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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

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FLEXIBLE STAFFING SERVICES,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-MR-0631
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and FREDERICK WILLIAMS,	)	Honorable
	)	Carl Anthony Walker,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the opinion of the court.  
Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the opinion.

**OPINION**

¶ 1

I. INTRODUCTION

¶ 2 Respondent, Flexible Staffing Services, appeals a decision of the Illinois Workers' Compensation Commission (Commission) awarding benefits to claimant, Frederick Williams, in accordance with the provisions of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). Respondent contends that the Commission applied the incorrect legal standard in assessing claimant's claim and that, in any event, its decision is contrary to the manifest weight of the evidence. We disagree and affirm.

¶ 3

## II. BACKGROUND

¶ 4 It is undisputed that claimant sustained a work-related injury on October 7, 2011, while in respondent's employ. Claimant was welding a section of rail, similar to a train track. The rail fell from a sawhorse, and claimant attempted to grab it. The rail weighed over 400 pounds. He felt immediate sharp pain in his right arm, and he heard something snap. Claimant reported the accident and sought medical care. He was diagnosed with a distal biceps tendon rupture.

¶ 5 On October 12, 2011, claimant, who was 45 years old at the time, sought treatment from Dr. Arabindi, an orthopedic surgeon. On November 7, 2011, Arabindi performed an outpatient repair of claimant's right elbow. Claimant underwent physical therapy from November 28, 2011, to February 8, 2012. Claimant saw Arabindi for a final time on March 7, 2012. On that date, claimant complained of numbness and diminished strength. Arabindi found that claimant's range of motion in his right forearm was limited by 5 to 10 degrees. Nevertheless, Arabindi released claimant to full duty. When he attempted to return to full duty, respondent informed claimant that it no longer had work for him.

¶ 6 Dr. Mark Levin examined claimant on respondent's behalf. Levin documented claimant's complaints of continuing pain and impaired range of motion as well as claimant's continued use of Norco. Levin found claimant "cooperative." According to Levin, claimant lacked three degrees range of motion in his right elbow. Levin noted "decreased pinprick sensation over the ulnar aspect of the right elbow." Levin opined that the surgery claimant underwent was appropriate and that claimant is now at maximum medical improvement. Using the "AMA Guides to Evaluation of Permanent Impairment," Levin calculated that claimant had a 6% upper-extremity impairment and a 4% disability rating of the person as a whole.

¶ 7 Claimant testified that he had been employed as a welder-fabricator at the time of his accident. He considered his job to be physically demanding. He is right-hand dominant. He served in the Marine Corps for four years and received an honorable discharge. Following his surgery, claimant felt that he was progressing well in physical therapy, though he still experienced pain and lacked full range of motion. He expressed this to Aribindi during their last visit. Aribindi told claimant that his arm was “as good as it is going to get.” While he had progressed in physical therapy, claimant’s range of motion never fully recovered, which was significant because welding required him to hold his arm in various positions. When Aribindi released claimant to full duty, claimant told him that he did not feel he could perform his job.

Claimant testified that he had worked other jobs prior to becoming a welder; however, they were all “physically demanding.”

¶ 8 The day after he received the release to full duty, claimant testified, he attempted to return to work for respondent. His former supervisor told him that they did not have a position for him. Since his release to full duty, claimant’s arm and fingertips continue to tingle. He is numb in the area where surgery was performed, and he continues to experience pain. He takes Norco three times per week. He experiences pain on a daily basis. He has welding equipment in his garage and tries to use it, but he finds it difficult. The pain and sensations he still experiences have not changed since he last saw Aribindi.

¶ 9 The arbitrator, applying the factors set forth in section 8.1b of the Act (820 ILCS 305/8.1b (West 2010)), determined that claimant had suffered 30% loss of use of his right arm. The Commission modified the award, finding claimant lost 25% of the use of his right arm. It did not articulate its reasoning. The trial court, on administrative review, remanded the case and directed the Commission to articulate the facts and reasoning upon which it relied in coming to

its decision. On remand, the Commission first noted that Levin placed claimant's level of "impairment" at 6%. It noted respondent's argument that this rating should have been given more weight, but it felt that to do so would effectively discount the other factors set forth in section 8.1b. This section states:

"Determination of permanent partial disability. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

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

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and

weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.” 820 ILCS 305/8.1b (West 2010).

The Commission stated that to give added weight to Levin’s opinion would “be to disregard the other factors and give them no weight at all.” The Commission noted that Section 8.1b(b) expressly states, “No single enumerated factor shall be the sole determinant of disability.” It further noted that “ ‘impairment’ in relation to the A.M.A. rating is not synonymous with the term ‘disability’ as it relates to the ultimate permanent partial disability award.” The Commission then discussed the other four factors set forth in the statute.

¶ 10 As for the second factor—claimant’s occupation—the Commission credited claimant’s testimony that the position of welder-fabricator was a “ ‘physically demanding job.’ ” It found that a person with heavier job duties would suffer a greater degree of disability than someone with a light-duty job relative to Levin’s impairment rating.

¶ 11 Regarding claimant’s age—the third factor—the Commission found that claimant was 45 years old at the time of the hearing. Therefore, the Commission reasoned, claimant would “live longer with his disability than someone who is older.” It found that this warranted an increase in the level of disability.

¶ 12 Factor four is a claimant’s future earning capacity. Here, the Commission first noted that after claimant was released to full duty, respondent refused to employ him. It credited claimant’s testimony that he has been unsuccessfully looking for a job as a welder. Finally, it observed that when claimant attempts to use welding equipment that he owns, he has difficulty doing so. It concluded that claimant suffered a loss in future earning capacity and that claimant is “more prone to future injury associated with loss of income.”

¶ 13 The fifth factor is “evidence of disability corroborated by the treating medical records.” 820 ILCS 320/8.1b (West 2010). Regarding this factor, the Commission noted that claimant’s medical records corroborate that he is right-hand dominant. His testimony (given during the arbitration hearing on June 5, 2012) that his pain level remains at 4 to 5 on a scale of 10 finds support in his final physical therapy record dated February 29, 2012. Moreover, Aribindi’s records indicate that claimant was still experiencing pain on March 7, 2012, when claimant was discharged from Aribindi’s care. Further, claimant’s testimony regarding not having a full range of motion and the resulting difficulties he has welding (at home) are corroborated by Aribindi’s records indicating claimant “lacked full supination of the right forearm.” Similarly, Levin’s records document a limited range of motion. Claimant’s testimony that he experienced numbness is corroborated by Levin’s finding that claimant “had decreased pinprick sensation over the ulnar aspect of the right elbow.”

¶ 14 The Commission concluded:

“Based on the above, the Commission finds that the 6% impairment rating by Dr. Levin does not adequately represent [claimant’s] actual disability in this case. When considering the other factors, we find that [claimant’s] permanent partial disability is 25% loss of use of the right arm.”

It modified the arbitrator’s decision accordingly. Respondent appealed to the trial court, which confirmed. Respondent now appeals to this court.

¶ 15 III. ANALYSIS

¶ 16 On appeal, respondent raises two main issues. First, respondent contends that the Commission misapplied section 8.1b of the Act (820 ILCS 305/8.1b (West 2010)) as a matter of law. Second, it argues that the Commission’s application of that section was erroneous as a

matter of fact, *i.e.*, contrary to the manifest weight of the evidence. We disagree with both contentions.

¶ 17

A. Misapplication as a Matter of Law

¶ 18 Respondent first contends that the Commission did not apply section 8.1b properly as a matter of law. Section 8.1b sets forth a list of factors for the Commission to consider in assessing permanent partial disability: “(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee’s future earning capacity; and (v) evidence of disability corroborated by the treating medical records.” 820 ILCS 305/8.1b(b) (West 2010). According to respondent, any given factor should be considered only if there is evidence in the record regarding that factor. It cites section 1.1(e) of the Act (820 ILCS 305/1.1(e) (West 2010)), which states, “Decisions of an arbitrator or a Commissioner shall be based exclusively on evidence in the record of the proceeding and material that has been officially noticed.” Respondent further points out that section 8.1b later states that “the relevance and weight of *any factors used* in addition to the level of impairment as reported by the physician must be explained in a written order.” (Emphasis added.) 820 ILCS 305/8.1b(b) (West 2010). That the statute refers to “any factors used” indicates that not all factors must be used in assessing permanent partial disability. We have no quarrel with any of these propositions advanced by respondent.

¶ 19 Respondent goes on to argue that the Commission misapplied section 8.1b as a matter of law because it considered factors for which no evidence was present in the record. For example, it contends that the Commission considered claimant’s age as a factor weighing in favor of a greater degree of disability despite there being no evidence of record regarding the impact of claimant’s age on his disability. Similarly, according to respondent, the Commission found that

claimant's "upper extremity impairment makes him more prone to future injury with an associated loss of income" despite a purported lack of evidence on the issue.

¶ 20 Assuming, *arguendo*, that respondent is correct that no evidence exists in the record on such matters, respondent has not identified an error of law. A finding entered without sufficient evidentiary support is against the manifest weight of the evidence. See *Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924, 934-35 (2011); *Johnson v. Industrial Comm'n*, 89 Ill. 2d 438, 443 (1982) (holding Commission's decision was contrary to the manifest weight of the evidence where "there simply was not evidence to show that her work activities caused her physical problem."); *Martino v. Levatino*, 99 Ill. App. 3d 907, 911 (1981).

Respondent attempts to frame this issue as the Commission misunderstanding the statute and believing that it could make findings on the factors set forth in section 8.1b "regardless of whether there was evidence in the record showing that the factor had an impact on Williams' level of partial disability." As we read the Commission's decision, it believed it had evidence before it on all of the factors it considered. Thus, what respondent purports to have identified is actually findings by the Commission that allegedly do not find support in the record. This raises a factual question—namely, whether the Commission's decision is contrary to the manifest weight of the evidence, which brings us to respondent's second argument.

¶ 21 B. Manifest Weight of the Evidence

¶ 22 On September 1, 2011, section 8.1b was added to the Act. In that statute, the legislature set forth a process for evaluating claims of permanent partial disability. *Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n*, 2015 IL App (5th) 1440445WC, ¶ 10. As noted above, that section sets forth five factors to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age



of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b) (West 2010). It further provides that "no single enumerated factor shall be the sole determinant of disability." *Id.* Further, the legislature did not state that these factors are exclusive, so the Commission remains free to evaluate other relevant considerations. See *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179, 184-85 (2009) ("We may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express."). As explained in the background section of this opinion, the Commission made detailed findings regarding each factor. As this is a factual matter, we will assess respondent's arguments using the manifest-weight standard and reverse only if an opposite conclusion is clearly apparent. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741-42 (1994).

¶ 23 Regarding the second factor, respondent argues that "[t]here was no evidence to support consideration of [the second factor,] the occupation of the injured employee." It contends that the only basis for finding that claimant's job was physically demanding was his testimony. It adds, "[Claimant] only testified in generalities as to his duties at work," and "[h]e did not provide the detailed evidence for the Commission to reach its conclusion."

¶ 24 Nevertheless, claimant did testify that he felt his job was physically demanding. Respondent cites nothing that would indicate that the Commission could not consider and give weight to claimant's evaluation of the demands of his job. Furthermore, claimant testified that he is right-hand dominant and described his physical impairment. He testified that welding requires him to hold his arm in various positions and that his injury has diminished his range of motion. Additionally, claimant finds it difficult to use the welding equipment he has in his

garage. Thus, contrary to respondent's claims, there was evidence in the record from which the Commission could draw inferences about claimant's disability as it relates to his occupation.

¶ 25 Respondent cites *Caterpillar Tractor Co. v. Industrial Comm'n*, 98 Ill. 2d 400, 405-06 (1983), in support of its position. That case is readily distinguishable. There, the Commission found that no evidence supported the claimant's assertion that his repetitive trauma injury to his left-wrist was caused by his employment. *Id.* It noted that the claimant's theory was that the injury was caused by driving; however, the claimant testified that he drove primarily with his right hand. *Id.* While a doctor testified as to a causal relationship, the doctor stated that the injury was caused by lifting 50 pounds repeatedly with his left arm. *Id.* The Commission pointed out that there was no evidence as to whether or how often the claimant lifted this amount. *Id.*

¶ 26 In *Caterpillar Tractor Co.*, there was no evidence that the claimant used his left arm to drive, here, it is undisputed that claimant suffered an injury to the arm at issue here. In that case, a doctor opined as to causation without knowing details of claimant's employment relevant to the subject. Here, the opinion that claimant's work was physically demanding came from claimant himself, and it cannot seriously be disputed that claimant knew what his own job entailed. Finally, we note that in *Caterpillar Tractor Co.*, 98 Ill. 2d at 407, the supreme court was affirming the Commission. Hence, that case stands for the proposition that where the Commission rejects a claim in the absence of certain evidence, the Commission's decision is not contrary to the manifest weight of the evidence. It does not mean that the presence of such evidence is the *sine qua non* of a successful claim. Here, the Commission had evidence of claimant's disability relating to his occupation before it, and we cannot say that an opposite conclusion is clearly apparent.

¶ 27 As for the third factor, respondent contends that there was no evidence to show a relationship between claimant's age and his level of disability. Respondent contends that "[t]he finding that [claimant] will have to live with [his disability] longer is an assumption that is not based on any evidence in the record of his life expectancy." That a younger person will probably live longer than an older person is hardly a controversial proposition. The Commission is not required to abandon common sense in rendering its decision. *See People v. Greene*, 50 Ill. App. 3d 872, 875 (1977).

¶ 28 Respondent also contends that there was no evidence to support the Commission's findings regarding claimant's future earning capacity (the fourth factor). It is true, as respondent points out, that Aribindi released claimant to full duty. However, it is also true that at the time claimant was so released, he protested, indicating that he did not feel he could perform his job. It is undisputed that respondent refused to reemploy claimant. Moreover, claimant testified that he had difficulty using the welding equipment that he personally owns. Claimant also testified that other positions he had held in the past involved physically demanding jobs. From this evidence, the Commission could draw inferences about claimant's future earning capacity, so it cannot be said that the Commission's decision finds no evidentiary support in the record.

¶ 29 Respondent takes particular issue with the Commission's finding that claimant's "future earning capacity has been diminished and his upper extremity impairment makes him more prone to future injury with an associated loss of income." Respondent contends that "there was no evidence in the record that [claimant] was more prone to future injury." It is unclear here whether the Commission was speaking of a future physical injury or a future economic injury, though the latter seems more likely to us given that this factor concerns future *earning* capacity. It does not strike us as an unreasonable inference that, given the nature of claimant's condition,

he will become less employable as his physical skills diminish as he ages. His injury-related physical limitations will likely become more significant as his other physical attributes diminish with age. Thus, it is inferable that claimant is more prone to economic injury following his accident. Moreover, it is worth remembering that the Commission is an administrative body, possessing unique skill and expertise in the areas of medical and workers' compensation issues. See *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 881 (1990) ("Because of the Industrial Commission's expertise in the area of workers; compensation, its finding on the question of the nature and extent of permanent disability should be given substantial deference."); *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 ("Therefore, a finding of fact by the Commission on this issue, based on any medical testimony or on inferences to be drawn from medical testimony, should be given substantial deference because of the expertise acquired by the Commission in this area."). We therefore owe it substantial deference on this issue. *Id.*

¶ 30 The fifth factor concerns "evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b) (West 2010). Respondent identifies particular portions of claimant's testimony and asserts that there is no corroboration for them and that, in turn, the Commission was not entitled to rely upon them. For example, respondent states that nothing in his medical records corroborates that claimant was still taking Norco at the time of the arbitration hearing. Black's Law Dictionary defines "corroborate" as "[t]o strengthen or confirm; to make more certain." Black's Law Dictionary 348 (7th ed. 1999). Of course, the plain language of a statute is the most reliable indicator of its meaning. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 15. Moreover, we are to interpret the Act liberally to effectuate its primary purpose of providing financial protection to workers. *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 514 (2006). Hence, we will not take "corroborate" to mean that there

must be a point-by-point coincidence between the nonmedical evidence relied upon and the accompanying medical record. Rather, so long as the medical record tends to confirm, strengthen, or make the nonmedical evidence more certain, it provides sufficient corroboration such that the nonmedical evidence may be considered under the fifth factor. *Cf. People v. Cloutier*, 156 Ill. 2d 483, 503 (1993) (holding that evidence is sufficient to corroborate a confession and establish the *corpus delicti* of a crime where it tends “to confirm a defendant’s confession.”). Indeed, a strict construction of “corroborate” would allow the consideration of nonmedical evidence only when it was cumulative of evidence in the medical records.

¶ 31 Thus, the Commission properly found that claimant’s testimony that his pain level remains at 4 to 5 on a scale of 10 is corroborated by his final physical therapy record dated February 29, 2012. That claimant was still experiencing pain on March 7, 2012, as corroborated by Aribindi’s records, makes it more certain that claimant experienced pain subsequently. Since Aribindi provided no further care after that date, the Commission could infer that claimant’s condition—his pain—remained the same thereafter, which also corroborates claimant’s testimony that he was taking a pain killer. The same is true of Aribindi documenting claimant’s limited range of motion in his right forearm. In other words, since claimant was experiencing problems at the time Aribindi ceased care, it is inferable that there was nothing more that could be done for these issues and that they continued on past March 7, 2012. This provides corroboration for much of claimant’s testimony concerning his medical condition. The documented impairment of his range of motion also corroborates claimant’s testimony regarding the difficulties he had trying to weld (which also could be considered under the second factor without corroboration).

¶ 32 Thus, none of respondent's contentions regarding the Commission's findings lacking evidentiary support are well founded. In turn, we reject respondent's argument that the Commission erred in determining the level of disability as it purportedly could only rely upon the first and, to an extent, the fifth factors. Quite simply, we owe the Commission considerable deference on such medical questions. *Long*, 76 Ill. 2d at 566. It is not within our purview to rebalance the five factors set forth in section 8.1b(b) and substitute our judgment for that of the Commission. *DiVittorio v. Industrial Comm'n*, 299 Ill. App. 3d 662, 671 (1998). Furthermore, we also cannot say that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 33

#### IV. CONCLUSION

¶ 34 In light of the foregoing, the judgment of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 35 Affirmed.

11WC46390  
14IWCC0576  
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STATE OF ILLINOIS            )  
  )SS       BEFORE THE ILLINOIS WORKERS'  
COUNTY OF COOK            )        COMPENSATION COMMISSION

Frederick Williams,            )  
  )                                    No. 11WC 46390  
  )                                    14IWCC0576  
vs.                                    )  
  )  
Flexible Staffing, Inc.,        )  
  )                                    Respondent,

ORDER

This matter comes before the Commission on its own Petition to Recall the Commission Decision to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated July 16, 2014, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Charles J. DeVriendt.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision shall be issued simultaneously with this Order.

  
\_\_\_\_\_  
Charles J. DeVriendt

DATED: JUL 22 2014

STATE OF ILLINOIS )  
) SS.  
COUNTY OF COOK )

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify <input type="checkbox"/> down	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Williams,  
  
Petitioner,

vs.

NO: 11WC 46390  
14IWCC0576

Flexible Staffing, Inc.,  
  
Respondent,

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County with instructions "to the Commission for clarification of which facts/evidence support its conclusion." The Arbitrator's decision, dated November 20, 2012, awarded Petitioner 75.9 weeks of permanent partial disability for the 30% loss of use of his right arm. On May 29, 2013, the Commission reduced the award to 25% loss of use of the right arm. On remand, the Commission makes the following clarifications to support its conclusion, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator.

We understand Respondent's argument that Dr. Levin's A.M.A. impairment rating of 6% of the upper extremity was not given enough weight by the Arbitrator. However, we do not agree with the great weight that Respondent wants placed on this rating because to do so would be to disregard the other factors and give them no weight at all. Section 8.1b of the Act requires the consideration of five factors in determining permanent partial disability:

- 1) Reported level of impairment;
- 2) Occupation;
- 3) Age at time of injury;
- 4) Future earning capacity;
- 5) Evidence of disability corroborated by treating medical records.

Section 8.1b also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the



level of impairment as reported by the physician must be explained in a written order." We initially note that the term "impairment" in relation to the A.M.A. rating is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

Regarding the second factor, we find that Petitioner was employed in a physically demanding occupation. His un rebutted testimony was that he was a welder/fabricator and that he considered it a "physically demanding job." (T.8). We find that Petitioner's upper extremity impairment is more significant for a person with Petitioner's heavier job duties than someone with a lighter-duty job and that this supports a finding of increased disability compared to the impairment rating.

Regarding the third factor, we find that Petitioner was only 45 years old and will live longer with his disability than someone who is older. We find that this warrants an increase in the level of disability in this case.

Regarding future earning capacity, Petitioner testified that he was released to full duty by Dr. Aribindi on March 8, 2012, even though he was still feeling pain and was lacking range of motion in his arm. Despite this full duty release, Petitioner's un rebutted testimony was that, when he took the release form to Respondent the next day, he was told that he no longer had a job there. Petitioner testified that he has been looking for employment as a welder, which is what he has done for the majority of his professional life. Petitioner testified that he tries to do welding work on the side from his garage, but that he still finds it difficult to do. We find that Petitioner's future earning capacity has been diminished and his upper extremity impairment makes him more prone to future injury with an associated loss of income.

As for the fifth factor, evidence of disability corroborated by treating medical records, Petitioner testified that he is right-hand dominant. Petitioner testified that he still has 4 or 5 out of 10 pain, which is consistent with what is reported in his last physical therapy record on February 29, 2012. On March 7, 2012, when Dr. Aribindi released Petitioner to return to work, the assessment still included "elbow pain." Petitioner testified that his primary care doctor, Dr. Ahmed, has prescribed Norco, which he takes three times a week. However, the Commission notes that Dr. Ahmed's records are not in evidence so there is no corroborating medical record for Petitioner's use of Norco for his arm pain. Petitioner testified that he still does not have full range of motion and he has difficulty welding in certain positions. This is corroborated by the March 7<sup>th</sup> record of Dr. Aribindi who noted that Petitioner had "almost" full extension of the right elbow but lacked full supination of the right forearm. On May 8, 2012, Dr. Levin reported that Petitioner's elbow lacked 3 degrees of full extension. He lacked 15 degrees of pronation and 15 degrees of supination. His right wrist had 75 degrees of flexion compared to 80 degrees on the left. His extension was 85 degrees on the right and 90 degrees on the left. His ulnar deviation on the right was 30 degrees while it was 45 degrees on the left. His mid-forearm circumference measured 26 cm on the right compared to 26.5 cm on the left. We find that these medical records support Petitioner's disability of decreased range of motion. Petitioner testified that he still has numbness in the area of the incision and has tingling sensations in his arm and fingertips. Although Dr. Aribindi reported that Petitioner denied numbness or paresthesias, Dr. Levin noted that Petitioner had decreased pinprick sensation over the ulnar aspect of the right elbow.

Based on the above, the Commission finds that the 6% impairment rating by Dr. Levin does not adequately represent Petitioner's actual disability in this case. When considering the other four factors, we find that Petitioner's permanent partial disability is 25% loss of use of the right arm. The Commission modifies the Arbitrator's Decision, to decrease Petitioner's partial

disability award from 30% to 25% loss of use of the right arm pursuant to Section 8(e) of the Act.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$435.27 per week for a period of 23.14 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 \$391.75 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the petitioner a 25% loss of use of his right arm.

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

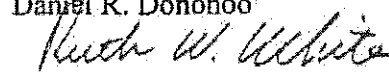
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$24,900.00. 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: JUL 22 2014

  
Charles J. DeYriendt

  
Daniel R. Donohoo

  
Ruth White

SE/  
O: 6/24/14  
049

STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF COOK )

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify <input type="text" value="down"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frederick Williams,

Petitioner,

vs.

NO: 11WC 46390

Flexible Staffing, Inc.,

**13IWCC0557**

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 nature and extent, Section 8.1(b), Section 19(e) and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Arbitrator's Decision, decreasing Petitioner's partial disability award from 30% to 25% loss of use of the right arm pursuant to Section 8(e) of the Act. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$435.27 per week for a period of 23.14 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 \$391.75 per week for a period of 63.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the petitioner a 25% loss of use of his right arm.

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

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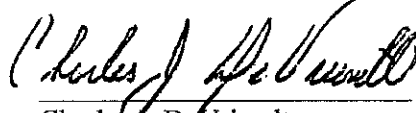
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$24,900.00. The probable cost of the record to be filed as return to Summons is the sum of \$35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

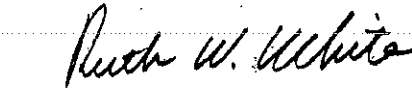
DATED:

MAY 29 2013

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Charles J. DeVriendt

  
Daniel R. Donohoo

  
Ruth White

STATE OF ILLINOIS )  
 )SS.  
 COUNTY OF COOK )

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

**ILLINOIS WORKERS' COMPENSATION COMMISSION  
 CORRECTED ARBITRATION DECISION  
 NATURE AND EXTENT ONLY**

**FREDERICK WILLIAMS**

Employee/Petitioner

v.

**FLEXIBLE STAFFING, Inc.**

Employer/Respondent

Case # 11 WC 46390

Consolidated cases: N/A

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Edwards**, Arbitrator of the Commission, in the city of **Chicago**, on **June 5, 2012**. By stipulation, the parties agree:

On the date of accident, **October 7, 2011**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **\$33,951.32**, and the average weekly wage was **\$652.91**.

At the time of injury, Petitioner was **45** years of age, married with **no** dependent children.

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

Respondent shall be given a credit of \$10,073.36 for TTD, \$0 for TPD, \$ for maintenance, and \$0 for other benefits, for a total credit of \$10,073.36.

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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.

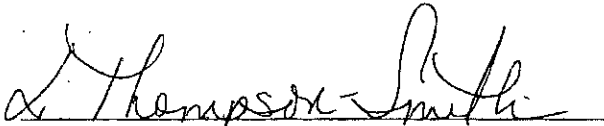
Respondent shall pay Petitioner temporary total disability from October 7, 2011 through March 7, 2012, for 23 & 1/7th weeks, in the amount of \$435.27 per week pursuant to Sections 8(b) of the Act.

Respondent shall pay Petitioner the sum of \$391.75/week for a further period of 75.9 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the Petitioner a 30% loss of use of his right arm.

Respondent shall pay Petitioner compensation that has accrued from October 7, 2011 through June 5, 2012, and shall pay the remainder of the award, if any, in weekly payments.

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

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

  
Signature of Arbitrator

November 20, 2012

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**FREDERICK WILLIAMS**  
**11WC 46390**

### **FINDINGS OF FACT**

The petitioner was 45 years old at the time of the work accident on October 7, 2011. He was married, and he had no dependent children. The petitioner testified that he is right-hand dominant. He testified that, before the subject work accident on October 7, 2011 he had never had any medical problems or symptoms involving his right arm. He testified that, before the work accident, he had never received any medical treatment for right arm problems. The petitioner testified that he never re-injured his right arm after October 7, 2011.

The petitioner testified that he was a member of the United States Marine Corp from 1984 through 1988, and that he received an honorable discharge from the service. The petitioner testified that, after he left the service, he spent most or all of his professional life as a welder. He testified that welding has always been his passion and that he has his own welding equipment in the garage of his home. He testified that he began working for the respondent on June 19, 2011 and that the respondent was in the business of manufacturing boilers, shredders and conveyors at the time of the work accident. The petitioner always worked as a welder/fabricator and testified that his job duties were physically demanding in nature, requiring cutting, welding and carrying both tools and metal equipment and interpreting blueprints. The petitioner testified that he worked without any physical restrictions for the respondent at all times.

The petitioner testified that he worked 40 hours per week for the Respondent. He testified that he worked from 6:00 a.m. to 2:30 p.m. The petitioner testified that the work accident on October 7, 2011 occurred at approximately 9:00 a.m. He testified that he was working on a section of a rail, similar to a railroad track. The petitioner testified that the section of rail was approximately nine feet long, two inches wide, and weighed in excess of 400 pounds. The petitioner testified that the rail was positioned on a horse while he welded it. He testified that one end of the rail slipped off the horse. The petitioner testified that his first reaction was to reach out and grab the rail, to keep it from falling on him. He testified that when the rail hit his hand, he felt a sharp pain in his right arm and he heard something snap. He testified that he immediately noticed that his arm was disfigured. The petitioner

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testified that he reported the incident to his supervisor, Mr. Greg Herndon. The petitioner testified that his supervisor asked him if he needed an ambulance. The Petitioner testified that he declined the ambulance, and instead drove himself to Ingalls Occupational Health Clinic ("Ingalls") using only his left arm. The petitioner testified that his right arm was x-rayed at Ingalls, that he was given a sling, and that he was diagnosed with a distal biceps tendon rupture. The specialist at Ingalls immediately sent Petitioner home. Petitioner testified that he was off work for one (1) week, in severe pain and was never contacted by Respondent's insurance carrier. Petitioner further testified that his right arm was wrapped in an Ace bandage for approximately one month until Respondent finally approved surgery.

Medical records from Southland Orthopaedic Associates, Ltd. ("Southland") show that petitioner's first visit with Dr. Arabindi took place on October 12, 2011. The petitioner complained of right arm and right elbow pain and the doctor immediately diagnosed a probable right distal biceps tendon rupture. Dr. Arabindi discussed a surgery to repair the tendon rupture at the completion of that first visit. The Southland records confirm that Dr. Arabindi kept the petitioner off work from that first visit through March 8, 2012. The doctor wrote that he was awaiting approval of the surgery during both office visits in October of 2011. Dr. Arabindi eventually performed the surgery at the Ingalls Same Day Surgery on November 17, 2011. The doctor performed a repair of the petitioner's right elbow distal biceps tendon rupture. Under a general anesthesia, the surgeon drilled two holes into the petitioner's right radius and used K-wire and metal anchors to pull and secure the tendon into place. The petitioner began attending physical therapy ("PT") at Southland on November 28, 2011. He continued to attend PT, at Dr. Arabindi's direction, through February 8, 2012. At the time of the last office visit on March 7, 2012, the doctor declared the petitioner to be at maximum medical improvement ("MMI") but noted that he still lacked approximately five to ten (5-10) degrees of full supination in his right forearm. *See, PX1.*

On May 8, 2012, petitioner was examined by Dr. Mark Levin of Barrington Orthopedic Specialists, at Respondent's request. During that examination, the petitioner complained of right arm pain, which he had been suffering since the work accident. The petitioner



indicated that he also experienced pain when he tried to fully pronate and supinate the right forearm. The petitioner told Dr. Levin that he did not believe that he had full extension of his right elbow and that he experienced constant numbness over the ulnar aspect of that elbow. The petitioner stated that he was experiencing pain two or three times per week and that he was still taking narcotic pain medication, i.e. Norco, approximately two or three times a week because of pain in his elbow. Following his examination, Dr. Levin also noted that the petitioner lacked full extension with both pronation and supination of his right arm and then listed an AMA disability rating of 4% of a whole person or 6% loss of the right arm. See, RX1.

The Petitioner testified that, at the time that he was released to return to work by Dr. Arabindi, he was capable of lifting only 25 pounds. He testified that he told Dr. Arabindi, at the time of the last office visit on March 7, 2012, that his strength was diminished and that he had ongoing pain and numbness. The petitioner testified that, despite those complaints, Dr. Arabindi released him to return to work, without restrictions, as of March 8, 2012. The petitioner testified that, once he was released to return to work, he was told by the respondent that he does not have a job anymore.

Petitioner testified that he continues to experience pain in his right arm on a daily basis, and that he still lacks range of motion. The petitioner further testified that he still lacks strength in his right arm and that he still has tingling sensations in his right arm and his fingertips. And he testified that he still experiences numbness and a measurable amount of pain in his right arm. He continues to take Norco approximately three times per week. He testified that he continues to look for employment as a welder and that he has attempted to use his own welding equipment after he was released by Dr. Arabindi.

The petitioner testified that he finds welding difficult and that he experiences difficulty while playing with his three young grandchildren due to his ongoing symptoms in his right arm. He testified that he cannot perform garden work, mow his lawn, or play golf. The Petitioner testified that he experiences the numbness and tingling in his right arm and hand a few times a week and that he experiences some level of pain in his right arm on a daily basis.

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## CONCLUSIONS OF LAW

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

On October 7, 2011 the Petitioner suffered painful injuries to his right arm. All of the medical evidence conclusively established that the Petitioner suffered a right distal biceps tendon rupture while in the course of his employment for the Respondent on that date. I base my findings on the petitioner's credible testimony that his right arm was symptom-free all times prior to the work accident on October 7, 2011. All of the medical evidence supports Petitioner's testimony that he was working without any physical restrictions and that he was not under a doctor's care for any problems involving his right arm, at the time of the subject work accident.

The injuries to Petitioner's right arm and elbow lingered for more than seven months after the subject work accident. The Petitioner voiced the same complaints of pain, numbness and tingling to both his treating orthopedic surgeon and his physical therapist. The Petitioner described those same symptoms when he was examined by Dr. Mark Levin of Barrington Orthopedic Specialists on May 8, 2012. During that examination, the petitioner complained of right arm pain since the work accident. He indicated objectively, that he experienced pain when he tried to fully pronate and supinate the forearm. Petitioner told Dr. Levin that he did not believe that he had full extension of his right elbow and that he experienced constant numbness over the ulnar aspect of that elbow. The petitioner testified that he was suffering from lingering effects of the right arm injuries at the time of the hearing on June 5, 2012. The petitioner testified that he was experiencing pain two to three times a week and is taking pain medication in an attempt to ease his pain.

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

- (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment

that include, but are not limited to: loss of range of motion, loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

- (b) Also, the Commission shall base its determination on the following factors:
- (i) the reported level of impairment;
  - (ii) the occupation of the injured employee;
  - (iii) the age of the employee at the time of injury;
  - (iv) the employee's future earning capacity; and
  - (v) evidence of disability corroborated by medical records.

With regards to (i) of Section 8.1(b) of the Act:

the level of impairment reported by Dr. Levin pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment is 6% upper extremity impairment and "disability" rating of 4% of a whole person. The Arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act. Dr. Levin's reference to "an AMA disability rating" is misplaced; Dr. Levin is rating impairment only, not permanent partial disability. Dr. Levin does not specifically include loss of range of motion or any other measurements that establishes the nature and extent of the impairment pursuant to Section 8.1b. Dr. Levin used a physical examination grade modifier of 2 indicating a moderate problem. Dr. Levin did not consider a grade modifier for clinical studies in his impairment report, even though the surgical report could have been used in this way. Dr. Levin scored the QDASH report for functional history grade modifier as 23, however, does not include a copy of the QDASH in his impairment report so that the Arbitrator may review his findings.

With regards to (ii) of Section 8.1(b) of the Act:

the petitioner's occupation is welder/fabricator, which the Arbitrator takes judicial notice to be medium to heavy work and concludes that Petitioner's permanent partial disability will be larger than an individual who performs lighter work.

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With regards to (iii) of Section 8.1(b) of the Act:

the age of the petitioner at the time of the injury was 45 years old. The Arbitrator considers the petitioner to be a somewhat younger individual and concludes that Petitioner's permanent partial disability will be more extensive than that of an older individual because he will have to live with the permanent partial disability longer.

With regards to (iv) of Section 8.1(b) of the Act:

the petitioner's future earning capacity, at the present time, appears to be undiminished as a result of his injuries, because he has medically been returned to his full-time duties. However, when he attempted to return to work, he was told that he no longer had a job. The Arbitrator concludes that this may negatively affect Petitioner's future earning capacity.

With regards to (v) of Section 8.1(b) of the Act:

the petitioner has demonstrated evidence of disability corroborated by his treating medical records. The petitioner has credibly testified that he currently experiences pain, numbness, tingling and loss of range of motion. The petitioner's complaints regarding his right arm are corroborated in the treating medical records of Dr. Arabindi, including but not limited to the diagnosis of distal biceps tendon rupture and the necessity of the subsequent surgery and course of treatment. The doctor also noted that the petitioner has disability of a permanent nature as, on Petitioner's last visit, he noted that Petitioner's condition was as good as it was going to get and that he still lacked approximately five to ten (5-10) degrees of full supination in his right forearm. The petitioner's complaints, supported by medical records, evidences a disability as indicated by Commission decisions regarded as precedents pursuant to Section 19(e).

The determination of permanent partial disability ("PPD") is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, applying Section 8.1b of the Act, 820 ILCS 305/8.1b, the petitioner has sustained accidental injuries that caused 30% loss of use of the right arm. The Arbitrator further

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13IWCC0557

finds that the respondent shall pay the petitioner the sum of \$391.75/week for a further period of 75.9 weeks, as provided in Section 8(e) of the Act

2016 IL App (1st) 152576WC

Opinion filed: November 10, 2016

NO. 1-15-2576WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

---

CON-WAY FREIGHT, INC.,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County.
	)	
v.	)	No. 2015-L-50168
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	Honorable
COMMISSION, <i>et al.</i> (Robert Armstrong,	)	Kay Marie Hanlon,
Appellee).	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court, with opinion.  
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred  
in the judgment and opinion.

**OPINION**

¶ 1 The claimant, Robert Armstrong, was employed as a "line haul" truck driver for the employer, Con-Way Freight, Inc., when he was involved in a workplace accident. He filed a claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), claiming injuries to both of his feet. An arbitrator awarded the claimant benefits under the Act, including permanent partial disability (PPD) benefits for 30% loss of the right foot and 8% loss of the left foot. The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission

(Commission). The sole issue that the employer raised before the Commission concerned the nature and extent of the claimant's permanent partial disability. The Commission corrected a calculation error in the arbitrator's decision but otherwise affirmed and adopted the decision. The employer sought review of the Commission's decision before the circuit court. The circuit court entered a judgment confirming the Commission's decision. The employer now appeals the circuit court's judgment.

¶ 2

### BACKGROUND

¶ 3 It is undisputed that the claimant was involved in a workplace accident on December 8, 2011, when a dolly weighing several thousand pounds ran over both of his feet while he was assisting another driver. At the time of the accident, he was 42 years old. He was taken to the emergency room, where X-rays showed that he had sustained fractures to the right fourth and fifth metatarsals, a dislocation of the proximal interphalangeal joints of the fifth toe on the right side, and a fracture of the cuboid and proximal phalanx of the left foot. That same day, Dr. Surender Dhiman, an orthopedic surgeon, performed surgery on the claimant's right foot. Two surgical screws were placed in the claimant's foot.

¶ 4 Following the surgery, the claimant followed up with Dr. Dhiman approximately once per month. Dr. Dhiman released the claimant to return to light duty work on March 27, 2012, and discharged the claimant from his care, releasing the claimant to work full duty beginning April 4, 2012. Dr. Dhiman noted that the claimant had completed his physical therapy and was improving. He believed that the claimant could resume driving trucks. The claimant returned to work full duty on April 5, 2012.

¶ 5 On June 25, 2012, the claimant returned to Dr. Dhiman with complaints of occasional aching on the side of his right foot. X-rays revealed healing of the claimant's fractures. The claimant returned to Dr. Dhiman in December 2012 with complaints that the two screws that had been placed in his right foot were causing him pain. The doctor performed a screw removal surgery on December 27, 2012. The doctor removed only one of the screws in the claimant's right foot and left a second screw in place. Following the screw removal surgery, on January 14, 2013, Dr. Dhiman released the claimant back to work full duty.

¶ 6 The claimant last saw Dr. Dhiman on March 4, 2013. He complained of some induration and tenderness in the area of the surgical scar on his right foot. The doctor released the claimant from his care, and there is no evidence that the claimant has sought any further medical care for any foot problems since his last visit with Dr. Dhiman.

¶ 7 The claimant's job duties require him to drive a truck on a daily basis from Bridgeview, Illinois, to Tomah, Wisconsin. The job description indicates that he is required to perform heavy job duties, including loading and unloading heavy objects, some weighing over 75 pounds. The claimant testified that he has to manually manipulate heavy freight, operate a forklift, and drive 10- to 12-hour shifts, approximately 500 miles round trip per day. At the time of the arbitration hearing, he was earning more money than he had prior to the accident.

¶ 8 The claimant testified that since returning to work full duty after the accident, he has noticed an increase in pain and other symptoms in his right foot. He testified that his right foot is always in pain and that he has a constant throbbing sensation. The pain is



worse during cold weather, when driving long distances, and when pressing the foot pedals of the truck. For pain relief, he removes his boot while driving and takes over-the-counter medication on a regular basis. He testified that when he walks his dog he is unable to walk as far as he did prior to the accident because of pain in his right foot. His right foot swells with overuse, and his work shoes feel tighter. He cannot jog or hop on his right foot without pain. With respect to his left foot, he stated that he has a constant tingling sensation from the top of the foot, near the fifth toe, to the middle-arch area of the foot. He has a loss in the range of motion in the fifth toe, and the left side at the top of the foot feels numb. He testified that his right foot pain is worse than his left foot pain.

¶ 9 On June 24, 2013, at the employer's request, the claimant submitted to a medical examination conducted by an orthopedic surgeon, Dr. Mark Levin. According to Dr. Levin's report, the claimant told the doctor that his left foot pain had totally resolved and that he had good healing. He stated that he had an achy sensation in his right foot over the fourth and fifth metatarsal areas during cold weather. He told Dr. Levin that he drove with no shoe on his right foot because he gets a throbbing sensation in the metatarsals. The doctor wrote, "By the end of his shift, he can get pain varying anywhere from 2/10 up to 4 to 5/10." He noted that the claimant took over-the-counter Aleve on an as-needed basis; was working full duty; and could perform all of his work activities with no problems, including driving a forklift and all of the other job activities that he could perform prior to the accident.

¶ 10 Pursuant to section 8.1b of the Act (820 ILCS 305/8.1b (West 2012)), Dr. Levin offered an impairment rating based on the American Medical Association (AMA)

Guides. With respect to the claimant's left foot, he opined that the claimant suffered no impairment and no objective deficiency pursuant to the AMA Guides. With respect to the claimant's right foot, he opined that the claimant sustained a 4% impairment.

¶ 11 At the conclusion of the hearing, the arbitrator found that the claimant sustained a 30% permanent loss of the right foot and an 8% permanent loss of the left foot. In determining the proper PPD award, the arbitrator noted each of the five factors enumerated in section 8.1b and made specific findings with respect to each factor.

¶ 12 The arbitrator began his analysis by noting Dr. Levin's impairment rating (8.1b(b)(i)). With regard to the claimant's occupation (8.1b(b)(ii)), the arbitrator found that it required heavy work and that the claimant's PPD award may be larger than an individual who performs lighter work. With regard to the claimant's age, (8.1b(b)(iii)), the arbitrator found that he was 44 years old and, therefore, was approaching middle age. The arbitrator concluded that the claimant may have to live and work with the disability for a longer period than an older individual with the same injuries and that he "may just as likely recover from his injury more quickly than an older worker." With regard to the claimant's future earning capacity (8.1b(b)(iv)), the arbitrator found that there was no evidence that his future earning capacity was diminished as a result of the injury. With regard to evidence of disability corroborated by medical records (8.1(b)(v)), the arbitrator noted the medical treatments following the accident as well as the claimant's continued pain following his treatments.

¶ 13 The arbitrator concluded as follows: "[A]fter applying Section 8.1b of the Act, 820 ILCS 305/8.1b and considering the relevance and weight of all these factors, including

Dr. Levin's AMA impairment rating, the Arbitrator concludes that [the claimant] has sustained a 30% permanent loss of the right foot and an 8% permanent loss of the left foot."

¶ 14 On review, the Commission corrected a calculation error in the arbitrator's decision but otherwise affirmed and adopted the decision. The circuit court, on review, entered a judgment that confirmed the Commission's decision, finding that the decision is not contrary to law and is not against the manifest weight of the evidence. The employer now appeals the circuit court's judgment and challenges the Commission's application of section 8.1b of the Act in determining the claimant's PPD benefits.

¶ 15

#### ANALYSIS

¶ 16 On appeal, the employer argues that the Commission's award should be set aside as a matter of law due to the Commission's failure to comply with section 8.1b of the Act (820 ILCS 305/8.1b (West 2012)). Section 8.1b of the Act provides as follows:

"For accidental injuries that occur on or after September 1, 2011, [PPD] shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a [PPD] impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the [AMA's]

'Guides to the Evaluation of Permanent Impairment' shall be used by the physician in determining the level of impairment.

(b) In determining the level of [PPD], the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability.

In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." 820 ILCS 305/8.1b (West 2012).

¶ 17 The employer argues that the plain and ordinary meaning of the language of section 8.1b "requires the impairment rating to be the *primary factor* to be considered in establishing [PPD]." (Emphasis added.) The employer contends that, under this plain language, the other four factors can either increase or decrease the impairment rating, but the impairment rating must be given primary significance. The employer argues that we must reduce the Commission's PPD award in the present case because the Commission ignored Dr. Levin's impairment rating and the impairment rating was not the "primary factor" considered by the Commission. The employer suggests that, as a matter of law, a PPD award of only 5 to 10% loss of use of the right foot and 0% loss of use of the left foot is appropriate. We disagree with the employer's argument.

¶ 18 Whether section 8.1b of the Act requires the impairment rating to be the "primary factor" that the Commission must consider in determining the amount of a PPD award involves a question of statutory interpretation. A legal question involving the construction of a statute presents an issue that we review *de novo*. *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 418 (2006). "In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature." *Id.* at 524, 844 N.E.2d at 419. "The language used in the statute is normally the best indicator of what the legislature intended," and "[e]ach undefined word in the statute must be given its ordinary and popularly understood meaning." *Gruszczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12, 992 N.E.2d 1234. "[W]here the statutory language is clear, it will be given effect without resort to other aids for construction." *Id.*

¶ 19 In *Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n*, 2015 IL App (5th) 140445WC, 43 N.E.3d 556, we held that the plain language of section 8.1b does not require the claimant to submit an impairment report. *Id.*, ¶ 17. Looking at the language of the statute, we held that section 8.1b(b) requires "that the Commission, in determining the level of the claimant's permanent partial disability, consider a report that complies with subsection (a), regardless of which party submitted it." *Id.* In addition, we emphasized that section 8.1b does "*not specify the weight that the Commission must give to the physician's report.*" (Emphasis added.) *Id.*

¶ 20 Likewise, in *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, 56 N.E.3d 1101, we again analyzed the plain language of

section 8.1b and held that the statute does not require either party to submit an impairment rating report. We stated that either party may submit an impairment report, and once it is submitted, "it must be considered by the Commission, along with other identified factors, in determining the claimant's level of PPD." *Id.*, ¶ 49. However, neither party is required to submit a report.

¶ 21 The language of section 8.1b is not ambiguous. Therefore, as we did in *Continental Tire of the Americas* and in *Corn Belt Energy Corp.*, we must apply the statute as it is written without resorting to other aids for construction, such as legislative history. The plain language of the statute does not support the employer's argument.

¶ 22 As noted above, in determining PPD benefits, section 8.1b(b) directs the Commission to consider: "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records." 820 ILCS 305/8.1b(b) (West 2012). Section 8.1b does not specify the weight that the Commission must give to the physician's report. Instead, section 8.1b(b) states that "[n]o single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b) (West 2012).

¶ 23 Nothing within this statutory language allows us to require the Commission to treat the impairment rating as the "primary factor." In fact, such a requirement would be contrary to the plain language of the statute. The Commission is obligated to weigh all of the factors listed within section 8.1b(b) and make a factual finding with respect to the level of the injured worker's permanent partial disability, with no single factor being the

sole determinant of disability. The Commission in the present case properly followed section 8.1b(b)'s requirement by weighing Dr. Levin's report along with the four other listed factors, making specific findings with respect to each enumerated factor. Therefore, the Commission's award does not violate the language of the Act as a matter of law.

¶ 24 The employer bases its argument entirely on an inaccurate statutory construction of section 8.1b. The employer does not offer an alternative argument that the Commission's decision is, nonetheless, against the manifest weight of the evidence even without treating the impairment report as the "primary factor." Therefore, whether the Commission's decision is against the manifest weight of the evidence is not before this court. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Archer Daniels Midland Co. v. City of Chicago*, 294 Ill. App. 3d 186, 190, 689 N.E.2d 392, 395 (1997) (failure to raise an issue in appellant's opening brief results in waiver). Waiver aside, there is no basis in the record to reverse the Commission's decision under the manifest weight of the evidence standard.

¶ 25 The Commission's "findings regarding the nature and extent of a disability will not be set aside unless they are contrary to the manifest weight of the evidence." *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 71 Ill. 2d 476, 479, 376 N.E.2d 1014, 1016 (1978). In addition, "[i]t is well settled that because of the Commission's expertise in the area of worker's compensation, its findings on the question of the nature and extent of permanent disability should be given substantial deference." *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624, 722 N.E.2d 703, 709 (1999). A decision is

against the manifest weight of the evidence when the opposite conclusion is clearly apparent. *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15, 19 (1996). The Commission's decision is not against the manifest weight of the evidence if there is sufficient factual evidence to support it. *Id.*

¶ 26 The record in the present case includes evidence that since the claimant has returned to work full duty, he has noticed increased pain and other symptoms in his right foot. He testified that the pain worsens in cold weather, when driving long distances, and when pressing his foot on the pedal of the truck. He takes over-the-counter pain medication daily to relieve the pain and removes his boot while driving. The injury has affected his ability to walk his dog as far as he did prior to the accident. He no longer rides his bicycle as much as he used to, and his right foot continually throbs. The claimant also testified that his left foot has a constant tingling sensation, numbness, and a loss of range of motion in the fifth toe.

¶ 27 Although Dr. Levin opined that, under the AMA Guides, the claimant sustained a 4% impairment rating for the right foot and no permanent partial impairment for the left foot, it was up to the Commission to determine what weight to give to Dr. Levin's report. The Commission adopted the arbitrator's analysis, in which the arbitrator evaluated the other four factors listed in section 8.1b, in conjunction with Dr. Levin's report, and made specific finding with respect each of the factors in determining the appropriate amount of PPD benefits.

¶ 28 The Commission found that there was no evidence that the claimant suffered any diminished future earning capacity. The Commission also found, however, that the



claimant's position required heavy work and that he was 46 years old and would likely work with his disability for a longer period of time than an older person. The Commission also considered the claimant's medical records, which included evidence of a significant work injury involving right foot fractures that required immediate surgery, physical therapy following the surgery, and a second surgery for the removal of a surgical screw from the foot, with one screw remaining in the foot as of the date of the hearing. The claimant testified about the lasting effects that he suffers from the accident, including pain and numbness, and his medical records corroborated his testimony with respect to his disability. Nothing in the record would compel us to second-guess the Commission's factual findings with respect to the nature and extent of the claimant's disability under the manifest weight of the evidence standard had the issue been properly raised.

¶ 29

#### CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court that confirmed the Commission's decision.

¶ 31 Affirmed.

STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF COOK )

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input checked="" type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Armstrong,  
Petitioner,

vs.

NO: 12 WC 15358

**15IWCC0136**

Con-Way Freight, Inc.,  
Respondent,

DECISION AND OPINION ON REVIEW

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

In awarding permanent disability benefits to Petitioner, the Arbitrator awarded 30% loss of use of the right foot and 8% loss of use of the left foot under Section 8(e)(11) of the Act. A 30% loss of use of the right foot equals 50.10 weeks and an 8% loss of use of the left foot is equal to 13.36 weeks of permanent partial disability benefits. When added together, Petitioner is entitled to a total of 63.46 weeks of permanent partial disability benefits, not the 66.80 weeks awarded by the Arbitrator. Therefore, the Commission hereby corrects the Arbitrator's Decision to reflect that Respondent shall pay Petitioner permanent partial disability benefits for a further period of 63.46 weeks under Section 8(e)(11) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Decision of the Arbitrator filed April 17, 2014, is hereby corrected as stated above, and otherwise affirmed and adopted.

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

15IWCC0136


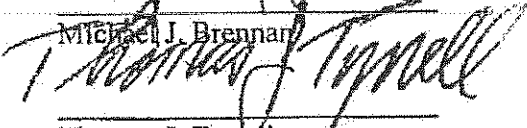
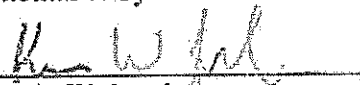
\$577.25 per week for a further period of 63.46 weeks, as provided in Section 8(e)11 of the Act, because the injuries sustained caused Petitioner to sustain a 30% loss of use of the right foot and an 8% loss of use of the left foot.

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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$36,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 17 2015  
MJB/ell  
o-12/16/14  
52

  
\_\_\_\_\_  
Michael J. Brennan  
  
\_\_\_\_\_  
Thomas J. Tyrrell  
  
\_\_\_\_\_  
Kevin W. Lamborn

STATE OF ILLINOIS )  
)SS.  
COUNTY OF COOK )

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION  
ARBITRATION DECISION

Robert Armstrong  
Employee/Petitioner

Case # 12 WC 15358

v.

Con-Way Freight  
Employer/Respondent

Consolidated cases: \_\_\_\_\_

**15 IWCC 0136**

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 **March 13, 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 \_\_\_\_\_

15IWCC0136

FINDINGS

On December 8, 2011, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned \$50,028.68; the average weekly wage was \$962.09.

On the date of accident, Petitioner was 42 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 \$11,636.04 for TTD, \$388.97 for TPD, \$0 for maintenance, and \$0 for other benefits, for a total credit of \$12,025.01. The TTD and TPD benefits were paid for the correct periods at the correct rates.

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

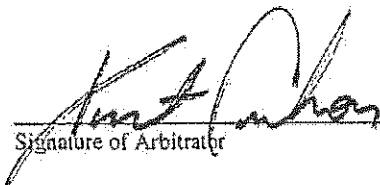
ORDER

Respondent shall pay Petitioner permanent partial disability benefits of \$577.25/week for a total of 66.80 weeks, because the injuries sustained caused 30% loss of the right foot (50.10 weeks) and 8% loss of the left foot (13.36 weeks), as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from December 8, 2011 through March 13, 2014, and shall pay the remainder of the award, if any, in weekly payments.

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

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

  
\_\_\_\_\_  
Signature of Arbitrator

04-17-14  
Date

APR 17 2014

Robert Armstrong v Con-Way Freight  
12 WC 15358

## FINDINGS OF FACT

### Petitioner's Testimony at Hearing

Robert Armstrong ("Petitioner") is claiming accidental right foot and left foot injuries on December 8, 2011, while employed with Con-Way Freight ("Respondent") as a Truck Driver Sales Representative. At the time of the accident, Petitioner was 42 years old and had worked for the Respondent since February, 2008.

Petitioner testified that on the day of his accident, his bilateral feet were run over by a dolly pulled by a co-worker. The dolly weighed a few thousand pounds. Petitioner felt immediate pain in his bilateral feet and was taken to the Emergency Room at St Catherine's Hospital where he underwent surgery to his right foot on the day of the accident.

Petitioner is a 1987 graduate of De La Salle High School in Chicago. Petitioner attended Progressive Truck Driving School and obtained his CDL in December, 2007. As of the hearing date, Petitioner works his regular duties as a Truck Driver Sales Representative with Respondent. In his normal shift he works around 12 hours per day and he is required to line haul drive on a daily basis from his terminal in Bridgeview, Illinois, to the terminal in Tomah, Wisconsin, a round trip of 482 miles. Petitioner testified that his job requires driving and loading and unloading freight by hand and by forklift.

Petitioner testified that since his return to work full duty he has noticed an increase in pain and symptoms in his right foot. His right foot is always in pain and he has a constant throbbing

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sensation. The pain is worse with cold weather, when driving long distances and when pressing his foot on the pedal of the truck. For pain relief he removes his boot while driving his truck and takes over the counter medication, like Aleve, on a daily basis. Petitioner testified that he walks his dog on a daily basis and is unable to walk as far as he did before the accident because of pain in his right foot. His right foot swells with overuse and his work shoes feel tighter. Petitioner can jog without pain but is unable to run like he used to. Hopping on his right foot causes pain. In the left foot, Petitioner has a constant tingling sensation from the top of the foot, near the fifth toe, to the middle, arch area of the foot. Petitioner notices a loss in the range of motion in the fifth toe and the left side at the top of the foot feels numb. Petitioner testified that his right foot pain is worse than his left foot pain.

The Arbitrator had the opportunity to listen to and observe Petitioner and finds him to be credible.

#### Medical Records

Petitioner's initial medical treatment was on December 8, 2011 at St Catherine Hospital. X-rays of the right foot revealed acute dislocation of the fifth metatarsal phalangeal joint with several small avulsion fracture fragments. There was an acute minimally displaced fracture in the proximal shaft of the fifth metatarsal and an acute spiral fracture with minimal displacement of the midshaft of the fourth metatarsal. X-rays of the left foot revealed evidence of a cuboid fracture and a minimally displaced corner fracture on the fibular side of the fifth proximal phalanx at the fifth PIP joint. Petitioner was referred to Dr Surender Paul Dhiman, an orthopedic

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surgeon within St Catherine Hospital. Dr Dhiman placed a cast on Petitioner's left foot and prescribed surgery on his right foot. (PX2, p. 8-11)

Petitioner underwent right foot surgery performed by Dr Dhiman on December 8, 2011. The procedures performed included right foot closed manipulation and percutaneous screw fixation of the fifth metatarsal and closed manipulation of the dislocation of the metatarsophalangeal joint. During surgery it was revealed that Petitioner had suffered a fracture of the right fourth and fifth metatarsals and a dislocation of the proximal interphalangeal joint of the fifth toe on the right side. (PX2, p. 12-14)

On December 21, 2011, Dr Dhiman removed the cast on the right foot and prescribed a Cam walker. On the left side Petitioner remained in a Reese shoe. Petitioner was allowed to wear a regular shoe on the left side starting on January 11, 2012. (PX2, p.15-18)

On February 15, 2012, Dr Dhiman prescribed a course of physical therapy for the bilateral feet. (PX2, p. 21-22). Petitioner completed 12 sessions of therapy at St Catherine's Hospital between February 28, 2012 and March 26, 2012. (PX2, p. 37-43)

Petitioner returned to work in a light duty capacity on March 27, 2012.

On April 4, 2012, Dr Dhiman allowed Petitioner to return to work in a full duty capacity. (PX2, p. 27). Petitioner returned to work in a full duty capacity effective April 5, 2012.



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Petitioner was re-examined by Dr Dhiman on December 3, 2012. X-rays of the right foot showed healing of the fractures but the two cabbulated screws and the washer were causing the Petitioner discomfort. Dr Dhiman prescribed surgery to remove the screws and the washer. (PX2, p. 30)

On December 27, 2012, Petitioner underwent surgery performed by Dr Dhiman at St Catherine Hospital. The procedures performed included 12/27/12 removal of one screw from the base of the fifth metatarsal on the right foot. The doctor did not remove the second screw or the washer and the hardware remained in placed through the date of the surgery. (PX2, p. 31)

Petitioner returned to work in a full duty capacity effective January 14, 2013.

On March 4, 2013, Dr Dhiman discharged the Petitioner at maximum medical improvement with no work restrictions. (PX2, p. 35)

AMA Impairment Rating

On June 24, 2013, Petitioner was examined by Dr Mark Levin, a Section 12 Independent Medical Examiner hired by the Respondent to perform an AMA impairment rating. Dr Levin found that Petitioner suffered 4% impairment to the right lower extremity. Dr Levin found that Petitioner suffered no impairment to the left lower extremity. (RX3)

**CONCLUSIONS OF LAW**

15IWCC0136

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

The causal connection between Petitioner's work accident and his present condition of ill-being is not stipulated to between the parties and is in dispute. Petitioner testified that before this accident he never had problems with his right foot or left foot. Immediately after the accident on December 8, 2011, he had pain in the right foot and left foot. Petitioner obtained medical treatment on the date of the accident at St Catherine Hospital. X-rays of the right foot revealed acute dislocation of the fifth metatarsal phalangeal joint with several small avulsion fracture fragments. There was an acute minimally displaced fracture in the proximal shaft of the fifth metatarsal and an acute spiral fracture with minimal displacement of the midshaft of the fourth metatarsal. X-rays of left foot revealed evidence of a cuboid fracture and a minimally displaced corner fracture on the fibular side of the fifth proximal phalanx at the fifth PIP joint. Petitioner underwent surgery to his right foot on the day of the accident. (PX2, p. 8-14)

On June 24, 2013, Petitioner was examined by Dr Mark Levin, a Section 12 Independent Medical Examiner hired by the Respondent to perform an AMA impairment rating. Dr Levin found that Petitioner suffered 4% impairment to the right lower extremity. Dr Levin found that Petitioner suffered no impairment to the left lower extremity. Dr Levin found that Petitioner's current right lower extremity, right fifth metatarsal, right fourth metatarsal and left lower extremity conditions are related to the work accident of December 8, 2011. (RX3, p. 4-5)

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The Arbitrator has had the opportunity to review the medical evidence and the testimony of the Petitioner and finds a causal connection between Petitioner's present condition of ill-being and the work accident of December 8, 2011.

**L. What is the nature and extent of Petitioner's injury?**

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

- (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.
- (b) Also, the Commission shall base its determination on the following factors:
  - (i) The reported level of impairment;
  - (ii) The occupation of the injured employee;
  - (iii) The age of the employee at the time of injury;
  - (iv) The employee's future earning capacity; and
  - (v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act:

- i. Dr Levin's AMA impairment rating report was admitted into evidence as Respondent's Exhibit 3. Dr Levin concluded that Petitioner's impairment as a result of the work accident is 4% of the right lower extremity. Dr Levin found that Petitioner suffered no permanent partial impairment of the left lower extremity.

With regards to paragraph (ii) of Section 8.1(b) of the Act:

- ii. Petitioner continues to be employed in his pre-injury employment as a Truck Driver Sales Representative with Respondent. The Arbitrator has reviewed the job description entered as Petitioner's Exhibit 4 and finds that this position involves heavy work. The Arbitrator concludes the Petitioner's permanent partial disability ("PPD") may be larger than an individual who performs lighter work.

With regards to paragraph (iii) of Section 8.1(b) of the Act:

- iii. Petitioner is 44-years old. The Arbitrator considers the Petitioner to be approaching middle-age and concludes that Petitioner while he may have to live and work with the disability for a longer period of time than an older individual with the same injuries, he may just as likely recover from his injury more quickly than an older worker.

With regards to paragraph (iv) of Section 8.1(b) of the Act:

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- iv. At the present time, there is no evidence that Petitioner's future earning capacity has diminished as a result of this injury. Petitioner continues to work with Respondent driving a truck. Petitioner has remained in a full duty capacity with Respondent. The Petitioner testified that he received a raise since the accident. Petitioner testified that this raise was provided to all employees, not just Petitioner.

With regards to paragraph (v) of Section 8.1(b) of the Act:

- v. Evidence of disability in the medical records finds that x-rays of the left foot performed on December 8, 2011, revealed cuboid and fifth proximal phalanx fractures. Surgery on the right foot performed on December 8, 2011 revealed fractures of the right fourth and fifth metatarsals and dislocation of the proximal interphalangeal joint of the fifth toe. The procedures performed included closed manipulation and percutaneous screw fixation of the fifth metatarsal and closed manipulation of the dislocation of the metatarsophalangeal joint. (PX2, p. 8-14) Post surgery, Petitioner completed 12 physical therapy sessions to the bilateral feet between February 28, 2012 and March 26, 2012. (PX2, p. 37-43)

Petitioner was allowed to return to work on a full duty basis on April 5, 2012. He continued experiencing pain in his right foot and was re-examined by Dr Dhiman on December 3, 2012. Dr Dhiman prescribed surgery to remove the screws and washer. (PX2, p. 30). Petitioner

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underwent surgery on December 27, 2012 but only one screw was removed. (PX2, p. 31). One screw and the washer remain in place as of the date of the hearing. Petitioner was discharged by Dr Dhiman on March 4, 2013. (PX2, p. 34-35)

At the time of the examination with Dr Levin, Petitioner had a scar over the right fifth proximal metacarpal area with some tenderness over the base of the right fourth and fifth metatarsals. He had slightly reduced pinprick sensation over the dorsal and lateral aspect of the right foot.

Petitioner made subjective complaints of increased pain that interferes with normal work activities both inside and outside of the home, increased pain that interferes with personal care and increased pain that interferes with recreation hobbies and activities that are important to him. (RX3 and PX3)

The determination of PPD is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying Section 8.1b of the Act, 820 ILCS 305/8.1b and considering the relevance and weight of all these factors, including Dr Levin's AMA impairment rating, the Arbitrator concludes that Petitioner has sustained a 30% permanent loss of the right foot and an 8% permanent loss of the left foot.