep, appetite, tolerance for crowds, or vigilance. He stated that he felt distracted, and that his memory was not as good as before. Dr. Crawford assessed Petitioner with anxiety disorder. (PX9.)

At follow-up with Dr. Crawford on April 10, 2014, Petitioner reported feeling much better. Dr. Crawford opted to taper Petitioner off Trazadone. Petitioner likewise reported feeling much better at follow-up with Dr. Crawford on June 12, 2014. He stated that he felt good, that he was working more and was looking to take advantage of getting overtime work. He reported that he had no more shoulder pain, except when carrying a large ladder. Dr. Crawford began to reduce Petitioner's Lexapro prescription from 20 mg to 10 mg. At Petitioner's next visit with Dr. Crawford on September 14, 2014, Dr. Crawford began to taper Petitioner off Lexapro. (PX9.)

Petitioner's last visit with Dr. Crawford was on December 4, 2014. He had stopped taking Lexapro entirely and was feeling good. Dr. Crawford no longer diagnosed Petitioner with PTSD. (PX9.)

On August 31, 2015, Petitioner underwent a Section 12 examination with Dr. Troy Karlsson, who was instructed by Respondent to provide an Impairment Rating relating to Petitioner's cervical spine, right shoulder, and left knee.

On examination, Dr. Karlsson noted decreased range of motion in Petitioner's right shoulder compared to his left, with 40 degrees less active and passive flexion, and 60 degrees less active and passive abduction. He noted no crepitus, swelling, or difference in shoulder strength. Petitioner's cervical spine exam was "essentially normal." On examination, Dr. Karlsson noted no difference in range of motion or strength between Petitioner's knees. Dr. Karlsson opined that Petitioner had 0% impairment of the cervical spine, 0% impairment of the knee, and 6% loss of use of Petitioner's upper extremity based largely on the loss of range of motion (equivalent to 4% impairment of the whole person).

CONCLUSIONS OF LAW

The sole issue in dispute is the nature and extent of Petitioner's injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Johnson,

Petitioner,

vs.

NO: 13 WC 9875

City of Chicago,

17IWCC0035

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, nature and extent of permanent disability, date of maximum medical improvement, §8(d)1 benefits v. §8(f) benefits in lieu of §8(d) 2 and §8(e) awards, overpayment of maintenance, improper wage differential and permanent partial disability awards and being advised of the facts and law, corrects the clerical errors in 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 notes that in the credit section on the face sheet, the Arbitrator stated that Respondent overpaid maintenance benefits from September 31, 2014. This should be from October 1, 2013 and the Commission corrects this clerical error. The Commission further finds that it is more appropriate in this case to award permanency under §8(d) 2 than §8(e). The Commission corrects this clerical error by awarding the same total of weeks that was awarded by the Arbitrator, 178.75, under §8(d) 2, which calculates to 35.75% person as a whole. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

17IWCC0035

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 23, 2016 is hereby affirmed and adopted with the above noted corrections of clerical errors.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,106.49 per week for a period of 63-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $712.55 per week for a period of 178.75 weeks, as provided in §8(d) 2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 35.75%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $107,329.53 in TTD benefits, $46,685.41 in overpaid maintenance benefits and $8,537.65 in PPD advance, for a total credit of $162,552.59.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

JAN 24 2017

DATED:
MB/maw
o12/22/16
43

Mario Basurto

Stephen J. Mathis

David L. Gore

17IWCC0035

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Johnson
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **9875**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **December 2, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0035

FINDINGS

On **July 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **86,306.21**; the average weekly wage was $**1,659.73**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **1** dependent child.

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 $ **107,329.53** for TTD. Respondent shall be given a credit for overpaid maintenance benefits from 09-31-14 to 08-03-15 (44 weeks) or **$ 46,685.41** and Respondent shall be given a credit for **$ 8,537.65** (advance against permanency) for a total credit of $ **162,552.59**.

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

ORDER

Maximum Medical Improvement

The Petitioner reached maximum medical improvement on September 30, 2013 (left leg). No temporary total disability or maintenance benefits are awarded after this date.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,106.49/week for 63.714 weeks, commencing 07-11-12 through 09-30-13, as provided in Section 8(b) of the Act.

Maintenance

Respondent is entitled to a credit for overpaid t.t.d. or maintenance benefits from 09-31-14 to 08-03-15.

Section 8(d)1 Benefits

Petitioner is <u>not</u> totally and permanently disabled.

Section 8(d)(1)

Petitioner is <u>not</u> entitled to a wage differential award under Section 8(d)(1).

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner partial disability benefits of $ 712.55 (max) for 125 weeks, because the injuries sustained caused 25% loss of a person as a whole (job loss), as provided in Section 8(d)2 of the Act and an additional 53.75 weeks because the injuries sustained caused 25% loss of use of the left leg. The total award is 178.75 weeks or $127,368.31.

17IWCC0035

Causal Connection
No causal connection is found for the Petitioner's lumbar spine, cervical spine and shoulder(s) condition(s). However, causal connection is found for Petitioner left leg condition.

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.

Arbitrator Kurt A. Carlson

05-23-16
Date

MAY 23 2016

17IWCC0035

John Johnson v. City of Chicago
13 WC 9875

MEMORANDUM OF DECISION OF THE ARBITRATOR

Findings of Fact

The Petitioner in this matter worked as a blacksmith for the Respondent. The Petitioner explained that his job duties required him to fabricate pieces of metal in order to repair city property. Specifically, the Petitioner provided the example of fashioning pieces of metal together in order to rehabilitate city refuse trucks that had fallen into disrepair. In order to perform the tasks of his job, the Petitioner explained that he had to be able to lift heavy sheets of metal while welding, cutting and placing them in position to make his repairs. The Petitioner testified that the items that he would repair often weighed over one-hundred pounds.

The Petitioner's above testimony describing his work duties was contradicted by his medical records, which show that on November 14, 2006, the Petitioner had permanent sedentary work restrictions. (RX #2) He was instructed to frequently sit and only occasionally walk, stand, climb a ladder, stoop, kneel, squat, crouch or crawl. These permanent restrictions were caused by a low back injury at work in 2005, where he was off work for 535 days. Petitioner was offered surgery in 2006, but declined. He had a previous low back injury (HNP) in 2000 where he was off for a year and a similar injury in 1993. (RX #2) Despite the above, Respondent was ostensibly able to accommodate the sedentary restrictions.

On July 11, 2012, the Petitioner was in the process of repairing a refuse truck when his pant leg caught on fire. In an effort to extinguish the flames, the Petitioner tripped over a raised bolt that was on the floor of the truck. The Petitioner testified that when he tripped over the bolt, he twisted his left knee and fell to the floor of the truck.

On July 12, 2012, the Petitioner reported to Advanced Occupational Medicine, the clinic that was suggested to him by the Respondent (Pet. Ex. 1, p. 20-24). The notes from that date indicate that the Petitioner had sustained a left knee sprain.

On July 19, 2012, the Petitioner underwent the MRI of his left knee at Athletic Imaging (Pet. Ex. 1, P. 9-10). The MRI revealed a complex tear involving the posterior medial meniscus that appeared to involve the posterior medial meniscal root with extension to the body horn junction. Based upon the findings of the MRI, the Petitioner was referred to see Dr. Gregory Primus for a surgical consultation (Pet. Ex. 1, P. 13).

On August 17, 2012, Dr. Primus evaluated the Petitioner and recommended surgical intervention to repair the Petitioner's left knee (Pet. Ex. 1, P. 58). Petitioner decided to choose neither Advanced Occupational Medicine nor Dr. Primus, instead seeking Dr. Brian Cole of Midwest Orthopedics who also recommended knee surgery (Pet. Ex. 2, P. 146-147). No low back complaints were recorded. Id.

On November 14, 2012, Dr. Cole performed arthroscopic surgery on the Petitioner's left leg (Pet. Ex. 2, P. 152-154). The operative report revealed a left medial meniscectomy and a three-compartment synovectomy.

On November 26, 2012, the Petitioner retuned to see Dr. Cole for a follow-up examination (Pet. Ex. 2, P. 141-143). Dr. Cole recommended that the Petitioner begin physical therapy at that time. On November 28, 2012, the Petitioner began a regimen of physical therapy at Sports and Ortho (Pet. Ex. 3).

On December 27, 2012, Dr. Cole again evaluated the Petitioner. On that date, Dr. Cole noted that the Petitioner had taken a tumble two weeks prior and noted that the Petitioner had a known herniated disc that had laid him up a bit (Pet. Ex 2, P. 138). Dr. Cole encouraged the Petitioner to stay in physical therapy and continue taking pain medications, ice and elevate his knee and employ a knee brace as necessary. Id. Dr. Cole noted that the Petitioner was attempting to get his back issue under control as well. Id.

The Arbitrator notes that the above record is the first documentation of low back complaints by the Petitioner to his physician. Those complaints do not relate back to the work accident on July 11, 2012, which occurred five months earlier. Instead, they relate to the Petitioner's pre-accident condition or "a tumble" that occurred two week prior.

On February 4, 2013, the Petitioner was again evaluated by Dr. Cole who noted that despite the setback noted in the evaluation of December 27, 2012, Petitioner had improved in physical therapy. (Pet. Ex. 2). Dr. Cole noted that the Petitioner had residual lower back pain for which he had a known history of a herniated disk. Id. Dr. Cole prescribed additional physical therapy. Id. Again, the Arbitrator notes that the low back complaints were not in reference to the work accident on July 12, 2012.

On March 25, 2013, Dr. Cole again examined the Petitioner (Pet. Ex. 2, p. 127). Dr. Cole wrote that he had a thorough discussion with the Petitioner regarding the non-operative management of symptomatic osteoarthritis in the knee. Id. Dr. Cole noted that his work accident caused "an aggravation of a preexisting condition that got [the Petitioner] outside of his symptomatic window and into a need for treatment. Id. Dr. Cole noted ongoing back symptoms as well and recommended that the Petitioner treat both pain generators with a Medrol Dosepak. Id. Dr. Cole recommended that the Petitioner continue with physical therapy Id.

On April 15, 2013, the Petitioner was examined by Dr. Kern Singh, also of Midwest Orthopedics at Rush, due to ongoing complaints of low back pain (Pet. Ex. 2, p. 77-82). Dr. Singh wrote that as a result of the work accident, the Petitioner had had increased axial low back pain and had a left knee injury in which he underwent a meniscal repair by Dr. Cole. (Pet. Ex. 2, P. 79). Dr. Singh noted that the Petitioner had symptoms including sharp, burning, cramping sensations in his low back with symptoms radiating to the posterior and medial aspects of his right lower extremity. Id. Dr. Singh noted that the Petitioner had stated that he had had previous back injuries many years ago and noted that he had had a history of bulging disks. Id. Dr. Singh noted that the

Petitioner's symptoms were getting worse, causing moderate discomfort. Id. Dr. Singh specifically noted that the Petitioner's pain was the result of an on-the-job injury. Id.

The April 15, 2013 medical record with Dr. Kern Singh is the first time the Petitioner related the work accident to his increased low back pain. A time span of nine months had elapsed. Further, the Petitioner told Dr. Singh that "he has had a history of bulging discs. However, he is unsure of the exact details. He denies any history of lumbar spine injury." He informed the doctor that his job is heavy duty. (Pet. Ex. 2 p.79-80)

Dr. Singh recommended that the Petitioner engage in physical therapy to treat his condition and further recommended that the Petitioner call his office to get an order for an MRI if his condition did not improve. (Pet. Ex. 2, P. 81).

On May 7, 2013, the Petitioner did, in fact, undergo an MRI of his lumbar spine. The MRI, performed at Chicago Ridge Radiology, revealed mild bilateral foraminal stenosis due to mild broad-based predominantly central disc bulge at L4-L5 (Pet. Ex. 2. P. 248). Additionally, the MRI revealed mild foraminal stenosis due to a broad-based disc bulge at the L5-S1 level and minimal bilateral foraminal stenosis due to a broad-based disc bulge at the L3-L4 level (Pet. Ex. 2, P. 249).

On May 15, 2013, the Petitioner returned to see Dr. Singh following the MRI (Pet. Ex. 75-76). Dr. Singh diagnosed the Petitioner with a herniated nucleus pulposus at L4-L5 (Pet. Ex. 76). Dr. Singh recommended that the Petitioner see Dr. David Cheng for an epidural steroid injection. Id.

On May 20, 2013, the Petitioner again saw Dr. Cole for his knee (Pet. Ex. 2, P. 72). On this occasion, Dr. Cole noted that given the severity of ongoing knee symptoms, a cortisone injection was indicated. Id.

On June 18, 2013, the Petitioner authored a new patient questionnaire for Dr. David Cheng where he stated that the pain in his back, neck, shoulder and knee were related to the work accident on July 12, 2012. (Pet Ex. 2 p. 191) The Arbitrator notes that there is no history heretofore of a neck or shoulder injury associated with the work accident.

On June 21, 2013, Dr. Cheng performed the injection on the Petitioner's lumbar spine that Dr. Singh had recommended (Pet. Ex. 2, p.59).

On July 1, 2013, the Petitioner saw Dr. Cole again with regard to his knee (Pet. Ex. 2, p.58). Dr. Cole noted that the Petitioner was six weeks post-corticosteroid injection for his knee. Id. Dr. Cole noted improvement with the injection and opined that the Petitioner could have additional injections every three months. Id.

One week after his appointment with Dr. Cole, the Petitioner was examined by Dr. Singh on July 8, 2013 (Pet. Ex. 2, P. 55-56). Dr. Singh recommended that the Petitioner complete two to four weeks of work conditioning and that he follow up with

Dr. Cole with regard to his knee.

On September 30, 2013, Dr. Cole examined the Petitioner a final time. On that date, Dr. Cole placed the Petitioner at maximum medical improvement (Pet. Ex. 2, p.52). Dr. Cole recommended that the Petitioner be limited to seated sedentary work as a result of his work injury. Id. These restrictions match the Petitioner's pre-injury state of physical health. (Resp. Ex. 2 p.1)

Despite having been released with regard to his knee, the Petitioner continued to treat with Dr. Singh for his lumbar spine. On October 28, 2013, Dr. Singh consulted the Petitioner regarding his treatment options and it was decided that the Petitioner would pursue surgical intervention to treat his symptoms (Pet. Ex. 2, p.49). On December 3, 2013, the Dr. Singh performed a minimally invasive L4 and L5 laminectomy with bilateral facetectomy and foraminotomy and a right-sided L4-5 microscopic discectomy (Pet. Ex. 2, p.149-151).

On December 30, 2013, the Petitioner returned to see Dr. Singh (Pet. Ex. 2, p. 45-46). Dr. Singh noted that the Petitioner had improved since the surgery and that his right lower extremity pain had resolved (Pet. Ex. 2, p.45). Dr. Singh recommended that the Petitioner begin physical therapy at that time. Based upon this recommendation, the Petitioner resumed a regimen of physical therapy at Sports and Ortho on January 7, 2014 (Pet. Ex. 3).

On February 10, 2014, the Petitioner performed a functional capacity evaluation at Sports and Ortho at Dr. Singh's prescription (Pet. Ex. 3, P. 195-199).

Dr. Singh noted that the functional capacity examination placed the Petitioner at the medium demand level which would mean that additional work conditioning would be required to get the Petitioner back to work as a blacksmith. However, is does not appear that Dr. Singh was aware of the Petitioner's pre-injury physical capabilities as this FCE placed the Petitioner at a higher work ability level than his pre-injury state. (Resp. Ex. 2 p.1) Nevertheless, based upon the "increase" in the Petitioner's symptoms, Dr. Singh recommended a new MRI (Pet. Ex. 2, p.35).

On March 13, 2014, the Petitioner underwent an MRI of his lumbar spine at Chicago Ridge Radiology (Pet. Ex. 3, p.218). Following the MRI, the Petitioner returned to see Dr. Singh to review the results. Dr. Singh read the MRI to reveal a central disk protrusion at L4-5, as well as a right lateral recess narrowing at L4-5 with a right-sided laminectomy defect as well as diffuse spondylosis (Pet. Ex. 2, p.32). Dr. Singh advised the Petitioner to come back to see him in two weeks in order to determine whether he is a candidate for additional work conditioning versus an L4-5 revision laminectomy with fusion (Pet. Ex. 2, p.32).

On April 7, 2014, Petitioner had opted against pursuing further surgical intervention at that time (Pet. Ex. 2, P. 27). Accordingly, Dr. Singh recommended work conditioning.

On May 21, 2014, the Dr. Singh again evaluated the Petitioner. On that date, Dr. Singh noted that the Petitioner had only attended one additional session of work conditioning due to his pain levels (Pet. Ex. 2, p.23). Dr. Singh noted that he had a long conversation with the Petitioner regarding treatment options and that the Petitioner had decided against any further surgery. Id. Accordingly, Dr. Singh placed the Petitioner at maximum medical improvement and imposed permanent restrictions upon him based upon the results of the February 10, 2014 functional capacity evaluation which stated the Petitioner could return to work at the medium demand level. (Pet. Ex. 2, p.24).

Petitioner's permanent work restrictions are currently greater now than his pre-injury state of physical health. Nevertheless, Respondent failed to accommodate the new restrictions. As a result, the Petitioner began vocational rehabilitation at Vocamotive, beginning with an initial assessment on June 19, 2014. The Petitioner failed to cooperate in job search activities from November of 2014 to August 3, 2015. Petitioner is currently neither seeking additional medical treatment, nor is he employed.

Conclusions of Law

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

The Respondent has disputed whether the Petitioner's current state of ill-being is causally related to his work accident of July 11, 2012. Based upon the entire record, the Arbitrator finds that the left knee condition is compensable. No other portion of this claim is compensable under the Act. Petitioner's lumbar spine condition is not related to the accident on July 11, 2012. Likewise, the Petitioner's neck and shoulder complaints are unrelated to the work accident.

Causal Connection (left knee)

The Petitioner's testimony at trial was that on July 11, 2012, he was in the process of repairing a refuse truck when his pant leg caught on fire. In an effort to extinguish the flames, the Petitioner tripped over a raised bolt that was on the floor of the truck. When he tripped and fell, he twisted his left knee and fell to the floor of the truck. Petitioner sought medical care the next day and gave a consistent accident history to his treaters for his occurrence. The overwhelming majority of records support the Petitioner's contention that the occurrence aggravated the Petitioner's pre-existing left knee condition. As a result, the Arbitrator finds causal connection for the left leg.

Causal Connection (lumbar spine)

Petitioner's lumbar spine is not causally related to the accident on July 11, 2012. While it is true, Dr. Kern Singh gave a causal connection statement relating the Petitioner's low back condition to the work accident and Respondent failed to counter by

requiring cross-examination or a Section 12 opinion of its own; the Arbitrator finds Dr. Singh's opinion to be unpersuasive as it was based upon a false history of back complaints immediately after the occurrence. There simply is no such history in the record. The first attempt by the Petitioner to link his low back pain to the accident on July 11, 2016 did not occur under nearly nine months after he began seeking medical treatment. Further, Dr. Singh's opinion is based upon an unclear history of the Petitioner's previous lumbar spine condition. It appears certain that Dr. Singh was unware of the nature and extent of the Petitioner's pre-injury condition or that Petitioner already had sedentary work restrictions. As a result of the above, causal connection for the lumbar spine is denied.

Causal Connection (cervical spine and shoulders)

The Petitioner also attempted to link unrelated neck and shoulder pain to the accident as well. Again, these claims were far too remote in time and place to be causally connected to accident on July 11, 2012. (Pet. Ex. #2 p. 191) The Arbitrator finds no causal connection for the Petitioner's cervical spine and shoulder claim to the work accident.

(K) What temporary benefits are in dispute?

The parties have a dispute with regard to the payment of maintenance benefits in this matter. The Respondent contends that due to a lack of a diligent effort with regard to vocational rehabilitation, it should not have paid any maintenance benefits subsequent to the date that the Petitioner reached maximum medical improvement.

First, with regard to the date of maximum medical improvement, the Arbitrator finds that the Petitioner's left knee condition stabilized on September 30, 2013, when he was released by Dr. Cole. A full discussion of that issue is addressed in Paragraph (O) of this Decision.

Second, it is clear to the Arbitrator that the Petitioner was uncommitted to seeking work during the time that he was working with Vocamotive and while he was engaged in a self-direct search for work. Vocational rehabilitation was discontinued by the provider due to non-compliance. (Pet. Ex. 4 p.231)

Accordingly, Respondent's request for a reimbursement of maintenance is granted. Petitioner was entitled to temporary total disability and/or maintenance benefits from July 11, 2012 until the date of maximum medical improvement for his left leg on September 30, 2013.

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

Is Petitioner permanently and totally disabled?

The Petitioner in this matter claims to be permanently and totally disabled from the workforce as a result of his injuries of July 11, 2012. "For the purposes of Section 8(f), a person is totally disabled when he cannot perform any services except those for which no reasonably stable market exists. Conversely, if an employee is qualified for and capable of obtaining gainful employment without seriously endangering health or life, such employee is not totally and permanently disabled. In arriving at its determination, the Commission must consider the employee's age, experience, training and capabilities." E.R. Moore Co. v. Indus. Comm'n, 71 Ill.2d 353, 361 (1978) and 820 ILCS 305/8(f). In the present case, Dr. Cole prescribed permanent sedentary restrictions upon the Petitioner with regard to his knee injury, but those restrictions match his pre-injury state. It appears from the record that Dr. Cole was unaware of the Petitioner's pre-injury condition, which was essentially the same those on September 30, 2013 (the date of MMI). Petitioner was able to work as a blacksmith from 2006 until 2012 with permanent sedentary restrictions.

Later, Dr. Singh's prescribed an FCE that placed permanent restrictions on the Petitioner that allowed the Petitioner to exceed the physical demands of the 2006 sedentary restrictions, which pre-date the occurrence. Despite being able to work at greater physical demand level than his pre-injury state, the Respondent chose not to accommodate the Petitioner. Nevertheless, No doctor has stated that the Petitioner cannot work.

"When the employee makes the proper showing, the employer must come forward with evidence to show the employee is capable of engaging in some type of regular and continuous employment, and that such employment is reasonably available." Id. at 362-63. Stated another way, "the claimant has the burden of proving by a preponderance of the evidence the extent and permanency of his injury. Once the claimant has met this burden, then the Respondent must show that some kind of competitive market work is regularly and continuously available to the claimant." Hutson v. Industrial Comm., 223 Ill. App. 3d 706, 714 (5th Dist. 1992).

Respondent has failed to accommodate the Petitioner's new work restrictions despite the fact that they are less restrictive. However, VocaMotive has agreed that the Petitioner is employable. (Pet. Ex. 4) As a result, the Petitioner is capable of engaging is some type of regular and continuous employment and he is not permanently and totally disabled. Not is Petitioner an "odd-lot." Petitioner underwent vocational rehabilitation and did not perform adequately to justify awarding his maintenance benefits after August 3, 2015. (Id.)

Is the Petitioner entitled to a wage-differential award?

There is no requirement under Section 8(d)(1) that a claimant conduct a job search in order to obtain a wage differential award. Rather, claimants need only to demonstrate an impairment of earnings. Albrecht v. Industrial Commission, 271 Ill. App. 3d 756 (1995) However, evidence of a job search is an ideal method to show impairment of earnings. In the present case, as stated earlier, the Petitioner's job search was

unsatisfactory. A labor-market survey is another, perhaps weaker, method to demonstrate an impairment of earning. In the present case, Vocamotive's Kari Stafseth (CRC) initial assessment stated that the Petitioner might be able to return to work with a wage of between $10.00 per hour and $13.00 per hour, but this is not a traditional labor market survey. (Pet. Ex. #4, p. 10). Instead, it was part of an initial assessment and not supported by demonstrated research or data.

At the time of the initial vocational assessment (Pet. Ex. 4), Petitioner was a 56 year old male with permanent light to medium physical restrictions. He graduated from high school in 1976 and received a scholarship to Southern Illinois University. He reported he did not complete his first year in college. However, he received a welding certificate in Industrial Arts and Welding through the University of Houston and held a welding certificate from the American Welding Society. He was certified through Local 1 Blacksmiths-Boilermakers and could perform all types of welding including Arc, MIG, TIG, Horizontal, etc. He received a provisional teaching certificate for welding. He reported owned rental properties. He had work experience as a safety trainer and foreman. He had been a small business owner for a time. (Pet. Ex. 4) Despite all of these skills and qualifications, the initial assessment stated that Petitioner might be able to work with a wage between $10.00 per hour and $13.00. (Id.)

Later, when vocational assessment was fully performed (Pet. Ex. 4 p.35), it was determined that the Petitioner was best suited for the following jobs (among others):

Maintenance Shop Supervisor
Welding Supervisor
Fleet Service Coordinator

Ostensibly, the occupation the Petitioner is most suited for given his age, experience, training and capability would be as a welding instructor or inspector, but the assessment does not state the pay range of such positions, nor of any others listed. In any event, it is difficult to imagine these positions paying less than $13.00 per hour. (Pet. Ex. 4) Respondent did not counter with any evidence that the Petitioner could earn more than $10.00 per hour and $13.00 per hour. But again, the Petitioner earned $43.00 per hour with more onerous pre-accident restrictions.

When inspecting the job search records, it appears that much of the work the Petitioner was encouraged to apply for exceeded the $10.00 to $13.00 hourly pay range and others were within it. (Pet. Ex 4) The jobs within the $10.00 to $13.00 hour pay rate appear to easily obtainable and well within the Petitioner's grasp, yet he failed to apply himself diligently to the task. The final report of Kari Stafseth (CRC) states that if he complied with vocational rehabilitation, he would have had access to positions as dispatcher, customer service representative, and clerk with the most probable earning potential of $10.00 to $13.00 per hour. (Pet. Ex. 4 p.231) The Arbitrator notes these jobs were easily obtainable by the Petitioner and would have been the least competitive, but the lowest paid positions for which he was qualified to work. Stated another way, if the Petitioner had put forth a minimum amount of effort, he could have, at the very least,

found a job in that salary range. The legal standard cannot be the above. The law cannot allow a Petitioner who has suffered a job loss to automatically default into an 8(d)(1) wage differential award when there has been no compliance with vocational rehabilitation and the Petitioner has the education, skills and qualifications to earn significantly more than minimum wage.

The Petitioner is capable earning more than the above. Anthony Kochevar wrote that "Mr. Johnson has a strong background as a welder/fabricator/blacksmith and is an excellent resource in helping veterans understand what would be expected for a career in the trades." (Pet. Ex. 7 p.4) Many jobs the Petitioner appeared qualified for paid more than $10.00 to $13.00 per hour. (Pet. Ex. 7 p.95) A position as a dispatcher at MegaBus USA could be expected to $42,500. A steel dispatcher position was paying $50,000. (Pet. Ex. 7 p.176) The Petitioner seemed ideally suited for a position at Cameron Craig Group that would pay $65,000+. (Pet. Ex. 7 p.191) That job stated the employee would not be installing metal structures (stairs, balconies) but working with customers and would be advising the field installers on field fixes/adjustments. The most important question was, "Do you know welding fabrication and assembly?" (Id.) He applied for an adjunct faculty position at a city college to teaching welding, but the pay rate was not listed. (Id.) Even call centers were paying more than the minimum range. (Pet. Ex. 7 p.92) It is somewhat surprising to the Arbitrator that Petitioner's job search was not focused like a laser on welding inspection and supervising. At trial, the Arbitrator found the Petitioner to be an effective communicator who was fully capable of presenting himself in a professional manner.

After reviewing the above, Petitioner did not meet his burden in showing an impairment of earnings as required by the law under 8(d)(1) of the Act. The Arbitrator specifically rejects the $10.00 to $13.00 per hour estimate as it is clearly the least the Petitioner could be expected to earn. The Petitioner is capable of earning much more. In fact, it is not clear that the Petitioner suffered impairment in earning capacity. His current restrictions are less onerous than his pre-accident state. As a result, the enclosed award defaults to Section 8(d)2 of the Act. To that end, taking into consideration the Petitioner's reported level of impairment, occupation, age, future earnings capacity and disability supported by medical records, the Arbitrator awards 25% loss of use of a person as a whole (job loss) and 25% loss of use of the Petitioner's left leg. No AMA impairment report was in evidence.

(N) Is Respondent due any credit?

The Respondent seeks a credit for all maintenance paid as it perceives the Petitioner's efforts with regard to vocational rehabilitation to be less than diligent.

The petitioner failed to participate in a diligent and good faith job search. Therefore, his claim for maintenance benefits after August 3, 2015 must be denied.

Multiple examples of non-compliance and sabotage on the petitioner's part are detailed in (Pet. Ex 4), the vocational reports, but some of the difficulty includes the following facts.

The petitioner was repeatedly late for his meetings and computer lab. He failed to request time off and failed to put in proper time off sheets. By his own admission, he completed 50% of the weekly required job searches. He was argumentative. He refused to dress properly. He disputed that but there are numerous examples of when he was in jeans, track suits and other inappropriate outfits identified in the vocational reports. He made numerous personal calls during his computer labs. The petitioner refused to make up dates that he missed. He missed appointments for personal court dates, for family issues, for his birthday, for holidays etc. Yet he claims he is dedicated to finding work.

Petitioner turned in job logs. A great deal of his alleged job search was conducted on the internet. He failed to provide confirmation sheets proving that he applied for work on-line. The petitioner lacks credibility with his job search which is similar to lack of credibility about his low back injury and similar to his lack of credibility about injuring his neck and shoulders at work.

The petitioner disputes that he was non-compliance. His litany of excuses became exhausting and unpersuasive after recounting them at length. The petitioner agreed that he was paid maintenance by the respondent in order to compensate him for his time during his job search. However, he did not perform a diligent job search. When asked to make up missed appointments, he was quoted in the vocational reports as saying he had "other responsibilities," which became a mantra.

When there is a lack of "good-faith" cooperation with vocational rehabilitation efforts, the termination of benefits is justified. *Hayden v Industrial Commission, 214 Ill. App.3d 749, 575 NE2d 99, 158 Ill.Dec 305(1st Dist. 1991).* It is the petitioner's obligation to make "good-faith efforts to cooperate in the rehabilitation effort". *Archer Daniels Midland Co. v Industrial Commission, 138 Ill2d 107, 561, NE2d 623, 149 Ill.Dec 253 (1990)*

The Arbitrator finds that the Respondent's termination of maintenance benefits as of August 3, 2015 was long overdue. It is difficult to state the specific moment in time when the Petitioner was noncompliant with vocational rehabilitation. In this case, it is immaterial for the following reason. Not only did Petitioner demonstrate a lack of "good faith" with vocational rehabilitation, he demonstrated a lack of good faith throughout the course of his medical care. For instance, Petitioner had an obligation to inform his doctors of the pre-existing permanent work restrictions that were imposed by Dr. Arnold in 2006, but he failed to do so. His employment duties after 2006 must have changed dramatically as the result of those restrictions, yet he told them that he was working heavy duty when he was injured. The voluminous medical records fail to show an instance where the doctors knew that Respondent had accommodated his sedentary restrictions from 2006 to 2012. If his physicians had known this fact, an FCE might not have been prescribed, as Petitioner would have been returned to his sedentary job. At least some inquiry would have been made about the matter. Further, the Petitioner had an

obligation to inform the functional capacity examiners that he had pre-existing permanent sedentary restrictions, but failed to do so. Moreover, the Petitioner failed to inform the vocational rehabilitation counselor of his pre-existing work restrictions. Additionally, he attempted to claim that his pre-existing low back condition was related to the July 11, 2012 incident and he attempted to claim that his shoulder and neck pain were somehow related to same occurrence. Finally, he could have set the record straight with his testimony at trial, but allowed the trier of fact to assume that he was working with no restrictions on the date of loss. In summary, he had an obligation to act in good faith throughout the course of his medical care and during the pendency of his claim, yet failed to do so. A lie of omission is the intentional failure to tell the truth in a situation requiring disclosure. An example of which could be seller's failure to note a known defect on a real estate disclosure form. The continued misrepresentation occurs when an important fact is left out in order to foster a misconception. Lying by omission includes failures to correct pre-existing misconceptions. In the present case, the Petitioner failed to inform others of his pre-existing permanent sedentary work restrictions. As a result, no maintenance is awarded and Respondent is allowed a credit for all maintenance paid from September 30, 2013 until August 3, 2015.

(O) On what date did Petitioner reach maximum medical improvement?

While that issue is addressed in Paragraph (N) to this Decision, the Arbitrator finds that the date that the Petitioner reached maximum medical improvement was September 30, 2013. At that time, Dr. Cole placed the Petitioner at MMI and stated he had permanent sedentary restrictions. These restrictions match the Petitioner's pre-injury state. The Petitioner worked as a blacksmith for Respondent from 2006 until the date of accident on July 11, 2012, a period of six years with sedentary restrictions.

The date of MMI following the Petitioner's low back surgery was April 7, 2014, but this date is irrelevant, as the lumbar spine component of this claim is not compensable. However, it is interesting to note that the Petitioner's final permanent restrictions (light–medium) allow the Petitioner to work at a higher physical demand level than those written in 2006. These final restrictions were embraced by the vocational rehabilitation counselor of Petitioner's choosing.

As a result of the above, Respondent's maintenance and temporary total disability responsibilities ended on September 30, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Constance Sarlo,

Petitioner,

vs.

NO: 13WC020497

ABM Industries Inc.,

Respondent,

16IWCC0727

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 24, 2015, is hereby affirmed and adopted.

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

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

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

DATED: NOV 9 - 2016
MJB/bm
o-11/1/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SARLO, CONSTANCE
Employee/Petitioner

Case# **13WC020497**

ABM INDUSTRIES INC
Employer/Respondent

16IWCC0727

On 11/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1993 ROMANUCCI & BLANDIN
FRANK A SOMMARIO
321 N CLARK ST SUITE 900
CHICAGO, IL 60654

2999 LITCHFIELD CAVO LLC
ANITA S JOHNSON
303 W MADISON ST SUITE 300
CHICAGO, IL 60606

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

CONSTANCE SARLO
Employee/Petitioner

Case #13 WC 20497

v.

16IWCC0727

ABM INDUSTRIES, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on September 30 and October 28, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☒ Maintenance ☒ TTD?

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

M. ☒ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On May 3, 2013, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer 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 $41,964.00; the average weekly wage was $807.00.
- At the time of injury, the petitioner was 37 years of age, married with two children under 18.
- The respondent agreed that the petitioner is entitled to temporary total disability benefits for 58-5/7 weeks, from June 24, 2013, through August 15, 2014.

ORDER:

- The respondent shall pay the petitioner the sum of $484.20/week for a further period of 43 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 20% loss of use of her right leg.
- The respondent shall pay the petitioner compensation that has accrued from May 3, 2013, through October 28, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for her right knee through July 9, 2014, was reasonable and necessary and is awarded. The medical care rendered the petitioner for her lumbar spine, left knee, fibromyalgia and right knee after July 9, 2014, was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The petitioner's request for penalties and fees is denied.

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

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

Robert E. Williams

Signature of Arbitrator

November 24, 2015
Date

NOV 24 2015

FINDINGS OF FACTS:

The petitioner, an accounting manager, gave a written injury statement on May 3, 2013, that she experienced right knee pain while moving timesheet files from the top drawer of a filing cabinet to the bottom drawer and bending/squatting. She sought care for her right knee at Concentra on May 6th and reported bending, squatting and moving files from one drawer to another on May 3, 2013. Specifically, she reported that she was squatting down to remove files and developed pain when she stood up. The doctor noted that the pain was located over the posterior aspect of her right knee. Conservative care was prescribed for a knee strain. She saw Dr. Ashish Rawal on May 9th, who noted a history of lifting files from a bottom to a top shelf in a squatted position and her complaints of pain in the posterior aspect of her knee and swelling later that night. He opined that x-rays revealed some mild thinning and spurring of the patellofemoral joint consistent with her previous history of patellofemoral pain. His assessment was right knee medial joint line pain consistent with a meniscus tear. An MRI on June 3rd revealed a small to moderate joint effusion, a small to moderate Baker's cyst, a cyst at the proximal tibia medially inferior to the medial tibial plateau, mild cartilaginous thinning of the lateral patellar facet and no meniscal or ligament tear. She was given a cortisone injection on June 3rd and 6th. A CT scan on June 20th revealed mild medial compartment oseteoarthritis, a subchondral cystic focus within the proximal tibia adjacent to the posterior cruciate ligament insertion and metallic foreign bodies in the posteromedial soft tissue of her knee. The same day, the petitioner informed Dr. Rawal that she had recurrent swelling in her right knee, weight bearing difficulty and pain in the posterior aspect of her knee. Dr. Rawal opined on June 21st that the CT scan revealed that her tibia

cyst was benign. Dr. Rawal recommended an arthroscopic partial medial meniscectomy. The petitioner reported continued posterior right knee pain to Dr. Rawal on July 9th. The doctor noted posterior knee tenderness, mild lateral joint line tenderness and no medial joint line tenderness. An independent medical evaluation of her knees by Dr. Ali on July 16th was negative except for diffuse tenderness over the joint lines of her right knee. His diagnosis was a knee strain.

The petitioner reported a recent fall on August 7th. Dr. Rawal noted posterior swelling and medial joint line tenderness. On September 19th, Dr. Rawal performed a right knee arthroscopic patellar and medial femoral condyle chondroplasty and extensive synovectomy. The postoperative diagnosis was medial femoral condyle trochlea lesion and synovitis. The petitioner followed up with Dr. Rawal and started physical therapy. Dr. Rawal noted mild tenderness over the medial joint line, tenderness posteriorally over her Baker's cyst and mild pain with patellofemoral range of motion on October 16th. On November 14th, the petitioner reported left knee and low back pain. It was noted that the petitioner had tenderness in the lower paraspinal region and mild soreness and tenderness over the IT band and minimal joint line tenderness in her left knee. She reported improved back pain on November 20th and bilateral patellofemoral knee pain. Dr. Rawal's assessment on December 30th was bilateral patellofemoral syndrome and on February 10, 2014, right patellar chondromalacia. On March 17th, the petitioner reported to Dr. Rawal treatment for a recent exacerbation of her fibromyalgia. Physical therapy was restarted by Dr. Rawal on April 16th.

X-rays of her knees on May 10, 2014, revealed bilateral patellofemoral degenerative changes with joint space narrowing and hypertrophic spurring, unchanged

compared to x-rays on October 5, 2010. Her knees were aspirated on June 24th and injected with Depo Medrol. The petitioner saw Dr. Koutsky on July 9th and reported bilateral knee pain. She was given work restrictions in accordance with an FCE. The petitioner's knees were aspirated and injected with Hyalgan on September 3rd, 7th and 24th, and October 1st and 8th. Dr. Koutsky's bilateral knee examination was unchanged at eight follow-ups from August 21, 2014, through August 19, 2015.

Surveillance videos of the petitioner on May 7 and 8, 2015, show her picking up toddlers, bending and putting a toddler into the rear of a car, pushing a stroller with two toddlers, bending to the ground, lifting, running, squatting, carrying toddlers and walking to, around and from a park for approximately an hour.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for her right knee through July 9, 2014, was reasonable and necessary and is awarded. The medical care rendered the petitioner for her lumbar spine, left knee, fibromyalgia and right knee after July 9, 2014, was not reasonable or necessary and is denied. Dr. Rawal released the petitioner with restrictions pursuant to the FCE. Dr. Ali opined on August 7, 2014, that the petitioner was at maximum medical improvement and capable of returning to work pursuant to the FCE. The petitioner was at maximum medical improvement on July 9, 2014.

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 her current condition of ill-being with her right knee is causally related to the work injury. The petitioner had a pre-existing degenerative condition in her right knee that was

aggravated while performing her work duties on May 3, 2013. The petitioner failed to prove that her current condition of ill-being with her lumbar spine, left knee and fibromyalgia is causally related to the work injury. The petitioner did not report or receive treatment for her lumbar spine, left knee and fibromyalgia initially after the May 3, 2013, incident.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The petitioner was at maximum medical improvement on July 9, 2014, and is entitled to temporary total disability benefits up to that date. The respondent agreed to pay the petitioner temporary total disability benefits from June 24, 2013, through August 15, 2014; therefore, no temporary total disability benefits are awarded.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner failed to prove that she is obviously incapable of employment or that she cannot perform any services except those which are so limited in quantity, dependability or quality that there is no reasonably stable labor market for them. The petitioner can perform some form of employment without seriously endangering her health or life. She has extensive experience in the sedentary labor market of accounting. Also, she failed to prove that she conducted a genuine and diligent search for employment. Her efforts were perfunctory and not a convincing legitimate job search effort. Vocational counselors, Courtney Goodman and Julie Bose, both opined that the petitioner was employable and knows how to find employment. The surveillance videos also disprove the petitioner's testimony and reveal her ability to run, squat, bend, and carry and lift. The petitioner is not believable or credible. The petitioner's request for permanent total disability disability benefits is denied.

There is no AMA impairment rating or evidence concerning the impact of the petitioner's injury in regard to her occupation, age or future earning capacity, as delineated in Section 8.1(b)(i) through (iv) of the Act, nor can any effect be reasonably inferred from the evidence. Regarding Section 8.1(b)(v), the petitioner complains of pain and swelling in her right knee and difficulty with using stairs. She has good and bad days and uses medication.

The respondent shall pay the petitioner the sum of $484.20/week for a further period of 43 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 20% loss of use of her right leg.

FINDING REGARDING PENALTIES AND FEES:

The petitioner failed to prove that she is entitled to §19(l) and §19(k) penalties and fees. There was a genuine dispute regarding the issues. The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Lizon,

Petitioner,

vs.

NO: 09 WC 43267

Post General Contractors, LLC,

16IWCC0675

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of maintenance and penalties and attorney's fees, modifies and corrects the Corrected 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.

First, Respondent argues that the Arbitrator lacked jurisdiction under Section 19(f) of the Act to change her original decision and find that Petitioner was entitled to maintenance benefits from May 8, 2015 through August 21, 2015.

The Commission notes that the Arbitrator issued a decision on November 6, 2015 awarding maintenance benefits from December 4, 2012 through August 21, 2015. In that decision, the Arbitrator explained that Petitioner had been paid maintenance benefits from December 4, 2012 through May 7, 2015 and that Petitioner "seeks fifteen (15) additional weeks of maintenance benefits from May 8, 2015 through the date of trial." The Arbitrator noted that Petitioner failed to offer any job search logs into evidence documenting a self-directed job search from May 8, 2015 to August 21, 2015 and that he testified that he believed he cannot return to work in any physical capacity. Based on those findings, the Arbitrator determined that Petitioner had failed to meet his burden of proof for an award of maintenance benefits from May 8, 2015 through August 21, 2015, the date of arbitration.

The parties filed 19(f) petitions noting that the award was inconsistent with the explanation given in the decision. As a result, the Arbitrator granted the 19(f) petitions and on December 7, 2015, she issued a Corrected Decision in which she again awarded maintenance benefits from December 4, 2012 through August 21, 2015 and explained that Petitioner had been paid maintenance benefits from December 4, 2012 through May 7, 2015. The Arbitrator noted that:

> "[m]aintenance benefits were stopped after the Petitioner was evaluated by Dr. Kevin Walsh. Petitioner seeks fifteen

> (15) additional weeks of maintenance benefits from May 8, 2015 through the date of trial, August 21, 2015. Petitioner testified that he continued to search for work after May 8, 2015. The Arbitrator concludes that Petitioner is entitled to maintenance benefits from December 4, 2012 to August 21, 2015."

On review, Respondent argues that the Arbitrator did not have jurisdiction under Section 19(f) to "substantially change her original decision and find that Petitioner met his burden of proof with respect to maintenance benefits from May 8, 2015 to August 21, 2015." (Respondent's Statement of Exceptions and Supporting Brief, pg.10) The Commission agrees.

Section 19(f) of the Act states, in pertinent part that:

> "the Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error ***or*** errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision." (emphasis added) 820 ILCS 305/19(f) (2013).

There is no question that the original decision contained an anomaly in the form of contradictory statements regarding maintenance benefits. In correcting that anomaly, the Arbitrator changed her reasoning and, as such, substantially changed her decision beyond the correction of a clerical or computational error. However, while the Commission finds that the Arbitrator exceeded the bounds of Section 19(f) of the Act, the Commission finds, after a complete review of the record, that Petitioner is entitled to maintenance benefits through August 21, 2015 and modifies the Arbitrator's Corrected Decision to reflect as such.

The Commission notes that the record establishes that Petitioner has been diligent and cooperative during vocational rehabilitation and in his self-directed job searches. Mary Schmit, the vocational rehabilitation counselor hired by Respondent to help Petitioner find employment, testified that Petitioner was diligent but unsuccessful in finding employment. (T.176) The vocational rehabilitation records show that despite Petitioner's cooperation and diligence, he was unable to find employment. (RX19) Ms. Schmit testified that Petitioner remained employable in the construction industry even though the industry was "recovering" and there is a "lot of competition for the jobs that are available." (T.178-179) Ms. Schmit admitted that it could be even more difficult for Petitioner with his permanent restrictions. (T.179) Ms. Schmit also testified that she spoke to one of the adjustors on Petitioner's case, Jeff Magin, and suggested that Petitioner "consider taking junior college estimating class" since "estimating construction positions tend to be physically easier and less demanding, he wouldn't have a big concern." (T.179-180) She explained that the adjuster did not go along with her recommendation. (T.180) Finally, Ms. Schmit testified that, in her experience, "when clients are cooperative with the vocational process, they do continue their maintenance benefits." (T.188)

It is clear to the Commission that while Ms. Schmit provided job search services to Petitioner, she failed to provide any vocational rehabilitation. She had recommended vocational rehabilitation in the form of an estimating course, but Respondent refused. The bottom line is

that Petitioner is still unemployed with permanent restrictions and vocational rehabilitation denied by the insurance company. Based on the Petitioner's ongoing diligence and lack of success during his job search, the Commission finds that Petitioner is entitled to maintenance benefits from May 8, 2015 through August 21, 2015.

Next, Respondent argues that the Arbitrator erred in awarding penalties and attorney's fees in this case. Again, the Commission agrees.

The Petitioner was given multiple opportunities by the Arbitrator to present evidence as to an underpayment of temporary total disability benefits. At each opportunity, Petitioner restated that 19(b) petitions were filed and that said petitions were evidence of late payments.

Nowhere in the record is there evidence, documentary or testimonial, which delineates the days and dates of late payment. Without such information, the Commission would be forced to speculate as to the date that the Respondent was late in payment and the time that Petitioner was forced to wait for payment.

The Commission is not free to speculate as it relates to the alleged dilatory acts of the Respondent. The Commission must have some evidence which delineates the date that payment was due and the date that payment was actually received. Had Petitioner testified with such specificity and Respondent failed to offer rebuttal, the Commission would have considered Petitioner's prayer for penalties. Based upon the record before us, Petitioner has failed to prove an entitlement to penalties. The Commission therefore vacates the award of penalties and attorney's fees.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. Furthermore, we have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. Finally, one should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 7, 2015 is corrected and modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $800.00 per week for a period of 141-4/7 weeks, from December 4, 2012 through August 21, 2015, in maintenance benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $664.72 per week for 250 weeks (less permanent partial disability credit of $7,200.00), because the injuries sustained resulted in permanent partial disability of 50% loss of use of the person as a whole, as provided in Section 8(d)(2) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $148,457.14 for temporary total disability benefits, $100,571.45 for maintenance

benefits and $7,200.00 as a permanent partial disability advance for other benefits, for a total credit of $256,228.59.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $23,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 25 2016
MJB/ell
o-08/30/16
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Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

John Lizon
Employee/Petitioner

v.
Post General Contractors, LLC
Employer/Respondent

Case # 09 WC 43267

Consolidated cases:

16IWCC0675

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on 8/21/15. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Petitioner's earnings?

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

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

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

K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

John Lizon
09 WC 43267

16IWCC0675

FINDINGS

On 05-14-2009, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $62,400.00; the average weekly wage was $1,200.00 .

On the date of accident, Petitioner was 38 years of age, married , with 2 children under 18.

Respondent shall be given a credit of $148,457.14 for TTD, $ 0 for TPD, $100,571.45 for maintenance, and $7,200 (PPD advance) for other benefits, for a total credit of $256,228.59 .

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

ORDER

Respondent shall pay Petitioner maintenance benefits from December 4, 2012 to August 21, 2015.

The Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 250 weeks (less PPD credit of $7,200), because the injuries sustained resulted in permanent partial disability of 50% loss of the man as a whole, as provided in Section 8(d)(2) of the Act.

Respondent shall be given a credit of $148,457.14 for temporary total disability benefits, $100,571.45 for maintenance, and $7,200 (PPD advance) for other benefits, for a total credit of $256,228.59.

Respondent shall pay Petitioner penalties of $1,000.00, pursuant to Section 19(k) of the Act, penalties of $10,000.00, pursuant to section 19(l) of the Act, and attorney's fees of $2,548.57, pursuant to section 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.

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

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) maintenance; 3) penalties; 4) attorney's fees; and 5) the nature and extent of Petitioner's injuries. *See*, AX1.

Mr. John Lizon, ("Petitioner") was employed by Post General Contractors, LLC. ("Respondent") as a superintendent/project manager. Petitioner testified that his job required him to "run all the trades, take care of job conditions and anything else that was not covered by the subcontractors". Petitioner was hired in October of 2008 and supervised a renovation project at the Shrine Nightclub in Chicago. Petitioner was required to move material including concrete bags, wood and metal studs. Petitioner was also responsible for supervising all the subcontractors, working with plumbing, masonry and ventilation.

On May 14, 2009, the petitioner was working on a ladder when it collapsed. Petitioner fell to the ground and landed on his left shoulder and "smashed" his left hand. Petitioner was taken via ambulance to Mercy Hospital. The admitting diagnosis was left shoulder arm pain and Petitioner complained of pain in his left shoulder, arm and hand. X-rays of the left shoulder and elbow did not reveal any fractures. An x-ray of the left wrist revealed a non-displaced fracture. Petitioner was advised to remain off work and was referred to an orthopedist for further evaluation. PX1.

On May 15, 2009, the petitioner presented to OAD Orthopedics. He was evaluated with respect to his left wrist complaints by Dr. Anup Bendre, an orthopedic surgeon. Dr. Bendre diagnosed the petitioner with a distal, radius fracture and a median nerve injury and recommended surgery. PX2.

On that same day, Petitioner was evaluated by Dr. Aaron Bare, regarding his left shoulder complaints. Updated x-rays of the left shoulder did not reveal any fractures. Range of motion testing in the cervical spine did not reproduce shoulder pain. Dr. Bare diagnosed petitioner with a left shoulder contusion with possible internal derangement. Dr. Bare kept the petitioner off work and advised him to rest his shoulder for three (3) weeks.

On May 19, 2009, Dr. Bendre performed an open reduction and internal fixation of the left distal radius fracture. Petitioner was kept off work and advised to begin physical therapy. On June 5, 2009, the petitioner returned to Dr. Bare for an evaluation of his left shoulder. Petitioner reported that his pain complaints were no better however; he denied any neck pain or radicular symptoms. On May 29, 2009, Dr. Bendre performed new x-rays of the left wrist and advised the petitioner that he could return to work, with restrictions. Ultracet and physical therapy were prescribed.

On June 5, 2009, Dr. Bare ordered an MRI of the left shoulder and on June 9, 2009, the petitioner began physical therapy.

On June 26, 2009, after reviewing the MRI films, Dr. Bare diagnosed Petitioner as having a non-displaced fracture of the acromial end of the distal clavicle. Dr. Bare released the petitioner to return to work with a fifty (50) pound lifting restriction and advised him to continue physical therapy.

Petitioner returned to Dr. Bendre on August 21, 2009, reporting "puffiness"/soreness in the palmar aspect of his index finger, with gripping. Dr. Bendre performed a carpal tunnel injection and advised him to continue therapy and to remain off work. PX2.

Petitioner returned to Dr. Bare on August 21, 2009. Petitioner was pleased with his progress regarding the left shoulder, as he had a full range of motion with intact strength. Petitioner had minimal pain with cross arm adduction. Dr. Bare placed the petitioner at MMI and released him to full duty, with respect to the left shoulder.

Petitioner returned to Dr. Bendre on September 21, 2009, who noted that Petitioner's fracture had healed without complications. Petitioner complained of persistent pain in the volar radial aspect of his wrist brought on/aggravated by holding a bowling ball and pushing a stroller. Dr. Bendre recommended hardware removal surgery, which was performed on October 19, 2009. Dr. Bendre prescribed additional therapy and light duty work restrictions. PX2.

On October 26, 2009, Petitioner sought a second opinion regarding his left shoulder, with Dr. Howard Freedberg of Suburban Orthopedics. Dr. Freedberg diagnosed Petitioner with left shoulder impingement and x-rays revealed a healed distal clavicle fracture. Dr. Freedberg injected Petitioner's left shoulder and recommended additional physical therapy. PX4.

Petitioner continued to treat with Dr. Bendre for his left wrist. On October 30, 2009, additional physical therapy was ordered and Petitioner's light duty restrictions were continued. Petitioner returned to Dr. Bendre on December 7, 2009, who recommended an updated MRI of his left wrist. PX3.

On December 15, 2009, an MRI of the left wrist was read to show post-operative changes of the distal radius, a mild strain of the pronator quadratus muscle and mild degenerative arthritis of the radial clavicle joint. Petitioner stopped therapy for his left wrist on January 5, 2010.

On December 18, 2009, Petitioner was examined by Dr. Sandeep Jejurikar, by request of Respondent. Dr. Jejurikar diagnosed the petitioner as having flexor tenosynovitis which was causally related to his work injury. He also stated that the medical treatment, to date, was reasonable and necessary, that the petitioner required light duty restrictions and would benefits from either more injections or possible surgery. PX12.

On January 5, 2010, Petitioner completed physical therapy on his left wrist and on January 8, 2010, Dr. Bendre reviewed the MRI of the left wrist and discussed the Section 12 exam report with him and the nurse case manager. The doctor offered to either do another surgery or the petitioner could try work conditioning and then a functional capacity evaluation, ("FCE"). Petitioner chose to think about it and in the meantime, Dr. Bendre prescribed work conditioning. PX3, p. 77-79.

On January 11, 2010, petitioner returned to Dr. Freedberg, who diagnosed him with a cervical strain and posterior nerve root irritation. This is noted to be approximately eight (8) months after the accident. Petitioner was advised to continue therapy and remain off work. PX4.

After three days of work conditioning, the petitioner self-terminated the program due to pain complaints. Petitioner returned to Dr. Bendre on January 22, 2010, complaining of pain at the base of his thumb joint. Dr. Bendre opined that Petitioner's pain may be related to flexor tendon adhesions and/or tenosynovitis at the level of the carpal tunnel. Dr. Bendre recommended a tenosynovectomy of the flexor tendons and a carpal tunnel release. PX3.

Petitioner returned to Dr. Freedberg on February 22, 2010, and was released to return to work full duty for his left shoulder. On February 25, 2010, the petitioner underwent a tenosynovectomy of the digital flexor tendon as well as a carpal tunnel release. On March 2, 2010, Petitioner restarted physical therapy at OAD Orthopedics.

On April 19, 2010, Petitioner returned to Dr. Freedberg, reporting that he was feeling 85-90% overall improved. Petitioner was released to return work full duty for his left shoulder. Petitioner completed physical therapy for his left wrist on May 13, 2010 and returned to Dr. Bendre on May 17, 2010 reporting that his complaints were no better after surgery. Dr. Bendre recommended a second opinion or an FCE.

On May 13, 2010, he completed physical therapy on the left wrist at OAD and on May 17, 2010, Dr. Bendre recommended a second opinion or repeat IME and an FCE. Petitioner advised Respondent that he then wanted a second opinion with Dr. Charles Carroll at Northwestern for his left wrist. On May 21, 2010, nurse case manager Linda Savage of Alaris Group was placed on the file by Respondent. Petitioner testified that the respondent did not authorize the FCE or the second opinion with Dr. Carroll. On June 3, 2010, Dr. Freedberg released him at MMI for the left shoulder. PX3, pp. 22-24.

Petitioner returned to Dr. Freedberg on June 3, 2010, complaining of periodic discomfort when holding something or laying down. Petitioner reported that he was not taking medication or undergoing therapy. Dr. Freedberg released the petitioner to return to work in a full duty capacity and placed him at MMI for his left shoulder.

Petitioner underwent an IME with Dr. Sandeep Jejurikar on June 8, 2010 regarding his left wrist. Dr. Jejurikar recommended additional work hardening and an FCE. Dr. Jejurikar believed that the petitioner may require some level of permanent restrictions.

Petitioner returned to Dr. Bendre on June 18, 2010. Work conditioning and a second functional capacity evaluation were ordered. On July 6, 2010, petitioner began work conditioning at AthletiCo. PX3 & 7.

Petitioner testified that on July 8, 2010, a 19(b)/8(a) emergency and penalty petition had to be filed for August 17, 2010, before then Arbitrator Peterson, to reinstate TTD that had not been paid since June 27, 2010. On August 1, 2010, Adjuster Ladonna Allen issued a check in the amount of $3,200.00, for four (4) weeks of TTD arrearage. PX17.

The petitioner completed an FCE on August 5, 2010, which was determined to be valid and stated that the petitioner could function at the "light-medium" (up to 40 pounds) physical demand level. It was recommended that Petitioner have additional work conditioning in order to attain the medium level ability, required by his job duties.

On August 9, 2010, Petitioner returned to Dr. Bendre, complaining of pain in his thumb and index finger. Dr. Bendre released the petitioner to return to work with permanent restrictions of no lifting greater than forty (40) pounds with either extremity and he was placed at maximum medical improvement ("MMI"). PX3.

Petitioner testified that the respondent did not take him back with his restrictions and he did not receive any TTD. Petitioner states that on August 30, 2010, his attorney appeared before then Arbitrator Peterson, where Respondent's attorney advised that he was awaiting a response from the adjuster, as to status of TTD issuance, thus Arbitrator Peterson continued the case to September 2, 2010 for status on the issuance of TTD. Petitioner's attorney also states that on September 2, 2010, respondent's attorney advised that the TTD check was issued and that the adjuster would authorize the second opinion with Dr. Carroll so Arbitrator Peterson returned the case to the call. On September 5, 2010, Petitioner received the TTD that was owed from August 9, 2010. Petitioner testified that he was aware that on October 11, 2010, another 19(b) and penalty petition was filed for October 19, 2010 before Arbitrator Peterson because the adjuster still had not sent written authorization for him to see Dr. Carroll. Petitioner also testified that the respondent was no longer in business and that he could not perform his former job as a project manager, with his current, permanent restrictions. PX17.

Petitioner finally presented to Dr. Charles Carroll IV of NorthShore Orthopedics on November 22, 2010. Petitioner complained of numbness and tingling in his thumb and index finger along with pain

in his index, long and small fingers. Dr. Carroll diagnosed petitioner with carpal tunnel syndrome and recommended an EMG study of Petitioner's left upper extremity. PX9.

Petitioner testified that in late December 2010, there was another delay in TTD payment. He had not been paid since December 19, 2010 and the adjuster had not authorized the EMG, so he was aware that another 19(b) and penalty petition was filed on January 18, 2011 for February 17, 2011 before Arbitrator Peterson. On March 7, 2011, Petitioner received his TTD check for December 20, 2010 through March 7, 2011, in the amount of $8,800.00 which was eleven weeks of benefits. Petitioner testified that at least eleven (11) 19(b) and penalty petitions had to be filed during the course of the case because Respondent continuously did not pay TTD or authorize treatment timely, sometimes for periods of up to eleven (11) weeks at a time. Tr. pp. 49-50, 53; PX17.

Petitioner testified that on April 11, 2011, he received a bill from Respondent's Section 12 examiner, Dr. Jejurikar because the adjuster did not pay the bill. Petitioner testified that in April 2011, there was another issue with TTD being paid timely since April 4, 2011 so another 19(b) and penalty petition was filed on April 21, 2011 for May 17, 2011 before Arbitrator Peterson. On May 2, 2011, petitioner underwent the EMG that Dr. Carroll prescribed on November 22, 2010, almost seven months prior. On May 23, 2011, Petitioner received TTD owed from April 19, 2011 through May 30, 2011, in the amount of $4,800.00. Petitioner testified that on May 24, 2011, the adjuster began sending the TTD checks directly to his attorney so that the attorney could monitor when TTD was late. Tr. pp. 51-54; PX17; PX9, pp. 55, 231-235; PX17.

Petitioner testified that in September of 2011, he was still awaiting written authorization to be sent to Dr. Carroll, to be seen in follow-up after the EMG, so another 19(b) and penalty petition was filed on September 19, 2011 for October 18, 2011 before Arbitrator Dollison. Petitioner testified that he was finally able to see Dr. Carroll on November 29, 2011, who after his review of the May 2, 2011 EMG, which was done six months earlier. He diagnosed him with a median nerve compression, prescribed surgery and continued his work restrictions.

Petitioner testified that in October 2011, there was another issue of TTD not being paid. Another 19(b) and penalty petition was filed on November 30, 2011 for December 15, 2011 before Arbitrator Thompson-Smith because TTD had not been paid since October 10, 2011. Petitioner testified that on December 7, 2011, he finally received TTD from October 11, 2011 through December 7, 2011, in the amount of $6,400.00. On December 27, 2011, the case was returned to the call by Arbitrator Thompson-Smith because Respondent's attorney advised that TTD was paid through December 21, 2011 and that adjuster was awaiting the full November 29, 2011 report of Dr. Carroll, to determine if surgery would be authorized. Tr. pp. 54-56; PX9, pp. 54, 237-238; PX17.

On February 21, 2012, another 19(b) and penalty petition was filed for March 15, 2012 before Arbitrator Thompson-Smith because TTD was not paid since February 1, 2012 and surgery still was

not authorized. On March 27, 2012, a new adjuster named Myrna Castaneda was placed on the file and the case was continued by Arbitrator Thompson-Smith because respondent's attorney advised that TTD was issued by new adjuster and that TTD would be paid timely from now on. Later in the day on March 27, 2012, Petitioner received his TTD check for February 20, 2012 through March 20, 2012, in the amount of $5,371.45.

On May 15, 2012, a new case manager named Marianne Drafkey was placed on the file to procure authorization for Dr. Carroll to perform surgery. On June 11, 2012, Petitioner was able to see Dr. Carroll in a follow-up since his November 29, 2011 visit, and schedule surgery for July 17, 2012. On June 29, 2012, Petitioner had his pre-operation testing, and on July 17, 2012, Dr. Carroll performed surgery, consisting of revision, exploration and decompression of left median nerve at carpal tunnel, hand and forearm and microneuroplasty of median nerve. On July 30, 2012, Dr. Carroll prescribed physical therapy and on August 1, 2012, Petitioner began physical therapy at AthletiCo. Tr. pp. 35-58; PX10, pp. 25-27; PX9, pp. 28-31, PX17.

On September 10, 2012, Dr. Carroll advised him to continue in physical therapy, which Petitioner completed on October 25, 2012. On October 29, 2012, Dr. Carroll prescribed an FCE. On November 14, 2012, petitioner underwent the FCE at AthletiCo which was noted to be valid; and recommended that he could return to work in a sedentary to light physical demand level job with a twenty (20) pound maximum occasional lifting restriction on the left extremity. On December 3, 2012, Dr. Carroll advised him to continue home exercise program and released him at MMI, with permanent restrictions per the November 14, 2012 FCE.

Petitioner testified that his employer did not take him back to work with the restrictions so Respondent began paying maintenance benefits as of December 4, 2012, but did not immediately commence vocational rehabilitation. Tr. pp. 60-64; AX1.

Petitioner testified that on December 11, 2012, he still had pain for both the left shoulder and left wrist. He wanted to see Dr. Freedberg for the left shoulder but needed authorization to be seen and to get another second opinion doctor regarding the left wrist. On March 4, 2013, Arbitrator Thompson-Smith returned the case to the call, since respondent's attorney advised that maintenance was being paid and that he was awaiting a response from the adjuster as to whether they would authorize the appointment with Dr. Freedberg for the left shoulder; and authorize a second opinion doctor for the left wrist. They also needed to do another Section 12 exam or commence vocational rehabilitation.

Petitioner testified that there was another issue with his TTD/maintenance benefits not being paid in late March 2013 so on April 5, 2013, another 19(b) and penalty petition was filed for May 15, 2013 before Arbitrator Thompson-Smith in order to get respondent to authorize appointments, commence vocational rehabilitation, and pay TTD/maintenance.. On April 30, 2013, Petitioner received his TTD/maintenance for March 27, 2013 through April 23, 2013, in the amount of $3,200.00 from the

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new adjuster, Jeff Mazich. On June 4, 2013, Arbitrator Thompson-Smith returned the case to the call because respondent's attorney advised that TTD/maintenance was again being paid and that Ms. Mary Schmit of Triune would be contacting Petitioner's attorney to schedule an initial vocational rehabilitation meeting. PX17.

On May 2, 2011, Petitioner underwent the EMG study, which findings suggested the presence of median neuropathy. Petitioner returned to Dr. Carroll on November 29, 2011 to review the EMG study results and Dr. Carroll diagnosed him as having median nerve compression and recommended a left median nerve exploration and release. He released the petitioner to return to work with a forty (40) pound lifting restriction. PX9.

Petitioner returned to Dr. Carroll on June 11, 2012, complaining of pain in his left hand. Dr. Carroll examined Petitioner's left shoulder and did not find any abnormalities. Petitioner had positive Phalen's and Tinel's tests and was diagnosed with carpal tunnel syndrome. Dr. Carroll recommended a left carpal tunnel revision and release. On July 17, 2012, petitioner underwent a left median nerve decompression and carpal tunnel release and remained off work.

On August 1, 2012 Petitioner began physical therapy at AthletiCo. Petitioner returned to Dr. Carroll on September 10, 2012 complaining of ulnar numbness since the last surgery. Petitioner was advised to continue physical therapy, which he completed. Petitioner returned to Dr. Carroll on October 29, 2012, who recommended work conditioning and an FCE.

On November 29, 2012, Petitioner underwent an FCE at AthletiCo. The examiner noted that the petitioner's physical demands of his pre-injury job as a carpenter were identified as "very heavy" per the Department of Transportation ("DOT"). The examiner did not have a functional job description from the employer. The FCE determined that Petitioner could function at the sedentary to light level of work and he had no limitations with respect to standing, walking, sitting, balancing, stooping, crouching, or climbing. Petitioner was limited to lifting 20 pounds from floor to 31 inches and 10 pounds from floor to 61 inches. Petitioner was able to carry 20 pounds up to 100 feet, push and pull 25 to 35 pounds and climb a ladder up to 8 feet. The test results were deemed valid. PX8.

Petitioner returned to Dr. Carroll on December 3, 2012, who determined that he had reached maximum medical improvement. The doctor released the petitioner to return to work with permanent restrictions per the functional capacity evaluation. PX9.

Petitioner testified that after his release from care, he did not begin searching for work. Petitioner testified that he could not return to respondent's employ as they had ceased operations in 2010. He further testified that several months later, he met with Ms. Mary Schmit, a certified rehabilitation counselor with Triune Health Group. The initial vocational assessment took place on May 13, 2013. According to the initial vocational assessment, the petitioner had worked as a

construction/superintendent for Post General Contractors for eight months before the accident. Petitioner previously worked as a project manager/construction superintendent for another company known as Single Site Solutions for approximately ten (10) years. Petitioner also ran his own home remodeling business for seven (7) years. RX1.

A transferable skills analysis was performed and determined that Petitioner was employable at the sedentary to light physical demand level, based upon his previous work experiences and skills. Ms. Schmit identified positions within that demand level that Petitioner would be qualified to perform. She targeted positions such as construction supervisor, foreman, maintenance manager, construction inspection, lumber estimator and a construction estimator. According to Ms. Schmit's initial assessment, the plan was to have him apply for positions within the construction trade that were within his permanent restrictions.

Petitioner returned to Dr. Howard Freedberg on June 17, 2013, complaining of left shoulder and left wrist pain. Petitioner stated that his left shoulder pain had worsened and complained of pain behind his left shoulder blade. Petitioner reported that his left wrist pain was worse than before surgery with Dr. Carroll. Petitioner had a normal physical examination except for positive tenderness to palpation in the cervical spine. X-rays of the left shoulder were normal. Cervical spine x-rays revealed C4 osteophytes. Petitioner was diagnosed with left shoulder bursitis/tendonitis and cervical referred rhomboid pain. Petitioner was referred to Dr. Dmitry Novoseletsky, a pain management physician, for further evaluation. PX5.

On June 25, 2013, the petitioner was evaluated by Dr. Novoseletsky, complaining of constant pain in his shoulder blade area. Dr. Novoseletsky performed a left subscapular injection. Petitioner was instructed to return in two weeks. Petitioner returned to Dr. Novoseletsky on July 9, 2013, stating that the injection helped for three to four days. Petitioner was diagnosed with cervical spondylosis and scapular pain. Petitioner was recommended to have injections at the C3, C4 and C5 level.

Petitioner testified that he began searching for work in the construction industry in July of 2013, contacting 20 to 30 potential employers a week. Petitioner obtained interviews within the first few weeks of searching for work however; he never received a job offer. On cross-examination, Petitioner admitted that he received one job offer from a demolition company. He testified that he did not accept the position as the job required him to help load trucks in addition to his superintendent duties.

Petitioner continued to search for work as a project manager/construction superintendent for the remainder of 2013 and into 2014. The petitioner's job search is documented in the vocational reports. The reports indicate that petitioner received approximately one interview a month for positions in construction/project management field. RXs 2–11.

On July 28, 2014, the petitioner accepted a volunteer position with Projx Construction. Petitioner volunteered from July 28 through August 4, 2014 as a project manager. Petitioner testified that he was not paid. Petitioner testified that the purpose of the volunteer position was to determine if he could physically perform the work that was required. Petitioner testified that he qualified bids, put together schedules and "did stuff on permitting". He testified that he performed all the duties of a project manager.

According to the vocational progress report, the petitioner was not offered a position after the volunteer period ended. Petitioner was told that if the company's business increased, he would be considered for a job. RX12.

Petitioner continued his job search throughout the remainder of 2014. He received several interviews for project management positions. Petitioner did not receive any job offers at this time. RXs 12–15.

On January 16, 2015, the petitioner returned to Dr. Carroll. Petitioner complained of pain in his palm with forceful gripping along with pain and stiffness radiating to the index and small finger. Petitioner's left wrist examination revealed pain with flexion. Petitioner had a normal left shoulder examination. Petitioner was diagnosed with pain from the radioscaphoid joint and an old fracture. Dr. Carroll released Petitioner to return to work, with permanent restrictions of sedentary to light duty. Petitioner told Dr. Carroll that he wanted a referral for a different opinion. Dr. Carroll provided Petitioner with a referral to Dr. Michael Vender. PX10.

Petitioner testified that he continued to search for work in the project management/construction superintendent field. The vocational progress reports document several more interviews for project manager positions. RXs 16-18.

On April 28, 2015, the petitioner underwent an IME with Dr. Kevin Walsh, who determined that the petitioner had a relatively normal physical examination. Petitioner had a negative Tinel's and Phalen's test and good range of motion in his wrist. Petitioner had full strength and range of motion in his shoulders. Dr. Walsh also reviewed a surveillance video and noted that the petitioner was participating in activities of daily living without any obvious restrictions. Dr. Walsh opined that petitioner's pain complaints were disproportionate to his injury, given the healed fracture. Dr. Walsh felt the FCE restrictions were far too limiting for the petitioner's diagnosis and physical examination. Dr. Walsh determined that Petitioner had reached MMI and was capable of returning to work full duty. In his April 28, 2015 Section 12 exam report, Dr. Walsh opined that his diagnoses were consistent with the diagnoses of the prior Section 12 examiners, but that all of Petitioner's current subjective complaints were not related to his May 14, 2009 accident, based on the length of time. Petitioner testified that his appointment was set for 9:00am but when he got there, he was told it was not till 2:00 p.m. so he had to leave and come back. He further testified that once he was seen by Dr. Walsh, the appointment lasted between 5-10 minutes.

On April 30, 2015, Arbitrator Thompson-Smith continued the case because Respondent's attorney advised that he was awaiting receipt of the April 28, 2015 Section 12 exam report. Tr. p. 83; RX21.

Petitioner testified that on May 21, 2015, he received a fax from respondent's counsel that no further maintenance would be paid, based on the Section 12 exam report of Dr. Walsh. On May 28, 2015, Arbitrator Thompson-Smith continued the case for trial to August 21, 2015 and recommended that respondent make an advance permanent partial disability payment.

On June 18, 2015, another 19(b) and penalty petition was filed for July 7, 2015 before Arbitrator Thompson-Smith because Respondent had neither paid the PPD advance or maintenance since May 7, 2015. Petitioner testified that on June 25, 2015, he finally received the December 27, 2013 Section 12 exam report of Dr. Wysocki; and on June 30, 2015, Petitioner and Ms. Schmidt were advised that vocational rehabilitation was being terminated by the respondent.

On June 30, 2015, formal vocational rehabilitation ceased and the petitioner testified that he continued to search for work on his own. He testified that he had a few job interviews but no offers of employment.

Petitioner testified that on July 24, 2015, he received the $7,200.00 PPD advance check. On July 29, 2015, Arbitrator Thompson-Smith noted that the case was already set for trial on August 21, 2015 and continued the pending penalty petition. Tr. p. 86; PX17; RX19.

Petitioner testified that he continued to look for jobs after he was advised that the vocational rehabilitation process was being terminated up through the trial date but still did not find any jobs or receive any job offers. Petitioner did not offer any job search logs into evidence from June 30, 2015 to the date of trial. Petitioner testified throughout the case, he would receive unpaid medical bills, several times before they were paid by the adjuster, but that now all medical bills have been paid or are being processed for payment by respondent. Tr. pp. 86-87; PX17; RX12.

Petitioner testified that he was paid TTD from May 15, 2009 through December 3, 2012; and maintenance from December 4, 2012 through May 7, 2015 and that at least eleven (11) 19(b)s and penalty petitions had to be filed during the course of the case because Respondent continuously refused to pay benefits or timely approve medical treatment.

Petitioner testified that he applied for social security disability, but did not remember when he applied. Petitioner believed that Ms. Schmit had recommended that he apply for SSDI. Petitioner also testified that he was denied benefits by the Social Security Administration and has not appealed the decision. Petitioner did not offer the denial letter into evidence.

Regarding his current left shoulder complaints, Petitioner testified that his left shoulder is "a big nuisance" but that he is "not in a great deal of pain". He testified that he experiences left shoulder pain if he sits too long or sleeps on his shoulder and when he drives. He testified that he is not really restricted with doing anything and testified that his strength is "fine" in his left shoulder.

Regarding his left wrist, Petitioner testified that he is in constant pain. He testified that he experiences pain in his index finger and thumb and numbness in his ring and pinky finger. Petitioner testified that he has decreased grip strength in his left hand, although he is not taking any narcotic pain medication for either his left shoulder or wrist. Petitioner testified that he takes non-prescription strength Aleve on a daily basis.

Regarding his current medical treatment, petitioner testified that he still wishes to see Dr. Michael Vender. He testified that he wants his left hand "fixed". Petitioner testified that he wishes to have further medical treatment as he "wants to return to the job he had before".

Petitioner testified that he feels he complied with vocational rehabilitation and that his earning capacity has been diminished, as he can no longer perform his usual and customary trade. Petitioner testified that no doctor has told him that it would be detrimental to his health or safety if he returned to work. Petitioner agreed that he did not have any restrictions on the amount of hours in a day that he could work and no restrictions with respect to sitting, standing or walking or with respect to his right upper extremity.

Petitioner testified that he bowls on a regular basis and that no doctor has told him that he cannot bowl. He testified that he primarily uses his right arm to bowl as he is right-handed. Petitioner admitted that he uses his left hand to stabilize the ball. He testified that he experiences pain when he bowls and drinks more while bowling, due to his pain complaints.

Petitioner believed that he is not physically capable of working and does not believe he can return to work in any capacity. Petitioner testified that he had applied for over 2000 positions and has been on "countless interviews" and "no one will hire me". Petitioner testified that he believes his problem is his education, as he does not have a college degree and the "big contractors" will not hire him.

Petitioner testified that he does not believe he is physically capable of performing a less physically demanding job in a different industry. Petitioner admitted that he only targeted jobs exclusively within the construction industry. These included jobs as a project manager, construction superintendent and construction sales. Petitioner testified that he never applied for any entry level unskilled jobs.

Petitioner denied ever working for Projx Construction. He denied having any contact with Projx prior to his volunteer period from July 28, 2014 to August 4, 2014. Petitioner was asked, on cross-

examination, whether he had ever been to a building located at 657 W. Lake Street in Chicago. Petitioner testified that he has been to that building numerous times as he "has a friend who works there" that he would visit from time to time.

Petitioner acknowledged that his name appeared on several documents, including records from the City of Chicago listing him as the point of contact for Projx Construction. The project was for a renovation at 657 W. Lake Street. Petitioner had no explanation for why he was listed as the main point of contact for Projx. Petitioner denied that he ever did anything more than volunteer for Projx Construction.

Respondent's first witness

Ms. Mary Schmit testified that she is a certified rehabilitation counselor and has worked as such since 2001. She often works with claimants that previously worked in the construction industry. Ms. Schmit testified that she has served as an expert witness in both workers' compensation cases and social security disability hearings. She testified that an individual typically must prove that they are unemployable for gainful wage in any occupation in order to receive social security disability.

Ms. Schmit testified regarding her initial vocational assessment of the petitioner, which was consistent with her report. Based upon Petitioner's skills, age and experiences, Ms. Schmit targeted positions within the construction trade; i.e., construction manager, superintendent, maintenance manager and lumber estimator. RX1.

Ms. Schmit testified that the goal of vocational rehabilitation is to return someone at the best and most appropriate occupation for that individual, provided those jobs are available. She makes every attempt to pursue positions that do not demean her clients and that provide her clients with the most income so that they can recapture the lifestyle they had prior to the injury. RX19.

Ms. Schmit further testified that Petitioner immediately generated interest from employers when he began his job search. He generated his own interviews within the first couple of months of searching for work and had a number of job interviews and second interviews. She testified that all the jobs were within the construction trade and that the petitioner was never encouraged to look for unskilled, entry level, minimum wage positions. She also testified that the petitioner never searched for work in a different industry.

Ms. Schmit testified regarding her opinion letter dated July 19, 2015, stating that Petitioner is employable to a reasonable degree of vocational certainty and that he is employable in a reasonably stable labor market. Ms. Schmit believed that he was still employable in the areas that they targeted, including construction management/supervisor.

Ms. Schmit explained that many jobs were lost in the construction market in Chicago and that over the last five or six years, the availability of construction jobs is only about half of what they were in 2000. She testified that the petitioner presents well and has a good work history and that his project list garnered a lot of attention from employers. She testified that petitioner was one of the final candidates in several of the jobs to which he applied however, he has not received a job offer, to date, due to the significant amount of competition for construction jobs.

Regarding the competition, Ms. Schmit cited to Bureau of Labor Statistics, which demonstrated that the loss of jobs and recovery of those jobs in the construction industry over the last several years has been less strong for construction management positions. She testified that the construction industry has not rebounded from the economic recession as compared to other industries and based upon these statistics, the competition, for construction management jobs, is significant.

Ms. Schmit testified that the petitioner may be a little bit more employable had he obtained a degree, and that it would benefit the petitioner to continue to look for work, as he is a young man and cannot afford to retire. Ms. Schmit testified that the petitioner could find work in the construction industry and that the range of pay would be between $50,000.00 and $75,000.00; based her statistics from the Department of Transportation as well as the Bureau of Labor Statistics for 2014. RX19.

She recommended junior college courses in construction estimating as those jobs were typically less physically demanding although she also testified that she was not instructed to enroll Petitioner in college level courses. She testified that many of those positions are commission only jobs. And finally she testified that the petitioner had performed a diligent job but unsuccessful job search and did everything she asked of him.

Respondent's second witness

Investigator Kevin Knop testified that he has been an investigator for twenty-six (26) years and works as a private investigator for Combined Investigations. He further testified that he was assigned to watch and record the petitioner in October and November of 2013. Mr. Knop's report along with a surveillance videotape, were admitted into evidence. The video showed the petitioner bowling at Fox Bowl on October 11, 2013. Petitioner's name was listed on a scoreboard as he is part of a bowling league for Stella's Pub. The video from November 1, 2013 showed the petitioner retrieving a bowling bag from his car and entering the same building. Petitioner played six games on two different lames. He used his right hand to bowl and left hand to hold the ball. He also used his left hand will drinking, leaning on a table and conducting celebratory high-fives. Mr. Knop personally identified the petitioner as the individual he watched on those days. RX23.

Respondent's third witness

Mr. Kyle Landes also testified that he was working as an investigator with PhotoFax, Inc., in July 2014 and that he was assigned to watch and record the petitioner on July 24, 2014. Mr. Landes' report and video was admitted into evidence. According to the video, the petitioner is seen leaving his house in Wheaton at 7:01 a.m., walking with a folder in his left hand as he entered his vehicle. At 8:18 am, the petitioner arrived at a vacant storefront located at 657 West Lake Street in Chicago and was observed entering an alley. The building was noted to be vacant and unfinished inside.

At 8:41 am, the petitioner was filmed walking to the driver side of his car and grabbing blueprint paper and a water bottle with his left hand. Petitioner then carried the blueprints and entered the building through the back alley entrance. Over the next several hours, petitioner was observed entering and exiting the back alley entrance of the building located at 657 West Lake. Petitioner was filmed conversing with individuals that arrived in the alley throughout that morning. Petitioner was observed entering and exiting the vacant storefront with a folder in his left hand. At 1:30 pm, petitioner was observed exiting the back alley with blueprint paper in his left arm. Petitioner placed the prints into his truck and returned inside the building. Petitioner eventually departed the area at 2:01 pm. RX24.

CONCLUSIONS OF LAW

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

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

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

Based upon the facts and medical evidence, the Arbitrator finds that the petitioner's current condition with respect to his left wrist and left shoulder is causally related to the accident of May 14, 2009. The

Arbitrator finds that petitioner's cervical spine complaints are not causally related to the accident of May 14, 2009. The petitioner did not testify to any current complaints with respect to his neck. His testimony was limited to his left wrist and left shoulder. The ER records from Mercy Hospital indicate that petitioner only sustained injuries to his left shoulder and wrist.

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

The parties agreed, on the record, that the bills indicated on Arbitrator's Exhibit 1, have been paid or will be paid directly to the providers pursuant to the fee schedule. Based upon the parties' agreement on the record, the Arbitrator finds that there are no disputed issues regarding medical bills.

K. What temporary benefits are in dispute?

The petitioner was paid maintenance benefits from December 4, 2012 to May 7, 2015. Maintenance benefits were stopped after the petitioner was evaluated by Dr. Kevin Walsh. Petitioner seeks fifteen (15) additional weeks of maintenance benefits from May 8, 2015 through the date of trial, August 21, 2015. Petitioner testified that he continued to search for work after May 8, 2015. The Arbitrator concludes that Petitioner is entitled to maintenance benefits from December 4, 2014 to August 21, 2015.

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

Petitioner claims that as a result of the work accident, he is permanently, totally disabled. For the reasons set forth, the Arbitrator finds Petitioner has failed to prove he is permanently, totally disabled as a result of the May 14, 2009 work accident.

There was no credible medical evidence presented by Petitioner indicating that Petitioner is medically permanently, totally disabled. The Arbitrator also finds that the petitioner failed to prove that he is permanently and totally disabled under an odd-lot theory.

An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify payment of wages to him. *A.M.T.C. of Illinois v. Industrial Commission*, 77 Ill.2d 482, 487 (1979). The employee, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp. v. Industrial Commission*, 95 Ill.2d 278, 286-87 (1983). Rather, the employee must show that he is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them. *Alano v. Industrial Commission*, 282 Ill.App.3d 531, 534 (1996).

If the employee's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, he may qualify for "odd lot" status. *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill.2d 538,546-47 (1981). An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed

regularly in any well-known branch of the labor market. *Valley Mould*, 84 Ill.2d at 547. The burden is upon the claimant to establish the unavailability of employment to a person in his circumstances. Valley Mould at 546-547 (Ill., 1981).

If employees fail to make out a prima facie case that they fall into the "odd lot" category, then it remains incumbent upon them to demonstrate that, given their present condition and in light of their age, training, experience, and education, they are permanently and totally disabled. *ABB C-E Services v. Industrial Commission*, 316 Ill.App.3d 745 (Ill.App. 5 Dist. 2000); citing *Valley Mould*, 84 Ill.2d at 547. They may accomplish this by a showing of diligent but unsuccessful attempts to find work or by proof that because of the above mentioned qualities they are unfit to perform any but the most menial tasks for which no stable market exists. *ABB C-E Services*, 737 N.E.2d at 685.

There are three ways by which employees can demonstrate that they are permanently and totally disabled: (1) by a preponderance of the medical evidence, (2) by showing a diligent but unsuccessful job search, or (3) by demonstrating that because of their age, training, education, experience, and condition, no jobs are available to a person in their circumstances. *Id*, at 686.

The claimant must establish by the preponderance of the evidence that they fall into the odd-lot category. *Meadows v. Industrial Comm'n*, 262 Ill.App.3d 650, 653-654 (holding that "claimant has the burden of proving that he fits into the 'odd lot' category of section 8(f) of the Act"). Applying the analytic framework of the case law, the Arbitrator does not find that the petitioner has established, by a preponderance of the evidence that he falls into the odd-lot category. The Arbitrator finds it significant that the petitioner received a number of interviews during his search for work in the construction industry. In petitioner's own words, he received "countless job interviews" and no offers. On cross-examination, the petitioner testified to one job offer at a demolition company. The job required him to unload trucks in addition to his superintendent duties. Petitioner declined the offer because of the unloading requirement. There was no evidence presented as to the required lifting capabilities for that job.

Petitioner also testified that he volunteered with a company known as Projx Construction. Petitioner testified that he performed all the duties required of a project manager. According to the vocational report from August of 2014, Projx did not have work for the petitioner at that time and advised that they would contact him should their business increase. Petitioner testified that he still maintains contact with Projx Construction, to date.

In reviewing petitioner's job search logs, the Arbitrator finds that the positions targeted were almost exclusively with the construction/project management industry. Both Petitioner and Ms. Schmit agreed that these were the only positions targeted.
The Arbitrator understands that the goal of the vocational rehabilitation process is to return the individual to work at the highest wage possible so the individual can continue his pre-injury lifestyle.

The Arbitrator also acknowledges that it is not always possible to return an individual to work in their usual and customary area of employment.

There is no evidence that Petitioner's job search was ever expanded to include other industries and positions. The Arbitrator notes that this case was tried on all issues. Petitioner also testified that he does not believe he can return to work "in any physical capacity". A claimant may prove by the preponderance of the evidence that they fall into the odd-lot category by demonstrating a diligent but unsuccessful job search. The Arbitrator finds that petitioner's job search was only limited to the construction trade and therefore not considered to be diligent. The Arbitrator finds the evidence to be insufficient to prove that the petitioner falls within the odd-lot category.

Furthermore, Ms. Schmit, the only vocational expert to testify, concluded that Petitioner is employable. She testified credibly and in an unrebutted manner, that the petitioner presented well to employers and garnered significant interest. She testified that Petitioner is motivated and that he is a younger individual (44 years old at the time of hearing). The job search logs revealed that Petitioner received interviews almost monthly and in some cases, petitioner was one of the final candidates to be selected for a position. Based upon this evidence and testimony, the Arbitrator cannot conclude that the petitioner is unemployable.

Even if the Arbitrator were to find that petitioner proved by a preponderance of the evidence that he falls into the odd-lot category, expert to testify and offer opinions on petitioner's employability as well as his skills and experience. Her testimony was unrebutted.

Ms. Schmit testified credibly that the petitioner is employable in a reasonably stable labor market. She testified credibly regarding petitioner's skills, age and work experience. Ms. Schmit testified that petitioner's age (44 years old) would not have a negative impact upon his ability to find work. The Arbitrator notes that the petitioner has many skills, including supervisory experience. Petitioner also ran his own business for several years. He was required to supervise all of the trades at a job site, maintain schedules, order supplies, document payroll and other duties of a business owner. The Arbitrator adopts Ms. Schmit's opinion that the petitioner is employable in a reasonably stable and well-known sector of the labor market.

The Arbitrator also relies upon the surveillance video taken on July 24, 2014. The video shows the petitioner entering and exiting a vacant building located at 657 W. Lake Street in Chicago over the course of several hours. Petitioner is seen carrying blueprints in and out of the building. Petitioner admitted that he has been to that address several times in order to "visit a friend". The Arbitrator notes that this video was taken before the petitioner began his volunteer period with Projx construction. After the investigator testified and the video was played, the petitioner did not offer any rebuttal testimony to explain his activities on that day. The Arbitrator questions what the petitioner was doing at the vacant building with blueprints prior to the volunteer period with Projx and considers this in her evaluation of the petitioner's credibility.

Since petitioner has failed to prove that he is permanently and totally disabled, the Arbitrator must consider whether Petitioner qualifies for an wage differential award under Section 8(d)1. The Arbitrator finds insufficient evidence to award a wage differential under Section 8(d)1. The Arbitrator finds that the petitioner has likely lost access to his usual and customary employment. However, there was no credible evidence to establish what petitioner is capable of earning in some suitable employment. The Arbitrator cannot base a wage differential award on speculation. Without credible evidence to establish an appropriate wage in some suitable employment, the Arbitrator declines to award a wage differential under Section 8(d)1.

Petitioner sustained injuries to his left wrist and shoulder. Petitioner does not have any permanent disability with respect to his left shoulder. He testified that his pain is more of a "nuisance" and that he has no issues with his shoulder strength or range of motion. Petitioner has not had treatment for his left shoulder in several years. Petitioner has a significant disability with respect to his left wrist, which resulted in permanent lifting restrictions.

Based upon the medical evidence and testimony, the Arbitrator finds that petitioner has sustained a loss of trade or profession. The Arbitrator finds that the petitioner sustained permanent, partial disability to the extent of 50% loss of use of person as a whole representing a loss of trade or profession.

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

Illinois courts have refused to assess penalties under sections 19(k) and (l) of the Act where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation withheld. *See, Board of Education v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982); *See also, Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297 (1980) and *Brinkmann v. Industrial Commission*, 82 Ill. 2d 462 (1980). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay, and the standard we hold him to is one of objective reasonableness in his belief." *Id. See also, City of Chicago v. Industrial Commission*, 63 Ill. 2d 99 (1976).

The Illinois Supreme Court has explicitly found an obligation on the part of Respondents to diligently obtain information regarding a Petitioner's claim in *Board of Educ. v. Industrial Comm'n*, 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 N.E.2d 861 (1982). In *Board of Educ.*, the court found that the Chicago Board of Education "had or should reasonably have had in its possession" sufficient evidence, that "would have disclosed that the grounds for challenging temporary total disability liability were insubstantial at best," and therefore fees and penalties were warranted. The Supreme Court also found that the Board's "failure to obtain that information did not entitle the Board to assert later that it acted in good faith because it was ignorant of the evidence in favor of the employee." *See, Board of Educ. v. Industrial Comm'n*, 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 N.E.2d 861 (1982).

The petitioner has requested penalties and fees to be awarded. While the respondent argues that the petitioner's three paragraph penalty petition does not specify the time periods in which penalties and fees were being claimed for a delay in payment of TTD or maintenance; the petitioner testified to the necessity of his attorney filing 19(b)'s and penalty petitions, for such delays. The 19(b) petitions were included as an exhibit at trial. The Arbitrator notes that the 19(b)'s do not indicate the time periods in which TTD or maintenance was delayed. Although Petitioner could not testify with any specificity as to all of the time periods in which his TTD or maintenance checks were delayed, he did testify sufficiently and in an unrebutted manner, to prove the chronic delays in payment of his benefits and authorization to necessary medical treatment, by the respondent. The Arbitrator finds that the petitioner has met his burden of proving entitlement to penalties with respect to the Act.

The Arbitrator finds that penalties of $1,000.00 pursuant to Section 19(k) of the Act, penalties of $10,000.00, pursuant to section 19(l) of the Act, and fees of $2,548.57, pursuant to section 16 of the Act, should be imposed upon the Respondent. The Arbitrator does not find Dr. Walsh's opinion to be persuasive and that the respondent's reliance on Walsh's opinion, to terminate Petitioner's benefits was misplaced. The respondent has previously utilized several other doctors for its Section 12 examinations of Petitioner, who offered credible, professional opinions regarding his medical condition and the Arbitrator finds that the respondent's chronic delays in paying Petitioner's temporary total disability payments rises to the level of arbitrary and capricious and acts in bad faith, on the part of the respondent, therefore penalties and attorney's fees are awarded.

John Lizon
09 WC 43267

16IWCC0675

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
09WC43267
SIGNATURE PAGE

L Thompson Smith
Signature of Arbitrator

November 25, 2015
Date of Decision

DEC 7 – 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dominick Ferazzo,

Petitioner,

vs.

No. 90 WC 55894

Jetco, Ltd.,

Respondent.

16IWCC0618

DECISION AND OPINION ON REVIEW UNDER SECTION 8(a)/
ORDER ON PETITION FOR PENALTIES AND ATTORNEY FEES

Timely Petition for Review under section 8(a) and a contemporaneous petition for penalties and attorney fees having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical care, penalties and attorney fees, and being advised of the facts and law, grants in part the 8(a) petition and denies the penalties and fees petition for the reasons set forth below.

On July 31, 1997, the Commission filed a corrected decision and opinion on review awarding temporary total disability, medical and wage differential benefits. Regarding the nature and extent of the injury, the Commission found that on September 22, 1990, Petitioner sustained a twisting injury to the low back. On June 4, 1993, Petitioner underwent a laser disc decompression surgery. In July of 1995, Petitioner's treating surgeon, Dr. Stamelos, diagnosed a failed back syndrome.

On December 11, 2014, Petitioner filed a petition under section 8(a), as well as a petition for penalties and attorney fees. Petitioner seeks payment of medical bills for doctor's visits, as well as past and future bills for physical therapy, prescription medications and a gym membership. Petitioner also seeks penalties and attorney fees. Respondent argues that Petitioner had exceeded his two choices of medical providers. Further, Respondent argues that it properly denied medical benefits pursuant to utilization reviews.

On July 2, 2015, Commissioner Joshua Luskin held a hearing in the matter. Petitioner, who was 49 years old at the time of the hearing, testified that in 1996 he moved to Florida and began treating with Dr. Hale, an orthopedic surgeon. Since moving to Florida, Petitioner has been working on light duty. Petitioner generally saw Dr. Hale quarterly. In 2009, Dr. Hale prescribed a gym membership. Petitioner stated he needed to go to the gym to stay fit and improve his low back condition. Petitioner has been paying for the gym membership himself. Petitioner also underwent some physical therapy until Respondent stopped paying for it. Petitioner stated the physical therapy helped "in some areas." The physical therapists have instructed Petitioner on home exercises. Petitioner performs home exercises and attends the gym. Petitioner continues to receive the wage differential benefits.

Petitioner further testified that he suffers from constant low back pain. Petitioner had been taking Soma for his injury for a long time. In 2013, Dr. Hale prescribed Flexeril instead of Soma because Petitioner developed some undesirable side effects to Soma. Petitioner explained that he tried five or six different medications before deciding that Flexeril worked the best for him. Dr. Hale also prescribed flurbiprofen. Respondent denied payment for either medication. Petitioner maintains that his pain levels go up and his functioning deteriorates without these medications. Petitioner incurred out-of-pocket expenses when he paid for Curad tape to attach Flector patches. He also paid out-of-pocket for some pain medications. Recently, Petitioner has been seeing Dr. Hale every other month or every month because of worsening pain.

Petitioner acknowledged that after injuring his low back in 1990, he treated with Dr. Milos and then Dr. Stamelos. When asked how he found Dr. Stamelos, Petitioner responded: "I don't know if I used a referral from him and my father brought him into it, my dad did," adding: "So I don't know if we went through the doctor or not." When Petitioner moved to Florida, he began treating with Dr. Hale. Until recently, Respondent has been paying the bills from Dr. Hale.

Petitioner introduced into evidence voluminous medical records and prescriptions from Dr. Hale, the medical bills from Dr. Hale and for physical therapy, the record of out-of-pocket pharmacy expenses, and gym membership bills.

The medical records from Dr. Hale go back to December of 2002 and document a history of persistent back pain with or without radiation to the legs and with fairly benign physical examination findings. Dr. Hale managed Petitioner's condition with various medications. In 2008, Petitioner underwent five sessions of physical therapy and was instructed on home exercises. Petitioner reported the physical therapy helped "somewhat." In 2011, Petitioner underwent six sessions of physical therapy and was again instructed on home exercises. Petitioner reported the physical therapy helped. In July of 2012, Dr. Hale switched Petitioner from Soma to Flexeril because Petitioner complained of some side effects from Soma. In December of 2012, Dr. Hale switched Petitioner from Motrin to Ansaid (flurbiprofen) and prescribed another course of physical therapy. The insurance carrier denied authorization for the physical therapy. In January of 2013, Petitioner reported his symptoms worsened after he stopped physical therapy. In February of 2013, Dr. Hale noted: "The patient has had four PT sessions that appear to have helped," and requested additional physical therapy. In March of

2013, Dr. Hale noted that Petitioner attended another four physical therapy sessions, which helped. Petitioner was instructed on home exercises and discharged from physical therapy. Petitioner told Dr. Hale he needed to exercise in the gym in order to maintain or improve his function. Dr. Hale supported Petitioner in his request that the workers' compensation carrier pay for the gym membership. Further, Dr. Hale added Flector patches to Petitioner's medication regimen. For the remainder of 2013 and during 2014, Petitioner's condition remained essentially unchanged.

In June of 2014, Dr. Hale noted that the workers' compensation carrier denied coverage for Flexeril and Ansaid. Dr. Hale maintained both medications were medically necessary and indicated. Dr. Hale noted that when Petitioner tried to make do without Flexeril and/or Ansaid, his pain increased and his function decreased.

In March of 2015, Petitioner complained of worsening symptoms and increased difficulty sitting for any length of time. Dr. Hale prescribed physical therapy "to see if we can improve his sitting tolerance." On April 13, 2015, Dr. Hale noted no improvement. Dr. Hale reiterated his recommendation for physical therapy.

On May 12, 2015, Dr. Hale noted, in pertinent part: "Still with pain in the back. Still with right buttock pain. Worse with cough and sneeze without intervening trauma or change in activity. He notes he has increased difficulty sitting for any length of time. After sitting for approximately two hours, he has to lie down for the rest of the day. ¶ Current medications are helping him function. He continues with home exercise program instructed by therapy. He continues going to the gym three times a week in order to continue to exercise and function. If he does not go to the gym he finds his function declines and he has difficulty getting through the day." Petitioner reported Flexeril and Flector patches worked well. On physical examination, Dr. Hale noted a mild paraspinal spasm, increased tenderness in the left paralumbar region, and a mildly restricted range of motion. Dr. Hale stated Petitioner "should have access to full gym facilities in order to maintain his condition and work on improving it." Dr. Hale continued to prescribe physical therapy "to see if we can improve his sitting tolerance."

Also on May 12, 2015, Dr. Hale issued a "to whom it may concern" letter, stating:

> "Please be advised that [Petitioner] is a patient under my care receiving treatment for injuries sustained to his low back on 9/21/90. He is currently using analgesic medication, anti-inflammatory medication, and muscle relaxant medication; a combination which allows him to function. I have requested additional therapy for treatment of sitting intolerance which has developed recently which has been declined by the carrier. He has tried to go without the anti-inflammatory and/or muscle relaxant and finds his condition worsens when he stops taking them. Additionally, he is personally paying for access to a gym in order to work out as well as stretch and strengthen which, at the very least, must be provided to him in order to maintain his wellbeing and avoid additional flares of pain in the back.
>
> All the treatment as outlined above is considered medically necessary at

this time and is well within the providence of acceptable treatment for this type of condition."

Respondent introduced into evidence utilization review reports. A utilization review report dated March 31, 2011, denied physical therapy as not medically necessary per the ODG guidelines.[1]

A utilization review report dated January 21, 2013, denied payment for a gym membership as not medically necessary. The reviewer, an occupational medicine specialist, stated that instead "temporary transitional exercise programs may be appropriate for patients who need more supervision." A utilization review report dated August 5, 2013, denied payment for a gym membership as not supported by the records provided. The reviewer, a family practice physician, stated that treatment needed to be monitored and administered by medical professionals.

A retrospective utilization review report dated May 2, 2014, denied payment for flurbiprofen (Ansaid) and cyclobenzaprine (Flexeril). The reviewer, a physical medicine and rehabilitation specialist, explained that ODG guidelines support only short term use for either medication. A prospective utilization review report dated May 12, 2014, denied payment for flurbiprofen (Ansaid) and cyclobenzaprine (Flexeril) as not medically necessary. The reviewer was an orthopedic surgeon.

A utilization review report dated April 14, 2015, denied physical therapy. The utilization review was performed by a family practice physician and denied physical therapy because "[d]etails regarding previous physical therapy for the lumbar spine was [*sic*] not provided, such as, number of sessions completed to date and objective functional gains made. The documentation failed to provide current objective functional deficits of the lumbar spine to warrant the need for therapy and the request as submitted exceeds the guideline recommendations of 10 visits."

Respondent asks the Commission to adopt the opinions of the utilization reviewers. Further, Respondent argues that it is not responsible for the medical services provided by Dr. Hale because Dr. Hale is Petitioner's third choice of medical providers.

The Commission notes that even if Dr. Hale is Petitioner's third choice of medical providers, Petitioner has been treating with Dr. Hale for close to 20 years and Respondent has not objected until now. Under these circumstances, the doctrine of *laches* applies. See, *e.g.*, Marshall v. Metropolitan Water Reclamation District Retirement Fund, 298 Ill. App. 3d 66, 74 (1998); Williams v. Interstate Cleaning Corp., 14 IWCC 0615. The Commission awards outstanding medical bills from Dr. Hale, pursuant to sections 8(a) and 8.2 of the Act.

With respect to the utilization reviews, the Commission notes that Dr. Hale is an orthopedic surgeon. Only one utilization review was performed by an orthopedic surgeon. Furthermore, the utilization review denials of physical therapy and a gym membership are inconsistent, as the denial of a gym membership contemplated a supervised exercise program

[1] It appears Respondent ultimately paid for the physical therapy Petitioner underwent in 2011.

instead. The Commission notes the short term courses of physical therapy Petitioner underwent in 2008, 2011 and 2013 proved to be beneficial in keeping his condition stable. The Commission awards another short term course of physical therapy, but not a gym membership.

As to the costs of Flexeril and Ansaid, the Commission defers to the opinions of Dr. Hale, who has kept Petitioner's condition stable for many years, and awards the costs of these medications. Further, the Commission awards the out-of-pocket expenses for medical supplies.

Lastly, the Commission finds that penalties and attorney fees are not warranted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) petition is granted, except for the gym membership, in accordance with §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's petition for penalties and attorney fees is denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 2 7 2016
o-08/25/2016
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rachel Allen,

Petitioner,

vs. NO. 15 WC 39401

Atlas Staffing Agency,

16IWCC0701

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 11, 2016 is hereby affirmed and adopted.

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

16IWCC0701

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 $3,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 3 1 2016
SJM/sj
o-10/20/16
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

ALLEN, RACHEL
Employee/Petitioner

Case# 15WC039401

16IWCC0701

ATLAS STAFFING AGENCY
Employer/Respondent

On 5/11/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1752 ASHER, RAYMOND L LTD
200 W JACKSON BLVD
SUITE 1050
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
JOSEPH F D'AMATO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0701

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Rachel Allen
Employee/Petitioner

v.

Atlas Staffing Agency
Employer/Respondent

Case # **15** WC **39401**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert Falcioni**, Arbitrator of the Commission, in the city of **New Lenox**, on **January 15, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

Rachel Allen v. Atlas Staffing Agency, 15 WC 39401

16IWCC0701

FINDINGS

On the date of accident, **November 4, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16, 150.16**; the average weekly wage was $**310.58**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **4** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $310.58 per week for 6 6/7 weeks, from November 4-6, 2015, November 19-24, 2015, and December 8, 2015 to January 15, 2016, as provided in Section 8(b) of the Act.

Respondent shall pay the medical bills from Dr. Wolin subject to the appropriate fee schedule, as explained more fully in the attached findings.

Respondent shall authorize care consistent with Dr. Wolin's treatment recommendations as contained herein.

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

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

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

Robert E Allen

Signature of Arbitrator

MAY 11 2016

5/11/16
Date

16IWCC0701

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RACHEL ALLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 15 WC 39401
	)	
	)	
ATLAS STAFFING,	)	
	)	
Respondent	)	

An Application for Adjustment of Claim was filed on this matter and Notice of Hearing was mailed to each party. The matter was heard before the Honorable Robert Falcioni, Arbitrator of the Illinois Workers' Compensation Commission, in the City of New Lenox, on January 15, 2016. After reviewing all of the evidence presented, the Arbitrator hereby makes findings of fact and rulings on the disputed issues below.

FINDINGS OF FACT

It is a well-accepted principle in Illinois Workers' Compensation cases that the Arbitrator and Commission sit as the finders of fact. Skinner v. Industrial Commission, et al, 72 Ill.2d 394 Ill., 1978 at 398. As such, the Arbitrator makes the following findings of fact:

Petitioner testified she worked for Respondent on November 4, 2015; she identified her job title as "inspecting mold and packing Fiji Waters." Tx. at 9. As far as actual job duties, Petitioner testified she was asked to "look inside the doors of containers to make sure there was no mold." Id. As for the Fiji water, Petitioner testified she was to "pack them 6 to a box or 12 to a box." Id. She noted her job required her to lift 60 pounds. Id. at 10. Petitioner testified that when it was time to clock out, she would walk with a group of three different temp agencies to clock out. Id. at 11.

Petitioner testified at around 3:25 PM on the alleged date of loss, she was heading with a group of around 20 people to the break room to clock out. Tx. at 12. She testified at that time, "someone behind (her) ran up and jumped on the back of (her) neck." Id. She testified she was "shocked" Id. Petitioner testified she did not see the person who jumped on her coming. Id. She testified she was not a "willing participant" to the incident. Id. at 14. She testified she fell and landed on her left shoulder. Id.

Petitioner testified the individual who jumped on her was named Rodney Cooper. Tx. at 15. She testified Rodney Cooper was a co-worker and she met him approximately in October of 2015. Id. Petitioner testified Rodney Cooper was a co-worker and not a friend; however, she admitted she

was Petitioner's "friend" on Facebook. Id. at 16. She testified she became his "friend" in order to gather more information about him so she would be able to "take him to court." Id. Petitioner admitted to "liking" comments Rodney Cooper made on his Facebook page on the date of loss. Id. at 49. She also admitted she might have "liked" other things Rodney Cooper posted on his Facebook pages at other times. Id. at 49; 56.

Petitioner testified she went to the Providence Hospital ER after the incident following a brief stop at her home. Tx. at 18-19. Petitioner's Exhibit One contains a chart note from the ER. The chart reads "patient presents with complaints of neck paid after a coworker playfully jumped on her back (emphasis added)." Pet. Ex. 1. Petitioner testified it was not her intention to engage in playful behavior with Rodney Cooper. Tx. at 19.

Petitioner testified the providers at Providence sent her home on November 4, 2015, with an instruction to return to full duty work as of November 6, 2016. Tx. at 21. Petitioner testified she attempted to return to work on November 6, 2015, however, she stated she needed to go back to the ER. Id. She further testified she did not seek treatment again until November 19, 2015. Id.

On November 19, 2015, Petitioner testified she sought treatment again at Providence ER. Tx. at 22; Pet. Ex. 1. She gave a consistent history of the onset and accident and further reported that she had been lifting heavy weights at her job that caused pain to continue at the left shoulder. She was prescribed pain and anti inflammatory medicines. At that time, she was told she could return to work on November 24, 2015. Id. Petitioner testified she could not work because Atlas told her they did not have work for her. Id. at 22. She testified she next sought and obtained treatment with Dr. Wolin on December 8, 2015. Id. She gave D. Wolin a consistent history. Petitioner testified Dr. Wolin recommended both a cervical MRI and an MR arthrogram of the left shoulder. Id. at 23-24. Petitioner testified the recommended diagnostics were not authorized by Respondent. Id. Petitioner testified Dr. Wolin took her off work for an indefinite period. Id. at 24. She testified she was not receiving benefits. Id. at 25. She testified she was waiting to follow up with Dr. Wolin until after completing of her diagnostic studies. Id. at 27.

On cross examination Petitioner was shown a statement written and signed by her on November 5, 2015, or the day following the date of loss. Tx. at 36.[1] The statement reads as follows:

> "I was walking to the break room to clock out and one of the works [sic] jump over my neck. I did not see this person coming and when he jumped on me I fell causing my pulled muscle. I do not personally know him other than co-worker at Lineage. He wanted to play around and caused me to fall and hurt left side of body. He was trying to play around. This was not work related (emphasis added)." Res. Ex. 1.

[1] This statement is also contained with Respondent's Exhibit 1.

Petitioner testified the statement was not accurate. Tx. at 41. She testified she originally wrote a different statement that was not acceptable to Atlas Staffing. Tx. at 41-46. She contends Atlas Staffing made her re-write the statement as noted above and stated she would not receive a paycheck if she did not do so. Id. Petitioner was not in possession of this statement Id. at 46. Petitioner testified she had not filed any employment related claims against Atlas Staffing, except for the case at bar. Id. at 48.

Petitioner testified she attempted to work briefly on November 6, 2015, but other than that brief attempt to return, she has not worked since the November 4, 2015, date of loss. Tx. at 6. The Arbitrator notes Respondent's Exhibit One shows claimant actually worked for the following periods after the date of loss:

- 24.25 hours for the period of November 8, 2015, through November 11, 2015, which were paid through check #0000003982;
- 24.25 hours for the period of November 15, 2015, through November 18, 2015, which were paid through check #0000004059 and
- 20.75 hours for the period of November 22, 2015, through November 25, 2015, which were paid through check #0000004122. Res. Ex. 1.

In all, the Arbitrator notes Respondent's Exhibit 1 shows Petitioner worked a total of 69.25 hours and checks were issued to her for that period despite her assertions to the contrary.

Respondent's Exhibit 1 also contains logs of conversations between Petitioner and Respondent. The records show on November 12, 2015, Petitioner called into Atlas Staffing and stated she could not come to work because there was a power cord downed in the street of her residence. Res. Ex. 1. There is a similar exchange between Petitioner and Atlas on November 13, 2015, and on December 4, 2015, there is an exchange between Petitioner and Atlas whereby Petitioner states she could not come into work because she did not have gas for her vehicle. Id.

Included in RX1 is a written statement from one Bryan Jurgovan, a co worker of Petitioner, which states that he saw an individual jump on Petitioner's from behind and cause her to fall to the ground on her left side and that Petitioner complained of her neck hurting her immediately.

CONCLUSIONS OF LAW

WITH REGARD TO ISSUE C, DID AN ACCIDENT OCCURR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

It is the burden of every Petitioner before the Workers' Compensation Commission to establish with evidence every disputed issue litigated at trial, including the issues establishing

Respondent's liability for benefits. Board of Trustees of the University of Illinois v. Industrial Commission (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, Edward Don v Industrial Commission (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. A claimant must establish her current condition of ill-being is causally-related to her asserted accident. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203 (2003); Land and Lakes Co. v. Industrial Comm'n, 359 Ill.App.3d 582, 591-92 (2nd Dist. 2005).

A compensable injury must "arise out of" and occur "in the course of" employment. An injury arises out of employment when a causal connection exists between the employment and the injury such that the injury has its origins in some risk incidental to the employment. Curtis v. Industrial Comm'n (1987), 158 Ill.App.3d 344, 110 Ill.Dec. 689, 511 N.E.2d 866. An injury occurs during the course of employment when the employee is injured within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or doing something incidental thereto. Eagle Discount Supermarket v. Industrial Comm'n (1980), 82 Ill.2d 331, 45 Ill.Dec. 141, 412 N.E.2d 492.

The credible evidence in this case demonstrates Petitioner met her burden proving she suffered an industrial accident that arose during the course of her employment and the Arbitrator so finds. The record confirms work had ended for the day and Petitioner was heading to the break room to clock out. She was not off the clock at that point and was within the confines of the factory at which she worked on behalf of Respondent.

Petitioner testified she had not been involved in an argument or had a fight with Rodney Cooper on the date of loss. Tx. at 35. She did not call the police or file a report after he jumped on her, without her consent. Tx. 68. She did not/has not filed a law suit against him for a tort. Id. at 67. She testified she was Rodney Cooper's Facebook "friends" and she liked one if not more of his posts. Id. at 16, 49, 56. She wrote a statement confirming Rodney Cooper was "playing around" when he jumped on her back. Id. at 42-43; Res. Ex. 1. Petitioner also advised the ER personnel at Providence Hospital Rodney Cooper "playfully" jumped on her back. Pet. Ex. 1.

Petitioner, denied this was consensual horseplay, and the written statement of Brian Jurgovan, admitted as Respondent's exhibit, supports Petitioner's testimony that the incident occurred without warning. No evidence was introduced to contradict Petitioner's testimony as to what occurred. Her testimony is further supported by the various histories contained in the medical records. The Arbitrator notes that Illinois permits the nonparticipating victim of horseplay to recover worker's compensation benefits if the horseplay occurs within the course of employment.. Murray v. Industrial Commission, 163 Ill. App. 3d 841 (3rd Dist. 1987),Anercan ErakoShoe Co. v. Indust nal Com. 201 Ill..2d 132. 169 N.E 2d 256; Intenational Harvester Co. v. Industrial Conm.{1933) 354 Ill. 151. 187 N. E.,9161. The evidence in this case clearly supports the finding that Petitioner was

injured by an act of uninvited horseplay while in the course of her employment and that therefore the injury or accident also arose out of her employment and the Arbitrator so finds.

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

Petitioner testified that she did not have any prior injuries to either her neck or left shoulder prior to the November 4, 2015 accident. (T.25) Petitioner did not sustain any new injuries to her left shoulder or neck since the November 4, 2015 accident. (T.26) The medical records consistently document petitioner's work injury without alternative histories. With respect to both her left shoulder and her neck, Petitioner stated that she was able to perform the duties of her job pain free prior to the work accident. (T.26) Respondent did not present any evidence to the contrary.

A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See* Caterpillar Tractor Co. v. Industrial Comm'n, 83 Ill. 2d 213; 414 N. E. 2d 740 (1980) Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See* Westinghouse Electric Co. v. Industrial Comm'n, 64 Ill. 2d 244 (1976).

The Arbitrator finds that prior to November 4, 2015, the petitioner enjoyed good health regarding her neck and left shoulder. Petitioner testified that she was asymptomatic, fully functional and treatment free in her left shoulder and neck prior to the work accident.

There is no evidence to suggest that Respondent exercised its right under §12 of the Illinois Worker's Compensation Act, or pursed utilization review services.

Having found in Petitioner's favor on the issue of accident, and in the absence of any preexisting conditions or intervening accidents, and noting the chronological order of the onset and treatment of Petitioner's injury as well as the ongoing and consistent nature of her complaints and treatment, the Arbitrator finds that a causal connection exists between Petitioner's current condition of ill being and her accident as alleged herein.

In support of the Arbitrator's decision relating to (G) Petitioner's Earnings, the Arbitrator finds the following facts:

Respondent's Exhibit One includes a wage statement. Based on the wage statement, Respondent calculated an average weekly wage of $310.58. On direct examination, Petitioner was

confronted with the wage statement, and agreed that the wage statement covered all of Petitioner's employment with Atlas in the year preceding the accident. (T. 30) The Arbitrator concludes that petitioner's average weekly wage was $310.58 in the year preceding the accident.

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

Petitioner's Exhibit Two includes bills from Dr. Preston Wolin, for services rendered on December 8, 2015. Arbitrator's Exhibit One reflects that the fee schedule amount for those bills totals $739.15. Having found in favor of Petitioner on the issue of accident and causation, the Arbitrator orders Respondent to pay said amount to Petitioner.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) PROSPECTIVE MEDICAL, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Having found in favor of Petitioner on the issue of accident and causation, the Arbitrator orders Respondent to authorize medical care consistent with Dr. Wolin's recommendations for [redacted] an[redacted] MRI and MRA.

WITH RESPECT TO ISSUE L, WHAT TEMPORARY BENEFITS ARE IN DISPUTE (TTD), THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was instructed to remain off work by a physician in the following timeframes:

November 4 to November 6, 2015 (Provident Hospital)

November 19, 2015 to November 24, 2015 and (Provident Hospital)

December 8, 2015 to the next follow up appointment (Dr. Wolin).

Petitioner testified that Dr. Wolin instructed her to schedule a follow up visit after completion of the cervical MRI and left shoulder MRA, which have not occurred yet. Dr. Wolin's chart note is consistent with petitioner's testimony.

Having found for petitioner on the issues of accident and causation, the Arbitrator awards TTD from November 4-6, 2015, November 19 – 24, 2015, and December 8, 2015 to the date of hearing, January 15, 2016.. The Arbitrator notes that while Respondent presented evidence that Petitioner was working during the period, it is clear from that evidence that she was not working full time and it is impossible to determine which days she did and did not work. Relying on the doctor's off work statements, the Arbitrator finds as above and orders Respondent to pay same.

WITH RESPECT TO ISSUE O, THE ARBITRATOR FINDS AS FOLLOWS:

- Status of Lineage Logistics as a Respondent: Petitioner amended her Application for Adjustment of Claim to remove Lineage Logistics, so this issue is moot. See, Tx. at 6-7.

- Doctor choices: The Arbitrator makes no finding regarding this issue, as no evidence was introduced.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lori Crowder,
Petitioner,

vs.

NO: 14WC 15569

16IWCC0656

City of Springfield,
Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 8, 2015, is hereby affirmed and adopted.

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

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

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 14 2016
o10516
CJD/jrc
049

Joshua D. Luskin

Ruth W. White

DISSENT

I must respectfully dissent from the Decision of the majority. The majority agreed with the Arbitrator who found that the Petitioner failed to prove she sustained an accidental injury that arose out of and in the course of her employment by respondent on 2/14/14.

There is no question that Petitioner was on Respondent's premises when she fell, or that despite the walk having previously been plowed, snow and ice had accumulated when Petitioner was walking. (Rx1) The evidence is also clear that Petitioner sustained a broken ankle requiring surgery as a result of her fall. (Px2 and Px4)

Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to be in the course of the employment. However, the fact that an injury is in the course of the employment is not sufficient to impose liability; to be compensable, the injury must also "arise out of" the employment. For an injury to arise out of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 203 (2003), Caterpillar Tractor Co, v. Industrial Comm'n, 129 Ill.2d 52, 62 (1989).

If an employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of her employment. However, if the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable. Caterpillar Tractor Co, v. Industrial Comm'n, 129 Ill.2d 52, 58 (1989).

Petitioner was exposed to a greater risk than the general public because she regularly used the entry and walkway where she fell while on break. Petitioner was on her break when she fell while walking to get coffee at a Starbucks. Petitioner exited through the west entrance, which was the same entrance used for ingress and egress by members of the public. Although Petitioner testified she could have walked out the east exit to get to the Starbucks, it would have taken her longer and she might not have made it back to the premises before the end of her break. (Tr. p. 18, 40) When an injury to an employee takes place in an area which is the usual route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment. Petitioner could have gone out the back door, but she was sure it would have been snowy too. (Tr. p. 18) Petitioner takes two breaks per day and will usually go outside, walk around and get a snack or go to the coffee shop. She typically exits the front door. It's rare she uses the back. (Tr. p. 13-14) Special hazards or risks encountered as a result of using a usual access route satisfy the "arising out of" requirement of the Act. See Bomarito v. Industrial Comm'n, 82 Ill.2d 191, 195 (1980); see also Mores-Harvey v. Industrial Comm'n, 345 Ill. App.3d 1034, 1040 (2004).

Petitioner's injuries also arose out of her employment under the personal comfort doctrine. The personal comfort doctrine is relevant to the determination of whether an

employee's injury occurred "in the course of" her employment. Circuit City Stores, Inc. v. Illinois Workers' Compensation Comm'n, 391 Ill. App.3d 913, 921 (2009). According to the personal comfort doctrine, an employee, while engaged in the work of his or her employer, may do those things that are necessary to his or her health and comfort, even though personal to him or herself, and such acts will be considered incidental to the employment. Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill. App.3d 347, 350 (2000). The Supreme Court has noted, however, that in lunch hour cases, "the most critical factor in determining whether the accident arose out of and in the course of employment is the location of the occurrence." Eagle Discount Supermarket, 82 Ill. 2d 331, 412 (1980). In the instant case, the accident clearly occurred on Respondent's premises.

Based on the above, I would find that Petitioner sustained a compensable accident that arose out of and in the course of her employment and that she is entitled to medical expenses, temporary total disability, and permanency benefits.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CROWDER, LORI
Employee/Petitioner

Case# 14WC015569

CITY OF SPRINGFIELD
Employer/Respondent

16IWCC0656

On 9/8/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.27% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1909 ACKERMAN LAW OFFICE
JAMES W ACKERMAN
1201 S 6TH ST
SPRINGFIELD, IL 62703

0332 LIVINGSTONE MUELLER ET AL
DENNIS O'BRIEN
PO BOX 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LORI CROWDER,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
Employer/Respondent

Case # 14 WC 15569

Consolidated cases: _____

16IWCC0656

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **7/30/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/14/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned **$36,291.84**; the average weekly wage was **$697.92**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 2/14/14. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

8/21/15
Date

ICArbDec p. 2

SEP 8 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 43 year old administrative zoning secretary, alleges she sustained an accidental injury that arose out of and in the course of her employment by respondent on 2/14/14, when she slipped and fell.

Petitioner works for respondent in the Municipal Center West, a building at 7th and Monroe. There are two entrances and exits. The front exit is considered the main entrance. This door faces 7th Street, and faces towards downtown. Also outside the building on this side is a fountain. This door is not locked during regular business hours and is the door in which the public mostly enter and exit the building. The second entrance/exit is out the back of the building and towards the respondent owned parking lot, that is restricted to employee-only parking during business hours. One can only get in this entrance if they use an employee badge. The public can only get in if they go in with an employee or are let in by someone inside the building. Anyone can exit the building from that door.

The Municipal Center West is a City owned building where some of the City's departments are located. CWLP has an office in that building where the public can pay bills. The zoning department is in the building, and people get building permits in the building. The City Clerk's Office is also in the building, as well as the City Council Chambers and the Springfield Hall of Fame. The public has access to the building and mostly uses the front door for entering and exiting the building.

There is a sidewalk that runs around the block. There is also a walkway that goes from the sidewalk on 7th Street to the west door of the Municipal Center West. That same walkway goes around the fountain in front of the building on the 7th Street side. This walkway is used by both employees and the general public to enter and exit the building. The walkway is owned and maintained by respondent.

Petitioner testified that she would usually use the east entrance to enter the building each day as she parked in the employee parking lot. Petitioner used her employee badge to gain access through the east door. Without it, the door would be locked. Petitioner testified that whenever she wanted to go to Starbucks or downtown she would exit the west door, and walk down the walkway from the building to 7th Street.

Petitioner gets two 15 minutes per day, as well as an hour lunch. Often petitioner used her morning break to go and get coffee from Starbucks. She would leave the Municipal Center West through the west door to walk down the walkway to the sidewalk on 7th Street and then north one block to the Hilton where she would get a coffee from Starbucks. Petitioner agreed that whether she went out the east door or the west door the distance to Starbucks was essentially the same.

On 2/14/14 at approximately 9:11 am, petitioner and a friend, Barb Jones, headed out of the west door of Municipal Center West, and started walking down the walkway towards 7th Street enroute to Starbucks to get a coffee. Snow started falling at approximately 7:27am. The snow was accumulating and at 8:56 am the walkway was shoveled. As petitioner and Jones exited the door and started walking down the walkway petitioner slipped and fell injuring her left foot/ankle. Petitioner was taken to St. John's Hospital via ambulance.

At the emergency room petitioner gave a consistent history of the accident. She had pain and was unable to bear weight. Petitioner was examined and x-rays were taken. She was diagnosed with a left bimalleolar ankle fracture, and displaced ankle fracture. Petitioner underwent a closed reduction of the left ankle.

On 2/20/14 petitioner presented to Dr. Stevens at Springfield Clinic regarding her left ankle. Petitioner reported that she was nonweightbearing and off work. Dr. Stevens examined petitioner and assessed an ankle fracture. He recommended surgical intervention.

On 2/27/14 petitioner underwent an open reduction and internal fixation of the left malleolus, open reduction and internal fixation of the left medial malleolus, and open reduction with manipulation without internal fixation of the posterior malleolus. Petitioner's post operative diagnosis was left trimalleolar ankle fracture subluxation. This procedure was performed by Dr. Benjamin Stevens. Petitioner followed-up post-operatively with Dr. Stevens. This treatment included physical therapy.

Petitioner followed-up with Dr. Stevens on 3/13/14, 4/10/14, 5/22/14, 7/21/15, 10/23/14, and 1/22/15. On 5/22/14 Dr. Stevens released petitioner to light duty desk work. When petitioner last followed-up with Dr. Stevens on 1/22/15 she was doing well. She had occasional stiffness and pain, and quite a bit of swelling with strenuous activity. A physical examination revealed left lower extremity neurovascularly intact, mild edema, tibiotalar motion without crepitus, nontender palpation, and nonantalgic gait. Dr. Steven's assessment was stable approximately 1 year postop course status post left ankle open reduction internal fixation. Dr. Stevens recommended that petitioner continue activity as tolerated, and to follow-up as needed.

Petitioner underwent a physical therapy initial evaluation on 4/16/14 at St. John's Hospital. On 6/2/14 petitioner was discharged from physical therapy after 12 visits for her left ankle rehabilitation. Therapist Wombles noted that petitioner progressed very well with her left ankle rehabilitation program with reports that she had transitioned into her athletic shoes "full time" with no significant difficulty or complaints.

Petitioner testified that currently still experiences problems with her left foot. She testified that it hurts every day. She stated that she does not have full mobility due to the hardware in her ankle. When going up and down steps, petitioner takes one step at a time. Petitioner testified that her foot swells almost every day, and

walking great distances aggravates it. Petitioner limits her walking and no longer takes morning break walks to Starbucks because of the pain. Petitioner is still wearing tennis shoes because she feels that she needs it for stability. Petitioner testified that sandals do not give her the support she needs. Petitioner takes OTC medication for pain in the morning and night, if needed. She stated that her left foot/ankle is sensitive to weather changes and it hurts more when the weather is bad. Petitioner also wears compression socks at time.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

The risk of injury must be inherent in, incidental to or reasonably related to the work of the petitioner. If the accident is the result of a hazard or activity to which the general public is equally exposed, then the injury does not arise out of the employment. There are three types of risks which an employee might be exposed to, namely: 1) risks distinctly associated with the employment; 2) risks which are personal to the employee; and 3) "neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute v. Industrial Commission*, 314 Ill. App.3rd 149, 162, 247 Ill. Dec. 22, 731 N.E. 2d 795 (2000). Generally, accidents arising from inherent risks are usually compensable while injuries arising from personal risks more than likely are not compensable.

Inherent risks are distinctly associated with the employment and are risks to which the general public is not equally exposed. Since both petitioner and the general public can exit and enter the west entrance to the Municipal Center West at any time the door is open, and petitioner's decision to exit the west entrance to go to Starbucks for a latte during her morning break does not benefit the respondent economically, the arbitrator finds the petitioner was not exposed to an inherent risk. The arbitrator bases this on the fact that petitioner testified that she was not required to go to Starbucks for coffee on her break, and there was coffee available in the Municipal Center West. Additionally, the petitioner admitted that whether she went out the east exit or the west exit of Municipal Center West the distance to Starbucks was essentially the same. The petitioner also admitted that she always entered and exited the east entrance of the building each day to go to and from her car and this exit was only accessible if she used her employee badge. Whereas, the west entrance was where the general public enters and exits the building for City business.

Personal risks are chances of injury brought into the workplace by the employee. Accidents resulting from personal risks are usually not compensable because the risk of injury is placed into the workplace by the employee, is particular to the employee, and is of no benefit to the employer. Although petitioner had access to coffee in the Municipal Center West, and could use either the east or west exit to get to Starbucks in approximately the same amount of time, the petitioner decided to go to Starbucks via the entrance accessed

equally by the general public and slipped on a snow covered walkway that had been shoveled just 15 minutes prior. Due to the snow on the ground and petitioner's decision to go to Starbucks for her coffee and use the west exit, when coffee was readily available within the building, the arbitrator finds the petitioner's risk was not reasonably related to her work duties. The arbitrator further finds petitioner unreasonably increased her risk by leaving the building to go get coffee within one hour of arriving at work when it was clear that the weather conditions outside were less than desirable. The arbitrator finds the petitioner voluntarily exposed herself to an unnecessary danger entirely separate from the activities and responsibilities of her job, and was performing an act of a personal nature solely for her own convenience, an act outside any risk connected with her employment, when she decided to go to Starbucks when it was clearly snowing heavily outside. The arbitrator finds the petitioner's injury resulted from this personal risk.

Neutral risks are those risks of injury which are neither peculiar to the employment nor personal to the employee. Given the fact that going for a latte at Starbucks within one hour of beginning her work day was personal to the petitioner since coffee was available in the Municipal Center West, the arbitrator finds the petitioner's risk of injury was not a neutral risk.

Based on the above, as well as the credible evidence the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 2/14/14. The arbitrator finds the petitioner's injury resulted from a personal risk, and that the general public was exposed to the identical risk.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 2/14/14, the arbitrator finds these remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lisa Eller,
Petitioner,

vs. NO: 14 WC 33344

Board of Trustees of Community College Districts No. 505 (Parkland College) ,
Respondent,

16IWCC0654

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 and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 29, 2016, is hereby affirmed and adopted.

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

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

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

DATED: OCT 12 2016
O100616
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ELLER, LISA
Employee/Petitioner

Case# 14WC033344

BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 505 (PARKLAND COLLEGE)
Employer/Respondent

16IWCC0654

On 3/29/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2847 TAPELLA & EBERSPACHER LLC
DANIEL C JONES
PO BOX 627
MATTOON, IL 61938

0522 THOMAS MAMER & HAUGHEY LLP
JOHN M SURMANIS
PO BOX 560
CHAMPAIGN, IL 61824-0560

16IWCC0654

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lisa Eller
Employee/Petitioner

v.

Board of Trustees of Community College District No. 505 (Parkland College)
Employer/Respondent

Case # 14 WC 033344

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Urbana**, on **January 28, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 25, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,754.33**; the average weekly wage was **$1,187.58**.

On the date of accident, Petitioner was **50** years of age, **married** with **0** dependent children.

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

Respondent **has** stipulated it will pay all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD; **$0** for TPD, **$0** for maintenance, and **$0** for an advancement of PPD, for a total credit of **$0**.

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

FACTS

On January 25, 2013, Petitioner, LISA ELLER, was employed as a Veterinarian at the School of Veterinary Technology of Respondent, BOARD of TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 505 (PARKLAND COLLEGE) (Tr. p. 10-11). At that time, she was a classroom instructor, and was also responsible for overseeing the care of animals that were kept at Parkland College, including performing surgery (Tr. p. 12-13). Someone from the Veterinary Technology Program was also required to come to the school on weekends and care for these animals, and Petitioner would perform this duty on weekends when it was her turn (Tr. p. 26). She also owned the Arthur Veterinary Clinic, where she worked as a practicing physician, providing care for dogs, cats, and horses (Tr. pp. 11, 14). Petitioner has been a Veterinarian since 1987, and the work with horses was a special area of passion for Respondent, for which she specialized her practice, especially in the areas of equine reproduction (Tr. pp. 14-15). Such work often required Petitioner to work internally within the mare reproduction system, and required Petitioner to repeatedly keep her arm elevated and reaching (Tr. p. 15).

Petitioner was injured while leaving Parkland College on January 25, 2013 (Tr. p. 16). Respondent provided and maintained parking lots on its property which surrounded the building (Tr. pp. 18-19). There were no special parking lots designated for faculty; and students, staff, and faculty all parked in the same lots on a first come, first served basis (Tr. p. 18). On the day of her injury, Petitioner parked in a lot designated as M6 (Tr. p. 19; Pet. Exh. 3). Petitioner's office is in the "L" wing of Respondent's building, in Room Number L135 (Tr. pp. 19-20; Pet. Exh. 3; Pet. Exh. 4). Petitioner had worked in her office at L135 on the day of her injury, and was leaving that office when she was injured (Tr. p. 19).

Petitioner always parks in Lot M6, as it is the one closest to her office, and is most convenient (Tr. pp. 19-20). In getting to the "L" wing from Lot M6, Petitioner takes the route depicted in Petitioner's Exhibits 5 through 9 (Pet. Exhs. 3-9). At the end of the sidewalk depicted in Petitioner's Exhibit 9 is a service entrance that separates "L" wing from the gymnasium (Tr. p. 22; Pet. Exhs. 9-11). The service entrance leads to a small

parking area which is south and east of the gymnasium and Petitioner fell in this parking area, which is marked with an "A" on Petitioner's Exhibits 3 and 4 (Tr. pp. 23-24; Pet. Exhs. 3, 4, 11-13).

Petitioner had been told that she was not allowed to park in this parking lot for a lengthy period of time (Tr. p. 24-25). She was to park in one of the outlying parking areas depicted on Petitioner's Exhibit 3 (Tr. p. 25; Pet. Exh. 3). There are 5 parking spaces in this parking lot – three are for public safety or policy cars, and two of them are reserved for short term parking (Tr. p. 25). There are two different kinds of signs in those 5 parking spaces (Tr. pp. 26-27). One type of sign says "No parking, reserved for police vehicles only," and Petitioner knows she is not allowed to park in those spaces, as those are for Parkland security police vehicles (Tr. p. 27). The other two parking spots have a different sign, and say "Two-hour parking limit, official use only" (Tr. p. 27). Petitioner and other faculty members will park in these parking spots when they need to drop something off and run something into the building, and on weekends when the college is closed and they check on the animals (Tr. pp. 25-28). There is also a public safety entrance next to this parking lot (Tr. p. 28; Pet. Exh. 3). She is required to go through the public safety entrance when she is there on weekends, as the other entrances around the parking lot are locked on weekends, and no faculty member she knows of has a key to these doors (Tr. pp. 28-29, 41).

Petitioner exited the "L" wing on January 25, 2013, around 6:00 or 6:15 p.m. from a door marked "D" on Petitioner's Exhibit 4 (Tr. pp. 21, 40; Pet. Exhs. 4, 15, 16). Petitioner's Exhibits 5-16 depict the route Petitioner would take from Lot M6 to her office in the "L" wing, and Petitioners' Exhibit 17-21 depict the rout Petitioner would take from the door she exited that night back toward Lot M6 (Tr. p. 40; Pet. Exhs. 5-21). Petitioners' Exhibit 13 shows the spot where Petitioner fell, and the concrete parking barrier that was in place on the night she fell (Tr. pp. 27-28; Pet. Exh. 13).

Respondent has never restricted Petitioner's use of the doors from which she exited on the night of her fall (Tr. pp. 41-42). No representative of Respondent has ever told her she cannot use these doors, and other faculty members and students use these doors all the time (Tr. p. 42). Respondent's Manager of buildings and grounds testified that he, as well as the 50 employees he oversees, all of whom are Respondent's employees, walk through the parking lot where Petitioner fell to get around Parkland College (Tr. p. 79). He further testified that Respondent maintains this parking lot, and puts salt around the walkways that Plaintiff walked over on her way to this parking lot; and that faculty and students coming from the "L" wing have to walk through this parking lot to get to the public safety office (Tr. pp. 80-82).

On that night, Petitioner exited the door, and went down the stairs depicted in Petitioner's Exhibit 17 (Tr. pp. 43-44; Pet. Exh. 17). She made a right turn, and the view she had is depicted in Petitioner's Exhibit 18, minus the vehicle, as there was no vehicle in the parking space on that night (Tr. pp. 44-45). Petitioner stepped over the concrete barrier and fell on black ice (Tr. p. 47). Petitioner fell on her right side with her arm extended (Tr. p. 48). Petitioner tried to get up, but could not because of the ice, and was forced to scoot over into the rocks in order to be able to stand (Tr. p. 48). Petitioner then walked to her vehicle in Lot M6, opened the car door, and telephoned her husband (Tr. p. 50). It was then she realized she had either dislocated her shoulder or broke her right arm, as she could not move it (Tr. p. 50). As she could not get into the car, she walked back through the parking lot, and entered the school through the public safety entrance so she could call an ambulance (Tr. pp. 51-52).

She was transported by Ambulance to the Carle Clinic Emergency Room, where x-rays revealed that her right shoulder was dislocated (Tr. p. 52; Pet. Exh. 22, pp. 2-3). A closed reduction procedure was performed to put the shoulder back in alignment (Tr. p. 52; Pet. Exh. 22, p. 3). She also had an MRI performed that date, and began seeing Dr. Robert Gurtler the following week (Tr. p. 53; Pet. Exh. 23, p. 1). Dr. Gurtler advised her to keep the arm in a sling, and over the next 3 months, Petitioner did some light physical therapy, but remained in a shoulder immobilizer for those 3 months (Tr. p. 54).

Petitioner did not get any better during those 3 months and this affected her ability to practice veterinary medicine (Tr. pp. 54-55). She could not see clients at her veterinary clinic, and she could not operate on animals at Parkland (Tr. p. 55). She could continue to teach (Tr. p. 55). Three to four weeks after the accident, Petitioner told her medical treaters that she did not feel right and requested another MRI, but she could not have one until April 9, 2013, some 3 months after the injury (Tr. pp. 55-56; Pet. Exh. 23, p. 3). This MRI revealed a severe rotator cuff tear (Tr. pp. 56-57; Pet. Exh. 23, p. 3). Dr. Gurtler performed surgery to repair the rotator cuff tear on April 22, 2013 (Tr. p. 57; Pet. Exh. 22, p.8). Petitioner missed 7 days of work following her surgery (Tr. p. 57).

Following her surgery, Petitioner had a slow recovery (Tr. p. 58). She slept in a recliner for 8 months due to the pain, and she could not raise her arm above shoulder level for at least 8 months (Tr. p. 58). Petitioner was unable to lift her arm that high until November, 2013 (Tr. p. 59; Pet. Exh. 23, pp. 9-10). Petitioner was unable to pour water into a coffee maker with her right arm or lift her right arm high enough to press the button on her car's sunroof until November, 2013 (Tr. p. 59). She was not released by her doctor to perform surgery during the Fall, 2013 semester at Parkland College, and so she was not allowed to teach her surgery class (Tr. p. 72; Pet. Exh. 23, p. 7). In order to maintain her full-time faculty status, she was required to make up those surgical hours in the Spring, 2014 semester, which affected her pay (Tr. p. 72). Although Petitioner last saw Dr. Gurtler on November 5, 2013, Petitioner did not receive a full release from the doctor until May 5, 2014, which was over one year following the surgery (Tr. pp. 60-61, 69; Pet. Exh. 24).

Today, Petitioner's arm still aches at times from the injury (Tr. p. 62). The injured arm restricts her work activities as a practicing veterinarian, as she is totally unable to perform the equine reproductive activities she performed in the past (Tr. p. 62). Dr. Gurtler has informed her that, if she uses her shoulder to perform such activities, she runs the risk of re-tearing the rotator cuff, and that he would not be able to repair it again (Tr. p. 63). Petitioner is also limited in her leisure activities, as she cannot perform activities such as gardening (Tr. pp. 63-64). She also has trouble putting on clothing and performing other daily activities, and she has had to use to learn her left hand more than she had to before the injury (Tr. p. 64). She also suffers from stiffness and decreased range of motion in her shoulder.

DISPUTED ISSUES

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

The facts demonstrate that Petitioner suffered an injury that both "arose out of" and was "in the course of" her employment. Petitioner was injured while she was stepping over a concrete parking barrier onto a parking lot that was under the direct control of Respondent, a risk connected with, or incidental to, the employment. She fell on an accumulation of ice, a hazardous condition which created a risk connected with the employment, and which involved a causal connection between the employment and the injury.

To obtain compensation under the Workers' Compensation Act, a claimant must show, by a preponderance of the evidence, that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. 820 ILCS 305/2. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. Mores-Harvey v. Industrial Comm'n, 345 Ill.App.3d 1034, 1037, 804 N.E.2d 1086, 1090 (3d Dist. 2004). "In the course of" refers to the time, place, and circumstances under which the accident occurred. Suter v. Illinois Workers' Compensation Comm'n, 2013 IL App (4th) 130049WC, ¶ 18, 998 N.E.2d 976, 971. Accidental injuries sustained on an employer's premises within a reasonable time before and after

work are generally deemed to arise in the course of the employment. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 18, 998 N.E.2d at 971.

While the injuries of an employee who slips and falls at a point off the employer's premises while traveling to or from work are generally not found to be compensable, Illinois Courts have found two exceptions to his rule. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 19-20, 998 N.E.2d at 976. The first exception is permitted when the employee's presence at the accident site was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 20, 998 N.E.2d at 976. The second is the "parking lot exception" where an employee is injured in a parking lot provided by and under the control of the employer. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 21, 998 N.E.2d at 976. This exception applies in circumstances where the employee's injury is caused by some hazardous condition in the parking lot. Suter, at ¶ 21, 998 N.E.2d at 976.

Illinois Courts have found that slips and falls on an employer-provided lot when hazardous conditions are present are generally compensable. Mores-Harvey, 345 Ill.App.3d at 1037, 804 N.E.2d at 1090; Suter, at ¶ 21, 998 N.E.2d at 976. Whether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. Mores-Harvey, 345 Ill.App.3d at 1041, 804 N.E.2d at 1092. If this is the case, then the lot constitutes part of the employer's premises. Id. The presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim. Id.

In Mores-Harvey, Petitioner drove to work and parked her car behind the Respondent's restaurant in the parking lot that surrounded the building, as employees were directed to park on either the side or back of the parking lot so that customers could park in front. As she exited her car, claimant put one foot down and slipped and fell on ice, injuring her head and back. In finding the claim compensable, the Appellate Court found that, by restricting where claimant could park her vehicle, the employer exercised control over its employee's actions, and in this way the employee faced risks greater than that of the general public. Id. at 1042, 804 N.E.2d at 1093.

A similar result was reached recently by the Fourth District Appellate Court in Suter v. Illinois Workers' Compensation Comm'n, 2013 IL App (4th) 130049WC, 998 N.E.2d 971. Petitioner was a temporary employee who had been assigned to a State agency, and who fell on ice in a parking lot on her way to work. The parking area was reserved for State workers, but the parking spot had been assigned to Petitioner by a building manager who was not employed by the State or the lending employer, and Petitioner had been directed by a State official to talk to the building manager about a parking space.

In finding the claim compensable, the Court explained that the rationale for the "parking lot exception" is that the conditions of an employer-provided parking lot is that such a lot is considered part of the employer's premises. Id. at ¶ 23, 998 N.E.2d at 976. Once the parking lot is considered part of the employer's premises, any injury on the parking lot is compensable if it would be compensable on the employer's main premises. Id. at ¶ 23, 998 N.E.2d at 977. The Court, in finding the case compensable, noted that the relevant inquiry was whether the employer maintained and provided the lot for its employees' use, and that if this is the case, then the lot constitutes part of the employer's premises, and the presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim. Id. at ¶ 23, 998 N.E.2d at 978.

Illinois has continued to recognize that slips and falls on an employer-provided lot when hazardous conditions are present are generally compensable. *See* Archer Daniels Midland Co. v. Industrial Comm'n, 91 Ill.2d 210, 217, 437 N.E.2d 609, 612 (1982) (injury arose out of and in the course of employment where employee slipped on ice while walking from employer's parking lot through gate to plant grounds as injury

resulted from a risk incident to employment"); Hiram Walker & Sons v. Industrial Comm'n, 41 Ill.2d 429, 431, 24 N.E.2d 179, 181 (1968) (injury arose out of and in the course of employment where the claimant injured his hand after he slipped and fell in snowy and icy company parking lot after he had parked his car in the lot because "his presence in the lot was due entirely to his employment"); De Hoyos v. Industrial Comm'n, 26 Ill.2d 110, 114, 185 N.E.2d 885, 887 (1962) (Petitioner's injury after fall on snow and ice was compensable because "an employee who falls on a parking lot provided by his employer while proceeding to work, we believe, is subjected to hazards to which the general public is not exposed"); Litchfield Healthcare Center v. Industrial Comm'n, 349 Ill.App.3d 486, 490-91, 812 N.E.2d 401, 405-06 (5th Dist. 2004) (Petitioner's ankle injury sustained after tripping on an uneven sidewalk connecting parking lot to workplace arose out of her employment where evidence showed that the sidewalk was defective, and the claimant was exposed to the defective sidewalk and the risk of tripping thereon more frequently than members of the general public); Chmelik v. Vana, 31 Ill.2d 272, 278-79, 201 N.E.2d 434, 438-39 (1964) (An injury accidentally received on the premises of the employer by a worker going to or from his actual employment by a customary or a permitted route, within a reasonable time before or after work, is received in the course of and arises out of the employment).

The cases on which Respondent may rely, Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill.2d 52, 541 N.E.2d 665 (1989) and Wal-Mart Stores, Inc. v. Industrial Comm'n, 326 Ill.App.3d 438, 761 N.E.2d 768 (4th Dist. 2001), are distinguishable from the present case. In Caterpillar Tractor, the claimant was injured on his way to the employee parking lot after his shift. Immediately in front of the employer's building was a sidewalk with a curb running along its edge. A blacktop driveway next to the curb was part of the company premises, and was used by employees and the general public to pick up employees. Claimant stepped off of the curb and onto the driveway, and twisted his ankle. Unlike the case at bar, the Claimant in Caterpillar Tractor, did not trip, skip, or fall, and the Court concluded that Claimant's injury did not result from the condition of the employer's premises because there was no evidence that the curb was either hazardous or defective. Caterpillar Tractor, 129 Ill.2d at 61, 541 N.E.2d at 668. Moreover, that Court found that curbs and the risks that are inherent in traversing them confront all members of the public, which was a different situation than one in which a hazardous condition, such as ice and snow, was present and caused the Claimant's injuries. Mores-Harvey, 345 Ill.App.3d at 1034, 1039-40, 804 N.E.2d at 1091. In Wal-Mart Stores, the Claimant slipped on ice in the parking lot, which was used by both employees and customers. Employees were requested, but not required to park in a certain area of the lot. Claimant testified that, at the time of her fall, she was walking towards her car, which had been parked by a friend waiting to pick her up in the area in which employees were encouraged to park. Unlike the parking lot in question in the present case which was only available to Respondent's employees at certain time, the Wal-Mart Stores case involved a lot that was available to both employees and customers at all times. In addition, no one had asked or instructed Claimant's friend to park where she did, and therefore the Claimant was not under the employer's control when she left the store, and therefore could not have faced any risks to a greater extent than the general public. Mores-Harvey, 345 Ill.App.3d at 1041-42, 804 N.E.2d at 1093. Moreover, Petitioner in this case, who was permitted to park in the lot in question on certain occasions, encountered the risk of slipping on ice more than the general public because of the number of times she used the lot to come in and out of the building. Cassandra Hervey v. Catholic Charities, 10 I.W.C. 48752, 15 I.W.C.C. 0027, 2015 WL 868845.

In the present case, Petitioner was permitted to park in any of the outlying parking areas surrounding Parkland College, including the M6 parking lot which was closest to her office. One route to and from this parking area used by Respondent's employees went through the parking lot in which she fell. Petitioner was permitted to park in this lot at certain times for short durations and on weekends. Both lots were owned and maintained by Respondent. As noted by the Court in Mores-Harvey, the key question is whether the parking lot is maintained by the Respondent, and provides the lot for its employees' use. In this case, Respondent is responsible for maintaining both parking lots in question for its employees, and Respondent controlled when Petitioner was allowed to park in the lot in which she fell. At that point, the parking lot is treated the same as if

it were in the Respondent's premises, and a hazardous condition, such as the ice encountered by Petitioner, supports the finding of a compensable claim. In addition, Petitioner is required to travel through this lot to get to the door closest to her office, and is required to go through this lot to get to the door leading to the Security Office, the door she was required to go through on weekends when she had to take care of animals that were housed at Parkland College. Petitioner slipped and fell on ice while leaving Parkland College on her way to her car to go home for the evening, and the icy condition of the parking lot further constituted a hazardous condition in the parking lot. Petitioner's injury both arose out of and was in the course of her employment, and her claim is compensable.

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

The parties have stipulated that, should Respondent be found liable, Respondent shall be responsible for payment of all reasonable and related medical bills associated with such medical care, and Respondent shall reimburse Petitioner for any deductible amount Petitioner was required to pay to her private health insurer in order to secure such medical care (Tr. p. 61). Respondent is found to be liable for such medical expenses, and shall be solely responsible for all reasonable and related medical bills associated with Petitioner's medical care, subject to the Illinois fee schedule, and shall reimburse Petitioner for any deductible amounts she has paid her private health insurer in order to secure such medical care.

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

Petitioner has proven that she sustained a permanent partial disability consisting of a dislocation of her right shoulder, and a tear of her right rotator cuff. The rotator cuff required surgery to repair, as wells as a lengthy course of rehabilitation.

The medical evidence reveals that Petitioner did not have a "normal" course of treatment and rehabilitation. Petitioner originally reported to Dr. Bradley Peterson at Carle Clinic Emergency Room, who noted that Petitioner slipped on ice, falling forward onto her chest with her arms sprawled out, with complaints of right shoulder pain which radiated down to her fingertips, with associated numbness and tingling (Pet. Exh. 22, p. 2). There was also radiation of pain into the right side of her upper back, and the pain was made worse with any movement of the arm (Pet. Exh. 22, p. 2). The original diagnosis was of a shoulder dislocation following a fall, and the doctor performed a closed shoulder reduction, and put a shoulder immobilizer in place (Pet. Exh. 22, p. 3).

Petitioner then began treating with Dr. Robert Gurtler on January 31, 2013 (Pet. Exh. 23, p. 1). At that time, Dr. Gurtler noted a lot of edema anteriorly, but did not recommend surgery at that time (Pet. Exh. 23, p. 1). The doctor recommended that Petitioner stay away from treating cows and horses (Pet. Exh. 23, p. 1). She could only raise her shoulder to about 80 degrees, and the doctor recommended wearing her sling in public (Pet. Exh. 23, p. 1).

Petitioner had another MRI exam on April 9, 2013, and saw Dr. Gurtler again on April 11, 2013 (Pet. Exh. 23, p. 3). Dr. Gurtler noted this new MRI showed a supraspinatus tear, large full-thickness tear, and a partial width tear of the supraspinatus tendon at the edges (Pet. Exh. 23, p. 3). Dr. Gurtler noted, "She just has not done well. She has not been able to restore any motion whatsoever. She is extremely weak so the tendency for dislocation is not there but her function because of the rotator cuff tear has never recovered and I think we are in a situation where we have no choice but to go ahead with surgery for her right shoulder. I told her I do

not believe we can make her shoulder normal but conservative care simply has not helped. She has gotten no better. I am going to recommend a right shoulder open rotator cuff repair." (Pet. Exh. 23, p. 3).

Dr. Gurtler performed the right shoulder open rotator cuff repair surgery on April 22, 2013 (Pet. Exh. 22, p. 8). His post-operative diagnosis was "Right large rotator cuff tear" (Pet. Exh. 22, p. 8). The doctor noted that the "Indication for Surgery" was "Severe pain and near complete inability to raise her right shoulder" (Pet. Exh. 22, p. 8).

Petitioner next saw Dr. Gurtler on May 2, 2013, when he noted that her activities, "sticking her arm inside animals is a long reaching, heavy work, hard on rotator cuff type of activity" (Pet. Exh. 23, p. 5). The doctor further noted, "I think we can get her shoulder back to doing many of the things she likes to do, but just try to not do as much" (Pet. Exh. 23, p. 5). She was to begin work on gentle range of motion exercises, and start a home program with a pulley a few weeks after the surgery (Pet. Exh. 23, p. 5). The doctor further stated, "She understands we cannot give her a normal shoulder, but we can certainly give her a shoulder that is better than it has been. She reminds me again how extensively traumatic this fall was, it was black ice, she went down in a microsecond, a very hard fall. I think we are seeing the consequences of that" (Pet. Exh. 23, p. 5).

Dr. Gurtler next saw Petitioner on May 16, 2013, which was almost one month after the surgery (Pet. Exh. 23, p. 6). He noted, "Certainly we do not want her to do any lifting with this right shoulder. She is still getting some muscle spasm, but pain relief is good" (Pet. Exh. 23, p. 6). She was put on a more active therapy program (Pet. Exh. 23, p. 6). On July 23, 2013, Dr. Gurtler saw Petitioner again, and noted she was making progress (Pet. Exh. 23, p. 7). The doctor stated, "We talked about the fact that everything appears that the rotator cuff repair on that right shoulder is intact, although it was a very big tear. She is very concerned because her progress is so slow. I think that the home pulley is her most important exercise and she can get the shoulder overhead. She just cannot lift it on her own"(Pet. Exh. 23, p. 7). Another MRI was ordered (Pet. Exh. 23, p. 7). The doctor further stated, "It is surprising how slow her progress is in some ways, but on the other hand, it is just a very difficult tear. I told her I do not think she be able to do veterinary surgery this fall, but we will shoot for January 2013 (sic)" (Pet. Exh. 23, p. 7). On July 29, 2013, Dr. Gurtler spoke with Petitioner on the telephone to discuss the readings of the most recent MRI, and advised her to keep doing the home pulley exercises (Pet. Exh. 23, p. 8).

Petitioner next saw Dr. Gurtler on September 5, 2013, and he noted that she had "decent passive range of motion helping with her other hand or her home pulley to about 150 degrees, but actively she is still cannot quite get it up, but she is getting close" (Pet. Exh. 23, p. 9). His plan was to continue with the home therapy, work on range of motion, use the shoulder carefully, and anticipate improvement over a 1 year period of time. (Pet. Exh. 23, p. 9).

Dr. Gurtler's final visit with Petitioner was on November 5, 2013, some six months after the rotator cuff surgery (Pet. Exh. 23, p. 10). The doctor noted that Petitioner had "finally gotten the strength to put her arm over her head. I told her that with as big as her tear was, as young as she is, and as much difficulty as she has had, I want to still be awfully cautious.... She just cannot do the physical stuff. Six months from now, we will release her completely" (Pet. Exh. 23, p. 10). Dr. Gurtler then gave Petitioner her final release, without restrictions, on May 5, 2014 (Pet. Exh. 24), over one year after the surgery, and over 15 months after the date of the initial injury.

Petitioner went over two months before Dr. Gurtler even diagnosed her rotator cuff injury. Once it was diagnosed, Dr. Gurtler continuously referred to the injury as a "big, "large," and "difficult" rotator cuff tear. Within 2 weeks of the surgery, Dr. Gurtler noted that Petitioner would "never have a normal shoulder." It was not until November 5, 2013, over 9 months after the injury that Petitioner could put her arm over her head, pour water into a coffee pot, or press the overhead button for her sunroof in her car. Even then, Dr. Gurtler noted she

"just cannot do the physical stuff." She was not cleared to perform surgery again until January, 2014, approximately 1 year after the fall. Petitioner's fall has caused severe, long-term permanent injury to Petitioner's rotator cuff and shoulder.

Based upon the records, exhibits, and testimony, and considering all the factors listed in Section 8.1(b) of the Workers' Compensation Act, Petitioner has suffered permanent partial disability equating to fifteen percent (15%) of the loss of a person as a whole.

CONCLUSION

The Arbitrator has carefully reviewed the medical records, all of the Exhibits submitted by the Petitioner and the Respondent, and has carefully observed the demeanor and credibility of the Petitioner. The Arbitrator finds that the Petitioner has met her burden of proof that a work-related accident occurred on January 25, 2013, causing injury to Petitioner's right shoulder. The Arbitrator finds that Petitioner has proven her surgery and subsequent limitations are all causally related to the January 25, 2013, work-related occurrence.

ORDER

Pursuant to the parties' stipulation, Respondent shall pay all medical services, pursuant to the Illinois medical fee schedule, associated with treatment of Petitioner's right shoulder since January 25, 2013 as provided in Sections 8(a) and 8.2 of the Act, and shall reimburse Petitioner for any deductible amounts she has paid her private health insurer in order to secure such medical care.

As provided in Section 8(d) 2 of the Act, Petitioner is entitled to an award of fifteen percent (15%) Permanent Partial Disability for the loss of a person as a whole, consisting of 75 weeks of compensation at her Permanent Partial Disability rate of $712.55.

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

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

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

Edward Lee

Signature of Arbitrator

March 19, 2016
Date

ICArbDec p. 2

MAR 29 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maricruz Lopez,
Petitioner,

vs.

NO: 12 WC 11027

16IWCC0647

Debbie's Customized Staffing,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, current and prospective medical benefits and temporary total 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. 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 found two clerical errors in the Arbitrator's decision. One, the Arbitrator erroneously awarded temporary total disability commencing on March 12, 2012, which was two days prior to the March 14, 2012 date of accident. The parties stipulated and the evidence supports the fact that Petitioner's temporary total disability should have begun on March 15, 2012. Two, the Arbitrator identified Dr. Levin as the independent medical evaluator when this doctor was actually Dr. Vender.

Having reviewed the evidence submitted at arbitration, the Commission finds the evidence supports the fact that Petitioner is entitled to temporary total disability benefits from

16IWCC0647

March 15, 2012 through March 20, 2013. Upon reviewing the evidence in the record the Commission finds that there is clear evidence that Petitioner was not complying with the treatment plan set forth by Dr. Fernandez. She voluntarily removed herself from Respondent's employment and she did not look for work on her own. More specifically, on January 8, 2013, Dr. Fernandez indicated that he would see Petitioner again in four weeks and at that time he would likely release Petitioner to full duty work. On February 20, 2013, Petitioner was discharged from physical therapy due to poor attendance and a complete lapse in attendance from mid November to mid December. On March 19, 2013, Dr. Fernandez sent a note indicating that Petitioner has missed her last appointment and indicating that she should set a new appointment. On the June 25, 2013, Petitioner was asked on the patient form approximately when last she visited Dr. Fernandez's office and Petitioner indicated it was February 1, 2013. The medical bill and records indicates that Petitioner's last visit was on January 8, 2013. Additionally, Petitioner told Dr. Fernandez that she left her employer's employment on her own on March 20, 2013. When Petitioner asked about leaving work on/around March of 2013, she said her impression was that she did not have any more work. During this time period, Petitioner had a restriction of limited force less than 5-10 pounds, limit repetitive use/use of tools to less than 5-10 pounds for her right hand. When Petitioner was asked if she looked for work on her own she said she had looked for work, but she has not kept a list/log of the jobs she applied for. When asked specifically at the August 11, 2015 arbitration hearing when she last looked for work, Petitioner testified she could not recall the last time that she applied for a job, but it was over a year ago. Based on the above, the Commission finds that Petitioner failed to prove she was entitled to temporary total disability benefits after March 20, 2013.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $220.00 per week for a period of 52-6/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize, approve and pay for the MRI arthrogram as ordered by Dr. Fernandez and any such related medical care under §8(a) and §8.2 of the Act.

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

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

16IWCC0647

No bond is due and owing. 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 6 - 2016

MB/jm

O: 9/22/16

43

Mario Basurto

David L. Gore

Stephen Mathis

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

LOPEZ, MARICRUZ
Employee/Petitioner

Case# **12WC011027**

16IWCC0647

DEBBIES CUSTOMIZED STAFFING ET AL
Employer/Respondent

On 10/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0222 GOLDBERG WEISMAN & CAIRO
RAUL RODRIGUEZ
ONE E WACKER DR 39TH FL
CHICAGO, IL 60614

1739 STONE & JOHNSON CHARTERED
BRIAN KAPLAN
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

16IWCC0647

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Maricruz Lopez
Employee/Petitioner

v.

Debbies Customized Staffing et al
Employer/Respondent

Case # **12** WC **11027**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **August 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0647

BACKGROUND

Maricruz Lopez ("Petitioner") and Debbie's Customized Staffing ("Respondent") proceeded to arbitration on 8/11/15 on all disputed issues in case number 12 WC 11027 for which Petitioner alleged a 3/14/12 accident arising out of and in the course of her employment with Respondent. At issue were the following: causal connection, temporary total disability benefits and future medical under Section 8(a). Ax1, Ax2.

FINDINGS OF FACT

On direct examination, Maricruz Lopez ("Petitioner") testified, via Spanish translator/interpreter Paul Krompier, that she sustained an undisputed work accident to her right hand on 3/14/12 during the course of her employment with Debbie's Customized Staffing ("Respondent"), a temporary work office that loaned her to Gold Eagle Company ("Borrowing Employer"). Ax1. On said date of accident, Petitioner was a 34 year-old machine operator for the Borrowing Employer.

According to Petitioner's testimony, a plastic molding machine caught her right wrist and then pressed on the radial portion of her wrist, just below the thumb. The machine also applied pressure to the ulnar side of the wrist. Petitioner said she was stuck like this in the machine for approximately 20 minutes. A co-worker released her from the machine and Petitioner reported the accident to Martha Hinojosa.

On the same date of the accident, She then sought medical attention at Clearing Clinic on the date of accident. Clearing Clinic documented a crushing type injury to both the right hand and wrist after a machine caught her hand. Physical exam showed gross effusion of the right second digit, contusion over the second MCP joint, deformity and effusion of the distal radius, bony tenderness over distal radius and overlying deformity over the second metacarpal and phalanges. There was no snuff box tenderness. She was diagnosed with right hand and wrist contusion. Petitioner was given restrictions of no use of the right hand. Respondent was unable to accommodate this restriction. Clearing Clinic continued these restrictions thru March. On 3/23/12, Petitioner followed up with Clearing Clinic who noted that Petitioner continued to complain of pain and tingling in the right hand made worse with movement. She also noted tingling in the fingers and the palm. Exam noted pain on the right dorsolateral wrist and throughout the second finger
Petitioner's unrebutted testimony was that at some point in the weeks following the accident, Petitioner had a conversation with the Borrowing Employer and Respondent where Petitioner came away with the impression she was no longer employed.

On 6/5/12, Petitioner sought medical treatment with Dr. John Fernandez, a hand specialist at Midwest Orthopedics at Rush. Px2a. the doctor noted Petitioner's work accident and treatment history. He noted pain along the dorsoradial wrist, numbness and tingling in the index and middle fingers, worse at night, and some dorsal greater than volar wrist complaints. Neurologic testing showed irritability of the median nerve with positive Tinel's, positive Phalen's and positive median nerve compression. Dr. Fernandez diagnosed right wrist dorsoradial sensory neuritis, carpal tunnel syndrome and forearm intersection syndrome. He ordered an EMG, MRI and issued medications and light duty work restrictions. On 7/13/12, MRI of the right wrist was unremarkable. Px2a:65. EMG of the right arm confirmed the diagnosis of right carpel tunnel and also diagnosed right cubital tunnel. Id. at 63.

On 8/16/12, Dr. Fernandez administered a right wrist carpal tunnel injection. Id. at 19. Petitioner's follow up form noted symptoms in the first three digits and along both sides of the wrist. Id. at 21. The doctor

Dr. Vender subsequently testified via evidence deposition on 11/7/14. Rx1. Dr. Vender testified to diagnosing Petitioner with post carpel tunnel release, extensor carpi ulnaris tendonitis and flexor stenosing tenosynovitis of the right middle and ring fingers. He was not certain of the latter two diagnoses, stating: "The less certain diagnoses related to flexor stenosing tenosynovitis of the right ring and middle finger and also the possibility of extensor carpi ulnaris tendonitis." He opined that these were not diagnosed at anytime prior and appeared to have developed separate and after Petitioner's initial injury. He did not find causal connection between the two new possible diagnoses and the original work accident. Dr. Vender believed Petitioner was at maximum medical improvement and that further treatment was both unnecessary and unrelated.

On 3/20/15, Dr. Fernandez testified regarding his medical opinions and conclusions related to Petitioner's injuries via evidence deposition. Px3. He noted that at her initial visit with him there was pain to palpation along the inner section of the forearm. He noted that in August 2012 she continued to have pains along the wrist dorsally and ulnarly without instability. He testified that her pain diagram was consistent with his clinical findings. When Petitioner followed up with the doctor in June 2013, he noted she was having loss of motion and pain along the ulnar aspect of the wrist with rotation, pronation and supination. The doctor opined that a causal relationship existed between the work accident and the ulnar-sided wrist complaints. He explained that if there appeared to be a delay in symptom reporting, although he stated she immediately complained of wrist pain consistent with her current diagnosis, then it may be from splinting and restrictions. On cross, he acknowledged he had not seen Petitioner for some time. He did not believe she exhibited pain behaviors but rather myofascial pain. He also testified that without the MRI arthrogram he previously recommended, Dr. Fernandez was unable to articulate a working diagnosis.

CONCLUSIONS OF LAW

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

The Arbitrator adopts and incorporates the findings of fact as though fully set forth herein. After careful review of the available medical evidence as well as Petitioner's credible and unrebutted testimony, the Arbitrator concludes that Petitioner's current condition of ill-being is casually related to her undisputed work accident, including her conditions of right wrist carpal tunnel syndrome, right ulnar wrist pain and her asymptomatic right cubital tunnel syndrome. In so finding, the Arbitrator relies on the testimony of Petitioner and on the treating records and opinions of Dr. Fernandez over those of Dr. Vender for the reasons that follow.

As an initial matter, the Arbitrator notes that it does not appear from the record there is any genuine dispute that Petitioner's right carpal tunnel syndrome and related care is causally related based upon the opinions of both Drs. Fernandez and Vender stating as much. Ax1. Nevertheless, the Arbitrator formally concludes the carpal tunnel syndrome to be causally related based on those opinions. The primary dispute on this issue centers on Petitioner's right ulnar-sided wrist complaints.

In reviewing the medical record, the Arbitrator finds that Petitioner's mechanism of injury is consistent with Dr. Fernandez's diagnosis of right ulnar-sided wrist complaints. Initial treatment records document that Petitioner's right hand and wrist became stuck in a machine after the machine pulled her arm into it. Px1. Clearing Clinic did not differentiate between the ulnar or radial side of the wrist in terms of what was caught or crushed in the machine. The Clinic did not do so either with the hand. Dr. Fernandez found this mechanism of injury the type of which could cause damage to structures in and around the wrist and hand. Petitioner's trial testimony was also consistent in stating that both the ulnar and radial sides of her wrist became trapped or

16IWCC0647

ISSUE (L) ***What temporary benefits are in dispute?***

The Arbitrator adopts the findings of fact and conclusions of law as though fully set forth herein. Having found in favor of Petitioner on the issues of causation and prospective medical, the Arbitrator finds and concludes that Petitioner's current condition of ill-being has not yet stabilized or otherwise reached a state of permanency and that remains temporarily and totally disabled per the medical opinions of Dr. Fernandez. *Freeman United Coal Mining Co. v. Indus. Comm'n*, 318 Ill.App.3d 170, 175-176, 741 N.E.2d 1144, 1148-1149 (5th Dist. 2000).

The medical evidence at hearing established that Petitioner was on light duty from the date of the accident until her final visit with Dr. Fernandez on 6/25/13. At her last visit, she remained on light duty of a 5-10 pound lifting restriction pending additional treatment and evaluation. Dr. Fernandez has not placed Petitioner at maximum medical improvement or otherwise opined that her condition has stabilized. At Dr. Fernandez's evidence deposition in March 2015, he did not indicate any change from his last work restriction that last time he saw Petitioner. At hearing, Respondent did not present evidence that it offered light duty to Petitioner and Petitioner's unrebutted testimony at trial was that she was not offered light duty or an opportunity to return to work.

Therefore, Respondent shall pay Petitioner temporary total disability benefits of **$220**/week for **177-6/7**th weeks, commencing **March 12, 2012** through **August 11, 2015**, as provided in Section 8(b) of the Act. Respondent is entitled to a credit in the amount of **$15,840.00** for any and all TTD benefits paid to date. Ax1.

ARBITRATOR SIGNATURE

10/19/15
DATE

16IWCC0669

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Creed Bevolo
Employee/Petitioner

v.

Continental General Tire
Employer/Respondent

Case # **15** WC **02506**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **August 7, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0669

FINDINGS

On **October 20, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,599.04**; the average weekly wage was **$1,011.52**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **1** dependent child.

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 **$96.34** for TTD, $- for TPD, $- for maintenance, and **$9,103.65 for PPD payments**, for a total credit of **$9,199.99**.

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

ORDER

- Respondent shall pay Petitioner Permanent Partial Disability benefits in the amount of **$606.91 a week** for **50.6 weeks** as Petitioner suffered **10.12% loss of use of the man as a whole** under §8(d)2.

- Petitioner's request for travel expenses is allowed and Petitioner shall be reimbursed for mileage expenses at the current IRS mileage reimbursement rate of 57.5 cents per mile for a total of 1060 miles (5 round trips to Dr. Paletta) for a total of $609.50.

- Respondent shall pay Petitioner compensation that has accrued between October 20, 2014 and August 7, 2015 and shall pay the remainder of the award, if any, in weekly installments.

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.

Barry Lindsay
Signature of Arbitrator

September 21, 2015
Date

OCT 2 2015

16IWCC0669

CREED BEVOLO VS. CONTINENTAL GENERAL TIRE, 15 WC 0250

Findings of Fact and Conclusion of Law

Petitioner alleges an injury to the left shoulder as a result of a traumatic injury while in the employment of Respondent. The disputed issues are nature and extent and travel expense. The only witness was Petitioner. Respondent tendered no exhibits.

The Arbitrator Finds:

On October 20, 2014, Petitioner was employed as a passenger tire cure set-up technician for the Respondent. At that time he was using a torque wrench to adjust a press when he felt a pop and a burning sensation in his left shoulder. He initially sought treatment with the company physician. Those records were not submitted into evidence. Petitioner came under the care of Dr. George Paletta beginning on December 3, 2014. Petitioner testified that this was on referral from the plant physician and he admitted that following the first visit he continued to treat voluntarily with Dr. Paletta.

On January 20, 2015, Petitioner underwent a diagnostic arthroscopy of the left shoulder with debridement of the subacromial bursa, subacromial space, and debridement of a partial thickness bursal-sided rotator cuff tear. This was performed by Dr. Paletta. The post-operative diagnosis was left shoulder pain, left shoulder subacromial bursitis, and a partial thickness rotator cuff tear. Surgery consisted of an arthroscopy with extensive debridement of the subacromial bursa and subacromial space along with debridement of the partial thickness rotator cuff tear.

Petitioner followed-up post-operatively with Dr. Paletta on January 28, 2015, March 4, 2015, and April 22, 2015. Dr. Paletta noted on April 22, 2015, that Petitioner was doing much better although he had minimal discomfort at the extreme forward flexion and extreme external rotation with the arm at the side. Petitioner had completed physical therapy and requested a release to return to full duty. There was no tenderness in the AC joint and no pain on cross body abduction testing. Petitioner had normal rotator cuff strength. The consensus was that Petitioner was doing well and had only minimal residual subjective symptoms with minimal rotational motion loss. Dr. Paletta felt that Petitioner had excellent strength and recommended a return to full duty work as tolerated without restrictions or limitations. It was recommended that Petitioner undergo a short course of prescription anti-inflammatories, and then once that was concluded, over-the-counter anti-inflammatories could be used as needed. Petitioner was placed at maximum medical improvement and told to return as needed.

At trial Petitioner testified that he has returned to his regular job for Respondent making the same rate of pay as before and he has not missed any time from work as a result of the shoulder injury. He did complain of a popping and grinding sensation occasionally when he is operating a fork truck and turning the steering wheel. He also experiences some symptoms when working on certain machines at shoulder height or above and away from his body. Petitioner admitted that his job rotated and he was

not working on those machines every day. Petitioner also testified that he has some reduced range of motion with his arms extended straight above his head and indicated that he would have some difficulty if he were to attempt to pitch a baseball with his left arm. Petitioner testified that he has pain when working with anything heavy with his arm out away from his body or across his body particularly at or above shoulder/chest level. He demonstrated this to the Arbitrator. He described that this causes him to have some difficulty in doing his job as a "curing set up technician" because changing out parts on machines requires him to lift parts with his arms extended and in confined spaces. Sometimes his job requires him to operate a truck lift. Petitioner stated he was ambidextrous, but wrote right-handed. Petitioner stated he occasionally had some problems sleeping, but had no complaints that this injury had impeded or affected any outside activities. He also stated he occasionally uses over-the-counter pain relievers.

Petitioner testified that on six occasions he traveled 212 miles to Dr. Paletta's office from his home in Iuka, Illinois. Petitioner did testify that his home was 35.6 miles away from the Respondent's location in Mt. Vernon, Illinois.

Petitioner admitted that he agreed to treat with Dr. Paletta and that it was his choice to continue to treat with Dr. Paletta after the initial evaluation. Petitioner stated that while treating with Dr. Paletta he had retained legal counsel and had made no demands for travel expense prior to the date of trial. Petitioner further testified that he was familiar with the fact that there were hospitals in the Mt. Vernon area where shoulder surgeries were performed and that he was comfortable using the internet to research items such as medical treatment and where it would be available.

The Arbitrator Concludes:

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

Pursuant to §8.1b (b) the arbitrator bases the determination of permanent partial disability on the following factors:

i) No AMA rating was submitted by Petitioner or Respondent. The Arbitrator gives no weight to this factor.

ii) The occupation of the injured employee. Petitioner is a passenger tire cure set-up technician. He described his job as replacing parts on passenger tire building machines within the plant and also occasionally cleaning conveyor belts of tires. This was the same job he was doing prior to the injury. Petitioner credibly explained that he works on different machines, some of which create more symptoms for him than others. While Petitioner's injury was to his non-dominant arm, his job does require the use of both arms. The Arbitrator gives some weight to this factor.

iii) The age of employee at the time of the injury was 29. Given Petitioner's young age, the Arbitrator reasonably infers that Petitioner will have to live and work with the effects of his injury longer than a much older worker. The Arbitrator gives weight to this factor.

iv) The employee's future earnings capacity is the same as it was prior to the injury. Petitioner stated that he had returned to work making the same rate of pay as prior to the injury and has physical restrictions or limitations. The Arbitrator gives weight to this factor.

v) Evidence of Disability as corroborated by the treating medical records. Petitioner was diagnosed with a partial rotator cuff tear and underwent surgery that consisted of significant debridement of the tear and of the bursa. The last note of Dr. Paletta indicates a loss of internal and external range of motion on the left compared to the right. Petitioner's demonstration of work activities and motions that affect his level of pain were consistent with the range of motion issues noted by Dr. Paletta. Dr. Paletta expected him to need anti-inflammatory medication for a couple of weeks after his release. Petitioner's complaints at trial with reduced range of motion aret consistent with the last reports of Dr. Paletta indicating a reduced range of motion at the ends of some planes. Petitioner made no complaints of any loss of strength and that is also consistent with the reports of Dr. Paletta. The Arbitrator gives weight to this factor.

Based upon the foregoing factors, the Arbitrator awards Petitioner 10.12% loss of use of the body as a whole under §8(d)2.

Issue O: **Travel expense - Mileage.**

Petitioner is awarded reimbursement for his mileage to and from his home to the office of Dr. Paletta. Petitioner testified that on six occasions he traveled 212 miles to Dr. Paletta's office from his home in Iuka, Illinois.

While the records of the Respondent's on-site physician were not put into evidence it is credible that Petitioner was referred to Dr. Paletta by that physician. The Petitioner was paid for his first visit to Dr. Paletta, but was not paid thereafter.

Petitioner admitted that he agreed to treat with Dr. Paletta and that it was his choice to continue to treat with Dr. Paletta after the initial evaluation. Petitioner stated that while treating with Dr. Paletta he had retained legal counsel and had made no demands for travel expense prior to the date of trial. Petitioner further testified that he was familiar with the fact that there were hospitals in the Mt. Vernon area where shoulder surgeries were performed and that he was comfortable using the internet to research items such as medical treatment and where it would be available.

Respondent deemed it reasonable to send Petitioner to Dr. Paletta in the first place, rather than sending Petitioner to someone closer. Respondent has also agreed to pay all of Petitioner's medical bills

and by doing so has inherently agreed that the services rendered by Dr. Paletta were reasonable and necessary. In awarding mileage, the issue is one of reasonableness. In this instance the Arbitrator finds it appropriate to award the mileage for the additional visits with Dr. Paletta. In reaching this decision the Arbitrator relies heavily on Dr. Paletta's office note of December 3, 2014 in which he set forth a treatment plan for Petitioner, including a follow-up visit with the doctor in four weeks. This was not an isolated examination. There is no evidence in the record indicating Petitioner was advised by Respondent or Dr. Paletta regarding an election to treat and/or that mileage would be an issue. From Petitioner's perspective he was being guided by Respondent in the medical management of his case and his employer was telling him where to go for treatment.

While Respondent has cited the recent decision of Lozano vs. Coolersmart, 15 IWCC 0007, 12 WC 31176 (2015) in support of its contention that mileage should not be awarded, the Arbitrator notes that just the opposite result was reached in the Wayne Bruce v. Black Beauty Coal Co., 2007 IWCC 1123 and Petitioner was awarded his mileage.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY BULVAN,

Petitioner,

vs.

NO: 12 WC 28080

PEPSI CO.,

16IWCC0665

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of "Petition to Rescind Settlement Agreement; and attachments" and being advised of the facts and law, denies Respondent's Petition to Rescind Settlement Agreement.

On July 28, 2015, a settlement contract was approved by Arbitrator Thompson-Smith. On August 13, 2015, Respondent filed a Petition to Rescind Settlement alleging that a condition precedent of the settlement was that Petitioner execute a Confidential Settlement Agreement and General Release of Employment, but that Petitioner failed to do so. As such, Respondent argues that the settlement does not accurately reflect the terms and conditions of the negotiated disposition between the parties.

According to Respondent's brief, a hearing was held before Arbitrator Thompson-Smith on September 30, 2015, but the Arbitrator declined to rule on the petition based on jurisdictional grounds. The Commission notes that no document or order reflecting the Arbitrator's decision is in the Commission file. On October 19, 2015, Respondent filed a Petition for Review.

Respondent asks that the settlement agreement be rescinded based on an additional document or agreement that is not in evidence. Respondent does not cite any Commission precedent or case law that would allow it to rescind a contract under these circumstances. It is not alleging that there was a clerical or typographical error. Nor is Respondent arguing that there was a mutual mistake. Rather, Respondent argues that the contract, which it prepared, is incomplete and missing some terms. However, this is due to Respondent's choice to write the

contract without referencing this other side agreement and remaining silent about that issue. The Commission has discretion over the approval of settlement agreements and this presumes that all of the terms of the settlement are included in the contract. Whether it is appropriate for a respondent to include such ancillary agreements in a workers' compensation settlement does not need to be decided here. However, we find that it is inappropriate for Respondent to now claim that it really didn't agree to what it agreed to, as evidenced by the contract, because of terms and conditions that it chose not to include in the contract.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Petition to Rescind Settlement Agreement is hereby denied.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 0 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 9/13/16
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