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RICHARD LEE, PETITIONER, v. FLUID MANAGEMENT, RESPONDENT.

NO. 11WC 048656, 11WC 048657

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2013 Ill. Wrk. Comp. LEXIS 1195

September 6, 2013

JUDGES: David A. Kane

OPINION: [*1]

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION REVERSE 19(b)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **8/26/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
L. What temporary benefits are in dispute?
TTD
O. Other Temporary Transitional Employment

FINDINGS

On the dates of accident, **10/5/11 and 11/28/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent,

On these dates. 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 **$ 41,305.68**; [*2] the average weekly wage was **$ 809.92.**

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

The issue of all reasonable and necessary charges for all reasonable and necessary' medical services is reserved for future determination.

Respondent shall be given a credit of **$ 47,977.52** for TTD, **$ N/A** for TPD, **$ N/A** for maintenance, and **$ N/A** for other benefits, for a total credit of **$ 47,977.52**.

Respondent is entitled to a credit of **$ 47,977.52** under Section 8(j) of the Act.

ORDER

With regard to Issue L, the amount of Temporary Total Disability benefits due and payable, see Addendum. With regard to Issue O, Temporary Transitional Employment, see Addendum. The Respondent's reverse 19(b) is denied.

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

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered [*3] 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

September 6, 2013

Date

ADDENDUM

This matter came to be heard on the Respondent's reverse 19(b) on the issue of "Temporary Transitional Employment." Arbitrator's Exhibit 1 is the Request for Hearing form signed by the parties. The issues in dispute are as follows:

1. Whether the Respondent is liable for TTD after December 7, 2012;

2. Whether the Petitioner is required to accept "Temporary Transitional Employment."

STIPULATED FACTS AND MEDICAL HISTORY

The parties stipulated to the following facts and medical history:

. 4/25/12. The Petitioner had his first right shoulder surgery consisting of an acromioplasty, biceps tenodesis and distal clavical resection. Physical therapy followed this surgery.

. 10/31/2012. The Petitioner underwent left elbow lateral epicondylitis [*4] and radial tunnel syndrome surgery.

. 11/2/2012-12/11/2012. The Petitioner followed up with 8 occupational therapy sessions for the left elbow.

. 12/7/12. The Petitioner received a letter from the Respondent requesting the Petitioner to accept temporary transitional employment (TTE). See Respondent's Exhibit 3 which included a TTE weekly summary of hours attended, as well as a volunteer application which included a requirement that the Petitioner undergo TB screening.

. 12/10/2012. The Petitioners physician's office note indicated the Petitioner was undergoing physical therapy two times a week for the right shoulder and left elbow. He also received an injection on that date to the right shoulder.

. 1/4/2013. Petitioner received four more weeks of physical therapy to the left arm/elbow, which was denied by Utilization Review.

. 1/9/2013. At this physicians visit, the Petitioner showed hypertrophic bone in the right shoulder and A/C joint.

. 2/8/2013. The Petitioner received restrictions from his physician of no forceful gripping with the left hand, limited lifting, pulling and pushing, 5 lb. weight restriction for the left arm and a prescription for a MRI without contrast to [*5] the right shoulder. An injection was also given on this date to the Petitioner's right shoulder.

. 3/7/2013, The Petitioner underwent his second surgery on the right shoulder, and his third surgery overall.

. 5/10/2013. The Petitioner was still undergoing physical therapy on the right shoulder.

. 5/21/2013. The Petitioner received restrictions of no lifting, pushing or pulling greater than 10 lbs and no overhead use of the arms.

. 6/18/2013. The Petitioner received a script from his physician for strengthening therapy five times a week for four hours each day. His physical restrictions were the same as those imposed on 5/21/13.

. 7/16/2013. The Petitioner was issued a second letter requesting that he accept TTE.

. 7/26/3013. The Petitioner first received approval for the strengthening therapy that was prescribed on June 18, 2013. However, approval was given for only two weeks.

. 8/13/2013. The Petitioner received a prescription for an additional two weeks of strengthening therapy at 4-5 hours per day in an attempt to return to his normal work duties. See Respondent's Exhibit 5, "Assessment and Plan." Pursuant to page 2 of RX 5, the Petitioner received restrictions of no lifting, [*6] pushing or pulling greater than 10 lbs.

It is stipulated that the Respondent/employer has not accommodated the Petitioner's work restrictions.

PRELIMINARY MATTER

The Arbitrator notes that the Petitioner filed a Motion to Dismiss the Respondent's reverse 19(b) on the basis that there is no statutory authority under the Illinois Workers' Compensation Act for Temporary Transitional Employment and, as a result, the 19(b) could not state a cause of action. The Arbitrator has denied that motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

There was one witness who testified. This was Tamara McMahon, an employment specialist employed by Cascade, which is a company owned by Liberty Mutual Insurance Company, the insurance carrier for the Respondent in this case. Ms. McMahon testified that her business address is in Grand Rapids, Michigan. She has been involved in attempting to place employees in temporary transitional employment in various states since 2010 She testified that she did not obtain approval from the Petitioner's physician for any of the TTE positions suggested for the Petitioner. As for the position with Addolorata Villa, a retirement village referred to in the Cascade [*7] December 7, 2012 letter, RX 3, Ms. McMahon stated that position was no longer available shortly after the December 7, 2012 letter was issued. She testified that three other volunteer positions were not sent to the Petitioner until July 16, 2013; in a letter to the Petitioner (RX 1). All of these volunteer positions called for hours between 8:30 a.m. to 5:00 p.m., 9-5 pm or 10-5 pm. She claims that there were no minimum hours, but could not say whether the Petitioner would be able to volunteer for these positions while undergoing strengthening therapy five hours a day.

Ms. McMahon testified that there were "numerous studies" that describe the benefits to be received from performing temporary transitional employment. On cross examination she was unable to name even one of those studies. She did admit that the Petitioner would benefit in body and mind from performing the strengthening therapy that he is presently undergoing. This would be the same benefit to be received from TTE, according to Ms. McMahon.

Ms. McMahon has no knowledge of the Illinois Workers' Compensation Act (Act) or whether TTE is referenced in any way under the Act. She admitted that Liberty Mutual Insurance Company [*8] would no longer have to pay tem-

porary total disability if the Petitioner performed TTE or, if the Petitioner did not receive his full salary as previously earned while performing TTE, Liberty Mutual's payments would decrease to an amount equivalent to wage differential. The Arbitrator concludes that Liberty Mutual, which owns Cascade, has a financial bias in this matter.

As for Petitioner travelling to and from the site where the TTE would be performed, Ms. McMahon testified that he would be on his own, and any injury he might suffer would not be the responsibility of the Respondent. She also did not believe the Petitioner would have a right to be reimbursed for mileage. She testified that the Petitioner would be required to complete a weekly tracking form, and to report his hours, despite the fact that he could work as few hours as he wished, and that this was a volunteer position. She testified that the Petitioner would be required to have a TB test to perform volunteer work at Addolorata Villa, but could not state what would happen if the Petitioner became infected by a dirty needle.

CONCLUSIONS OF LAW

There is no statutory authority in the State of Illinois for Temporary [*9] Transitional Employment and the Act does not refer to Temporary Transitional Employment. It is clear from the evidence and the stipulation of medical history that the Petitioner's disability and work restrictions still exist. Indeed, as of the date of the hearing, the Petitioner was still undergoing strengthening therapy 4-5 hours per day, 5 days a week. Section 8(b) of the Act provides that weekly compensation shall be paid as long as the total temporary incapacity lasts. As stated by our Illinois Appellate Court in *Anders vs. Industrial Comm.*, 332 Ill. App.3d 501, *773 N.E. 2d 746* (4* Dist. 2002), a worker has not reached maximum medical improvement on the date he was returned to work on a light duty basis, and was entitled to continued temporary total disability benefits as the employer refused to provide work within the petitioner's restrictions.

It is clear that the Petitioner's condition has not stabilized. Our Appellate Court has held that where the petitioner's condition has not stabilized, and he was still receiving medical treatment, he had not reached maximum medical improvement, and thus TTD was proper. *Mobile Oil Corp. vs. Industrial Comm.* [*10] , 327 Ill. App. 3d 778, *764 N.E. 2d 539 (3d Dist. 2002).*

The Arbitrator concludes as follows: The Illinois Workers' Compensation Act makes no mention of TTE. The Petitioner has been compliant with his medical care. The Respondent cannot accommodate the Petitioner's restrictions. The Petitioner has attended ongoing medical treatment including physical and occupational therapy and strengthening therapy, leaving little time to do volunteer activities. The volunteer position referred to in RX3 was unavailable even if this Petitioner wished to accept it. Liberty Mutual, the Respondent's workers' compensation carrier, has a financial bias in that it stands to gain by reducing its obligation to pay TTD. There are many unresolved issues concerning TTE, including the merit and purpose of volunteering for a minimal number of hours; who is responsible for injuries the Petitioner may suffer traveling to and from TTE, or at the site of the TTE; and mileage reimbursement.

The Arbitrator finds that the Respondent has failed to prove a reverse 19(b) and thus the Arbitrator denies the Respondent's reverse 19(b) Petition.

This Arbitrator has no inherent problem with the concept [*11] of temporary transitional employment, but it is not authorized under the Illinois Workers' Compensation Act and therefore, Respondent cannot terminate Petitioner's rights under the Act in a reverse 19(b) based on this non-existent concept under Illinois law. A denial of the reverse 19(b) is required under the circumstances.

Legal Topics:

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

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ANTHONY BERNDT, PETITIONER, v. HRIBAR TRUCKING, INC., RESPONDENT.

NO. 12WC 10057

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

14 IWCC 152; 2014 Ill. Wrk. Comp. LEXIS 157

February 27, 2014

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or [*2] after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 41,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

ATTACHMENT:

ARBITRATION DECISION

19(b)

Anthony Berndt
Employee/Petitioner

v.

Hribar Trucking, Inc.
Employer/Respondent

Case # **12** WC **010057**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Cook**, on **May 29, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings [*3] on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. [X] Is Petitioner's current condition of ill-being causally related to the injury?
J. [X] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] Is Petitioner entitled to any prospective medical care?
L. [X] What temporary benefits are in dispute?
[X] TTD

FINDINGS

On the day of accident, 2/28/12, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **50,411.40;** the average weekly wage was $ **969.45.**

On the date of accident, Petitioner was **41** years of age, ***married*** with **1** dependent [*4] child.

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

Respondent shall be given a credit of $ **19,155.54** for TTD, $ **3,049.55** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $ **22,205.09.**

Respondent is entitled to a credit of $ **37,582.60** under Section 8(j) of the Act.

ORDERS

Medical Expenses

The Arbitrator awards Petitioner the following medical expenses, subject to the fee schedule and with Respondent receiving credit for any payments made toward said expenses, as reflected in RX 2: 1) Dr. Maiman/Medical College of Wisconsin, $ 36,467.98; Froedtert Hospital, $ 38,505.44; MCMC Radiology Services, $ 1,352.00; and OccuCare, $ 2,993.00.

Temporary Total Disability

See pages 12-13 of the attached conclusions of law for an explanation of the Arbitrator's temporary total disability award. With respect to the disputed period, October 15, 2012 through May 29, 2013 [with October 15, 2012 through December 23, 2012 involving a claimed underpayment], the Arbitrator awards a total of $ 18,669.95 in benefits.

Prospective Care

The Arbitrator awards prospective [*5] care in the form of follow-up visits to Dr. Maiman and additional physical therapy as recommended by Dr. Maiman.

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

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

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

6/25/13

Date

Arbitrator's Findings of Fact

The parties agree that Petitioner was injured on February 28, 2012 while working as a local deliveryman for Respondent. Arb Exh 1. Petitioner testified his job involved driving a semi from location to location, delivering and picking up ash and [*6] cement. He was required to climb stairs, pull and hook up hoses weighing 100 to 200 pounds and lift various items, with the heaviest being tires.

Petitioner testified he was in good health when he began working for Respondent on July 12, 2002. He denied having any neck problems or undergoing any neck treatment prior to his February 28, 2012 accident. Immediately prior to that accident, he was driving his work vehicle southbound on 294, near I-88, when traffic slowed. He brought his semi to a complete stop and was then rear-ended by another semi. He described the impact as forceful, referencing the photographs in Group PX 11. The semi that hit him pushed his 79,700-pound vehicle forward about a car length. He experienced stiffness in his neck, back and shoulders after the accident.

Petitioner testified he sought treatment on the day of the accident at Aurora Occupational. The brief treatment note from this facility sets forth a consistent account of the accident. Petitioner complained of a "brutal headache with neck and shoulder pain." Petitioner was referred to an Emergency Room. PX 6. No Emergency Room records are in evidence.

Petitioner testified he stayed home from work on February [*7] 29, 2012. On that day, he experienced numbness and tingling down his left arm into his fingertips. He had never experienced this sensation before. He resumed working on March 1, 2012 but experienced increased pain in his head, neck and shoulders while operating his semi. He sought treatment that day at United Occupational Medicine, where he saw Dr. Foster. The doctor's note sets forth a consistent account of the accident and subsequent care at Aurora Occupational. Petitioner reported that the impact was sufficient to cause the backside of his trailer to collapse. The doctor noted that Petitioner's symptoms increased that day after he resumed working and was "bouncing" in his truck. Petitioner complained of pain in his neck and "down triceps of L arm." He denied any previous injuries involving these areas.

Dr. Foster examined Petitioner and obtained cervical spine X-rays, which showed mild reversal of normal lordosis secondary to positioning or muscle spasm. The doctor diagnosed a cervical strain and possible radiculitis. He prescribed a short course of Prednisone. He noted that Petitioner was required to "handle hoses." He released Petitioner to light duty as of March 5, 2012, with [*8] no lifting over ten pounds and no commercial vehicle driving. PX 3.

Petitioner returned to Dr. Foster on March 7, 2012 and reported that his neck was "still very tight" and that he was occasionally experiencing mild headaches. On examination, Dr. Foster noted that Spurling's testing resulted in slight

pain in the paracervicals. He noted that Petitioner expressed concern about being able to maneuver heavy 20-foot hoses at work. The doctor indicated he might require physical therapy. The doctor continued the previous work restrictions. PX 3.

On March 8, 2012, Petitioner called Dr. Foster's office and requested a muscle relaxant. The doctor prescribed Skelaxin. PX 3.

When Petitioner next saw Dr. Foster, on March 12, 2012, he denied improvement. He complained of pain in the back of his neck, increased by neck motion, occasional pain radiating down the back of his left arm and significant headaches. The doctor prescribed Celebrex and physical therapy. He continued the previous work restrictions. PX 3, 8.

Petitioner began a course of therapy at Sports Physical Therapy and Rehab Specialists on March 13, 2012. On that date, the evaluating therapist noted complaints of headaches and "neck [*9] pain with referred left UE pain." On examination, the therapist noted a positive Spurling's on the left "with referred pain into C7 distribution (5th finger/triceps)" and a "severe increase in cervical muscle tone bilaterally," left worse than right. PX 8.

Petitioner continued attending therapy thereafter. He testified the therapy caused his symptoms to worsen. On March 27, 2012, he returned to Dr. Foster and complained of a "very sore neck" and occasional headaches. The note reflects that Petitioner denied "radiation down arm" but pointed to a tender spot at C7. The doctor released Petitioner to light duty with no commercial vehicle driving. PX 3. On March 30, 2012, Petitioner's physical therapist noted overall improvement but continued localized pain with the "greatest pain along C7 to palpation." PX 8.

When Dr. Foster next saw Petitioner, on April 5, 2012, he described Petitioner as "difficult to assess" based on a lack of objective abnormalities. Due to Petitioner's "somewhat consistent" C7 complaints, however, he placed therapy on hold and prescribed a cervical spine MRI. PX 3. The MRI, performed at Kenosha Open MRI on April 16, 2012, demonstrated mild annular bulging of the C4-C5 [*10] disc with a "shallow focal disc protrusion midline and posteriorly effacing the spinal cord creating moderate vertebral canal stenosis without significant foraminal stenosis," a tiny focal disc protrusion at C5-C6 with mild effacement of the spinal cord creating moderate vertebral canal stenosis without significant foraminal stenosis, and annular bulging of the disc at C6-C7 "with broad-based protrusion midline and posteriorly creating mild to moderate vertebral canal stenosis without foraminal stenosis." PX 2.

On April 6, 2012, Petitioner called Dr. Foster's office and requested refills on his Skelaxin and Flexeril as well as pain medication for his headaches. The doctor prescribed Tramadol and Flexeril.

On April 9, 2012, Petitioner's physical therapist recommended that Petitioner undergo a cervical spine MRI due to "fluctuating progress" in therapy and Petitioner's concern about the level of his discomfort at C7. PX 8.

Petitioner returned to Dr. Foster on April 10, 2012. The doctor noted that Petitioner denied radicular symptoms but complained of tightness and occasional "massive" headaches. On examination, the doctor noted mild tenderness to palpation of C6-C7. He refilled the [*11] Skelaxin and made a notation concerning Dr. Didinski, a spine specialist. At the next visit, on April 17, 2012, Dr. Foster reviewed the MRI results and noted that Petitioner planned to see Dr. Maiman, a physician of his own choice, rather than Dr. Didinski. Dr. Foster recommended against surgery. He suggested that Petitioner undergo an epidural steroid injection. He broached the idea of Petitioner returning to his regular duties but held off after again noting that Petitioner was required to lift heavy hoses. Following a discussion with a case manager named "Jason," Dr. Foster imposed new restrictions: "may drive personal vehicle" and "can lift up to 15 pounds." PX 3.

On April 26, 2012, Petitioner saw Dr. Maiman, a neurosurgeon affiliated with the Medical College of Wisconsin/Froedtert Hospital. PX 1, p. 5. The doctor's initial note reflects that Petitioner experienced an immediate onset of largely left-sided neck pain, associated with headaches and pain in the trapezius, after being rear-ended by a semi on February 28, 2012. The doctor also noted a complaint of "occasional painful paresthesias going into the left arm." He indicated that Petitioner denied right arm and lower extremity [*12] complaints. He also indicated that Petitioner denied any previous history of significant spinal problems.

Dr. Maiman advised Petitioner to stop smoking.

On examination, Dr. Maiman noted a decreased cervical range of motion to the left "with severe paravertebral spasm throughout his neck and up into the trapezius musculature." Flexion was normal but extension was "limited to about 15 degrees, also with a severe paravertebral spasm." Motor and sensory examinations were normal. Left triceps jerk was decreased.

Dr. Maiman reviewed the MRI. He expressed concern with the largely passive nature of the therapy performed to date. He requested the therapy records and prescribed flexion-extension cervical spine X-rays. Those X-rays, performed the same day, showed no abnormalities. PX 7.

At Dr. Maiman's recommendation, Petitioner resumed therapy at Sports Physical Therapy & Rehab Specialists on May 8, 2012. By July 2, 2012, he had attended thirty-six sessions and was demonstrating the ability to perform within a light physical demand level. His therapist described his truck driver occupation as within the heavy physical demand level. PX 8.

Petitioner returned to Dr. Maiman on July 5, 2012. At [*13] that visit, the doctor described Petitioner as "clearly improved" but continuing to experience a fair amount of pain. On examination, the doctor noted a near-full range of cervical spine motion but with mild paravertebral tenderness. He described his neurologic examination as unremarkable. He released Petitioner to light duty and instructed him to continue attending therapy. He noted that Petitioner expressed some concern about being able to pass a DOT exam. He released Petitioner to light duty with no lifting over 20 pounds, no repetitive bending/twisting and no overhead work. PX 7.

Petitioner continued attending therapy thereafter. In mid-July 2012, his therapist noted increased symptoms secondary to simulated work activity, "hose stacking," during therapy. The therapist asked Dr. Maiman to prescribe a home cervical traction unit. PX 8. On July 25, 2012, Petitioner reported that he was resuming light duty six hours per day. On July 27, 2012, Petitioner reported that his neck was "really sore from going back to work for office work, due to prolonged looking toward and cervical rotation with paperwork." On August 15, 2012, the therapist sent a re-evaluation note to Dr. Maiman indicated [*14] Petitioner had regressed during the preceding three to four weeks. PX 8.

On August 16, 2012, Petitioner returned to Dr. Maiman, with the doctor recording the following history:

> "Mr. Berndt came in today for follow-up of his cervical radiculopathy. In the interim, the therapist describes him as having deteriorated. He has been having increased pain, and increasing difficulties doing his exercise program, although he continues to do most of it. He denies any new trauma or other neurological abnormalities."

On examination, Dr. Maiman noted a decreased range of motion to the left with moderate paravertebral tenderness. He stated: "it appears to me that he does have some decreased sensation in the C7 distribution which is a new phenomenon." He recommended a cervical spine CT scan, noting that the previous MRI "does not define the foramen adequately." He put therapy on hold, continued the previous work restrictions and prescribed Vicodin for pain. PX 1.

Petitioner underwent the recommended CT scan at MCMC Radiology Services on August 27, 2012. The radiologist interpreted the scan as showing straightening of the cervical spine, indicating spasm, and a "mild posterior bulge of the C6-C7 [*15] disc abutting the thecal sac without evidence of central canal or neuroforaminal stenosis." PX 5.

On October 5, 2012, Dr. Maiman administered a left C6-7 transforaminal injection at Froedtert Hospital. PX 4. Soriano Dep Exh 2. Petitioner testified that this procedure did not relieve his symptoms. By the time he underwent this procedure, he was experiencing symptoms in both arms.

On October 10, 2012, a placement coordinator affiliated with an entity called "ReEmployAbility, Inc." sent a letter to Petitioner's counsel referencing Petitioner's work restrictions and indicating that a transitional full-time job as a thrift store sales assistant had been located for Petitioner, In the letter, the coordinator indicated that Petitioner would be paid $ 16.00 per hour while working in the thrift store. The coordinator referred to the transitional job as an "extension" of Petitioner's employment by Respondent. The coordinator indicated Petitioner would have to meet with Jon Bender on October 17, 2012 and begin working at the thrift store the following Monday, October 22nd. RX 3.

On October 18, 2012, Petitioner saw Dr. Maiman again, with the doctor recommending a single level procedure at C6-C7. [*16] The doctor discussed two options with Petitioner: "artificial disc versus an ACDF with iliac crest bone." He informed Petitioner he would have to be nicotine free for at least three weeks prior to surgery. He released Petitioner to light duty with "no repetitive looking up or down."

At Respondent's request, Petitioner saw Dr. Soriano, a neurosurgeon, for a Section 12 examination on December 17, 2012. The doctor's report (Soriano Dep Exh 2) sets forth a consistent account of the accident of February 28, 2012. The report reflects that Petitioner was "pitched forward quite hard" at impact, with his hat flying off and his Bluetooth coming out of his ear. Dr. Soriano noted that the cab of Petitioner's semi was operable after the collision and that Petitioner drove the cab sixty miles back to Caledonia, Wisconsin.

Dr. Soriano noted that Petitioner complained of headaches, numbness and tingling in his arms and fourth and fifth fingers, shoulder pain and spasms down to his toes. He also noted that Petitioner was currently taking Flexeril and Vicodin, as well as Percocet for "really bad pain."

Dr. Soriano interpreted the August 27, 2012 CT scan as showing a "broad spur with calcification slightly [*17] towards the left foramen but without significant compression."

Dr. Soriano indicated he reviewed a First Report of Injury, records from United Occupational Medicine, an initial therapy evaluation and Dr. Maiman's records.

On examination, Dr. Soriano noted a normal gait, 5/5 strength in all motor groups of the hands and upper extremities, symmetrical reflexes at the biceps, triceps and brachioradialis, negative Tinel's signs at the elbows and wrists, a normal range of neck and shoulder motion, and no point tenderness or spasm in the neck, shoulders or arms.

Dr. Soriano opined that the rear-end collision of February 28, 2012 resulted in a cervical strain. He found no causal relationship between the collision and Petitioner's continued complaints of neck and trapezius pain. He described the MRI and CT findings as "consistent with mild degenerative changes at multiple levels" with "no evidence of neuroforaminal narrowing" and "no evidence of any acute aggravation or acute findings related to the accident." He described Petitioner's complaints as "bilateral in a non-dermatomal distribution and somewhat exaggerated."

Dr. Soriano found Petitioner to be at maximum medical improvement and [*18] capable of full duty. He described Dr. Maiman's surgical recommendation as "difficult to justify, at best." He indicated that Dr. Maiman was the only provider to have made a "very soft neurological finding," i.e., apparent decreased sensation in the C7 distribution. Soriano Dep Exh 2.

The parties agree that Respondent stopped paying workers' compensation benefits as of December 23, 2012. Arb Exh 1. PX 9. Petitioner testified he received benefits in the amount of about $ 218.00 per week from October 23, 2012 through December 23, 2012.

Petitioner testified that, in late December, after Dr. Soriano found him capable of full duty, he contacted Respondent's human resources representative about resuming employment. The representative instructed him to undergo a new DOT examination. He underwent this examination on January 5, 2013. The examining physician disqualified him due to his use of narcotic pain medication and the need for clearance from Dr. Maiman.

Petitioner returned to Dr. Maiman on February 7, 2013. The doctor noted Petitioner had resumed smoking because his workers' compensation benefits had been terminated and he did not have money to pay for the anti-smoking medication he had [*19] been taking. Dr. Maiman recommended that Petitioner contact him as soon as he was completely nicotine-free so that the surgery could be scheduled with Petitioner's group carrier. Petitioner testified he quit smoking "cold turkey" so that he could undergo the surgery and get back to work. With reference to the "negative IME," Dr. Maiman addressed causation as follows: "note that I have said previously, and continue to assert, that [Petitioner] has a herniated disc in the cervical spine which is directly related to the work injury in question. There is absolutely no reason to think otherwise and all evidence is very clear." PX 7.

On March 21, 2013, Dr. Maiman performed an anterior cervical decompression, fusion and stabilization at C6-7, using an ACF spacer and a 14-mm plate. The surgery took place at Froedtert Memorial Lutheran Hospital. PX 4, 7. Petitioner testified that, by the time the surgery took place, he was experiencing pain with any movement of his head.

On April 11, 2013, Dr. Maiman gave a deposition on behalf of Petitioner. PX 1. Dr. Maiman testified he obtained board certification in neurosurgery in 1985. He currently practices at the Medical College of Wisconsin, where [*20] he is Sanford J. Larson distinguished professor and chairman of the department of neurosurgery. PX 1 at 5. He performs 350 to 400 spine surgeries annually. About 40% of these surgeries involve the cervical spine. PX 1 at 6. He routinely interprets MRI and CT scans. PX 1 at 6.

Dr. Maiman testified he has an independent recollection of Petitioner. PX 1 at 6. He identified Maiman Dep Exh 2 as a copy of his outpatient notes concerning Petitioner. PX 1 at 7. He first saw Petitioner on April 26, 2012, at the referral of Dr. Jeranek, Petitioner's personal care physician. PX 1 at 8. Petitioner related that he was rear-ended by a semi on February 28, 2012. PX 1 at 8-9.

Dr. Maiman testified his initial examination findings of a significantly reduced range of motion and "a lot of neck spasm" into the back of the neck and trapezius were "consistent with muscle injury" in Petitioner's neck. PX 1 at 9. Petitioner's MRI, which he personally reviewed, showed three-level disc bulging, with the bulge at C6-7 "more prominent"

and "in the midline, heading over to the nerve going to the left arm." PX 1 at 10-11. The MRI findings correlated with the examination findings. PX 1 at 11. Petitioner denied having [*21] any pre-existing cervical spine problems. PX 1 at 12.

Dr. Maiman testified he diagnosed a cervical radiculopathy, i.e., "irritation of the nerve root of the C6-7 nerve." Based on the history and examination, he opined that this condition stemmed from the motor vehicle accident. PX 1 at 12-13. He recommended therapy. Petitioner subsequently reported improvement. On July 5, 2012, he released Petitioner to light duty and told him to continue therapy. PX 1 at 14. As of August 16, 2012, however, Petitioner had deteriorated, per his physical therapist, and was "not doing well." Petitioner was experiencing numbness down his arm that he had not previously complained of. The numbness involved the same nerve, i.e., the C7 nerve root, that Petitioner had previously complained of. PX 1 at 16. Petitioner's condition as of August 16, 2012 was a "continuation of the same injury." PX 1 at 17. He obtained a CT scan because he needed to understand why Petitioner had gotten worse. The MRI showed a disc and foraminal narrowing but the narrowing was not catastrophic. He ordered a CT scan because MRIs do a "lousy job of bone definition." The CT scan was consistent with the MRI. It confirmed that there [*22] was disc bulging and compression of the C7 nerve. PX 1 at 19. The motor vehicle accident was a "principal factor" in this compression. PX 1 at 19-20. He held off on recommending surgery to see whether therapy would help. Petitioner did therapy faithfully for several months. Petitioner "got worse in spite of that and maybe, in part, because of it." PX 1 at 21-22. The need for the therapy stemmed from the motor vehicle accident. PX 1 at 22. He discussed surgery with Petitioner and presented him with two alternatives. Petitioner could either undergo an anteriocervical fusion or an artificial disc replacement. He told Petitioner that surgery was "not absolutely necessary in the sense that he was going to be paralyzed if he didn't have it" but he also told Petitioner his pain was not likely to improve without surgery. PX 1 at 23.

Postoperatively, Petitioner returned to Dr. Maiman on April 18, 2013. The doctor indicated Petitioner was "not doing as well as expected" in that he was complaining of trembling in his left hand as well as neck pain. On examination, the doctor noted a full cervical range of motion with minimal tenderness. Cervical spine X-rays showed good positioning of the fixation [*23] device and early incorporation of bone. The doctor refilled Petitioner's Flexeril and Percocet and noted that Petitioner was going to be starting therapy. PX 7.

Petitioner began a course of therapy at Accelerated Rehabilitation on April 18, 2013. The last therapy note in evidence is dated May 21, 2013. PX 8.

On May 28, 2013, Dr. Maiman's assistant, Steve Kisch, PA-C, issued a note indicating that Petitioner remained under Dr. Maiman's care and was to remain off work "until at least 6/20/13." PX 10.

Petitioner testified he is scheduled to undergo additional therapy, per Dr. Maiman. He wants to undergo this therapy. The surgery helped quite a bit in terms of his arm symptoms. He still has pain at the back of his neck as well as at the incision site but the pain is more localized than it was preoperatively. He feels he is continuing to improve. His current medications include Percocet and Cyclobenzeprine, a muscle relaxant. He started taking Percocet in December of 2012. He began taking Cyclobenzeprine in April of 2012. He is scheduled to return to Dr. Maiman on June 20, 2013. He is not sure when he will be released to work. Dr. Maiman has had him off work since the surgery. He wants [*24] to return to work for Respondent but has to pass a DOT examination in order to be able to do so.

Under cross-examination, Petitioner testified his truck was not equipped with airbags. At impact, his head bounced off the head rest behind him. He did not undergo any treatment at the scene of the accident. After the accident, he was able to drive back to Wisconsin. Between April and May of 2012, he performed light duty at Respondent. The light duty consisted of inventory work in Respondent's warehouse. He had to count batteries as part of this work. He was required to look down at times but, for the most part, the work was at eye level. While he was subject to restrictions per Dr. Maiman, Respondent offered him restricted work, through an entity called "Re-EmployAbility." At the point at which Respondent extended this offer, the work was within Dr. Maiman's restrictions. Petitioner testified he met with Jon Bender, the manager of the store where he was supposed to work, and told Bender he was seeing Dr. Maiman the following day. When he saw Dr. Maiman, the doctor added a work restriction, indicating he needed to keep his head in a neutral position. Petitioner testified he advised Bender [*25] of this added restriction, with Bender indicating he would have to check with human resources.

On redirect, Petitioner testified that, the week after Dr. Maiman added the work restriction, he contacted Bender again but never received an offer of employment from "Re-EmployAbility." Nor did he receive an offer of accommodated duty from Respondent. Dr. Soriano spent about an hour with him.

Respondent offered into evidence Dr. Soriano's deposition of May 21, 2013. Dr. Soriano became "board eligible" in neurosurgery in 1987. He achieved board certification in 1992. Soriano Dep Exh 1. He now concentrates on disorders of the spine and peripheral nerves. He stopped performing brain surgery about six years ago. RX 1 at 7. He devotes less than 20% of his practice to medical-legal work. He conducted 123 independent medical examinations in 2012 and 122 in 2011. RX 1 at 7. When he examined Petitioner, in December of 2012, Dr. Maiman was recommending a fusion at C6-7. RX 1 at 11. As of the examination, Petitioner was taking Flexeril and Vicodin. Petitioner complained of pain in his neck, mid-back and lower back as well as headaches and numbness/tingling in his arms and ring and small fingers. Petitioner [*26] indicated he was able to drive but spent most of his time reading or watching television. RX 1 at 12.

Dr. Soriano testified he reviewed treatment records and radiographic studies, including cervical X-rays and a cervical CT scan. RX 1 at 13. He reviewed an MRI report but not the actual MRI scan. RX 1 at 14. The CT scan showed a spur, or calcification, at C6-7, slightly to the left side of the disc. The spur was not causing any nerve root or spinal canal compression. RX 1 at 14-15. It takes at least a year or two for such a calcification to develop. A calcification develops in response to a bulging disc. RX 1 at 16. The MRI report documented a protruding or bulging disc at C6-7. The MRI was consistent with the CT scan. RX 1 at 15-16. There was no evidence of trauma in either the CT or the MRI. Both were consistent with "long-standing multi-level degenerative discs consistent with a 42-year-old spine." RX 1 at 17-18.

Dr. Soriano testified that Petitioner exhibited a normal gait and did not appear to be in distress. RX 1 at 13. Dr. Soriano described his examination of Petitioner as "completely normal." RX 1 at 14.

Dr. Soriano testified there were no objective findings to correlate with [*27] Petitioner's headaches or numbness/tingling. The tingling was into the ring and small fingers. "That would be the disc level associated with the C7-T1 disc" whereas the protrusion is at C6-C7. RX 1 at 18.

Dr. Soriano opined that the motor vehicle collision resulted in soft tissue whiplash-type injuries. He viewed Petitioner's initial symptoms as related to the collision. RX 1 at 19, 22. Petitioner's current symptoms, however, are non-anatomical and unrelated to the accident. RX 1 at 19-20.

Dr. Soriano testified that Petitioner "ha[s] a mild degree of central stenosis because of the breakdown of his discs from C3-C4 to C4-C5 to C5-C6 and at C6-C7." The terms "stenosis" is relative, however, because, in Petitioner's case, "it just means there is arthritis taking up some of the space where his spinal cord should be." RX 1 at 21. Petitioner has no evidence of foraminal stenosis. RX 1 at 21.

Dr. Soriano opined that Petitioner had reached maximum medical improvement as of the December 2012 examination. RX 1 at 22. He did not believe that Petitioner required surgery. He testified there is "no standard of care that would recommend surgery" to a person who has numerous complaints that are [*28] not reproducible or objective in nature. RX 1 at 23. Petitioner's complaints extend all the way to his feet and are clearly unrelated to the C6-C7 disc. RX 1 at 24.

Dr. Soriano testified that Petitioner is capable of driving a car and performing full duty. Petitioner has no neurological or mechanical deficits. RX 1 at 24. Petitioner exhibited a full range of neck motion and is thus capable of driving a truck. RX 1 at 24-25.

Under cross-examination, Dr. Soriano testified he charged $ 950 per examination and $ 1100 per hour for deposition time as of December 2012. RX 1 at 25. Of the independent examinations he performed in 2012, over 95% were for defendants. RX 1 at 25-26. He recalls some of Petitioner's history but, if he did not have Petitioner's picture available in his chart, he would not be able to recall what Petitioner looked like. RX 1 at 26. He has offices in several locations. He currently has privileges at a surgi-center and at the following hospitals: St. Anthony's, Swedish American and Rockford Memorial. RX 1 at 26-27. He probably performed 25 to 30 cervical surgeries per year during the last several years. RX 1 at 27. He is familiar with an "anterior cervical approach" [*29] fusion. He spent about 5 to 10 minutes actually examining Petitioner. RX 1 at 28. Petitioner did not relate any history of pre-existing cervical problems. Petitioner's records do not reveal any such history. RX 1 at 28. It is his belief that Petitioner's cervical spine was asymptomatic prior to the accident. RX 1 at 28. Petitioner described his duties but he did not receive a formal written description of those duties. RX 1 at 28-29. He has not reviewed the operative report or any treatment records post-dating October 18, 2012. RX 1 at 29. He did not review the MRI films. He may have asked to see these films. It is his practice to review his patients' MRI films. RX 1 at 30-31. He believes Petitioner injured the soft tissues of his neck, not his cervical spine. RX 1 at 31. The family doctor's visits, the radiographic studies and the attempts at therapy and medication were reasonable and necessary. RX 1 at 31-32. It was reasonable for Petitioner to be restricted, work-wise, early on in March. Petitioner related bilateral complaints. RX 1 at 32. Dr. Maiman stated that it "seemed" to him that Petitioner had some decreased

sensation in the C7 distribution. Dr. Soriano testified that using [*30] the phrase "it seems to me" is not a good way to word a medical finding. RX 1 at 34. He personally did not document decreased sensation when he examined Petitioner in December of 2012. RX 1 at 35. Since he has not seen Petitioner recently, he cannot comment on Petitioner's current condition or ability to work. RX 1 at 35. Petitioner did exhibit disc pathology. The pathology was a pre-existing bulging degenerative disc at C6-C7 that had already become calcified. That is consistent with the normal aging process. RX 1 at 36. The accident did not accelerate the degenerative process. RX 1 at 36-37. What is key is that Petitioner had a disc bulge, not a disc herniation. RX 1 at 37.

On redirect, Dr. Soriano testified that Petitioner does not require any lifting-related restrictions, based on his normal examination. RX 1 at 38. If the accident had aggravated Petitioner's disc pathology, the CT and MRI would have shown this. "No acute findings were even minimally suggested on the MRI scan." RX 1 at 39.

Under re-cross, Dr. Soriano testified he has no opinion as to whether Petitioner would be expected to improve, symptom-wise, following a cervical fusion. RX 1 at 39-40.

Arbitrator's Credibility [*31] **Assessment**

Dr. Foster described Petitioner as "difficult to assess" at one point but did not note any symptom magnification. Respondent's examiner, Dr. Soriano, described Petitioner's symptoms as non-anatomical but acknowledged that Petitioner exhibited disc pathology. Dr. Maiman, who has treated Petitioner over an extended period, did not note any inconsistencies.

Overall, the Arbitrator found Petitioner credible.

Did Petitioner establish a causal connection between his undisputed work accident and his current condition of ill-being?

The Arbitrator finds that Petitioner met his burden of proof on the issue of causal connection. Specifically, the Arbitrator finds that the undisputed work accident of February 28, 2012, in combination with subsequent flare-ups associated with attempts to resume working, led to the need for the cervical spine surgery that Dr. Maiman performed on March 21, 2013. In so finding, the Arbitrator relies on the following:

-Petitioner's credible account of the force associated with the collision of February 28, 2012
-Petitioner's credible denial of neck problems prior to the collision
-The lengthy duration of Petitioner's pre-accident employment by [*32] Respondent, with that employment involving the manipulation of heavy hoses
-Petitioner's credible testimony that he experienced numbness and tingling in his left arm the day after the accident
-The therapy notes of March 13, 2012 documenting a positive Spurling's and complaints in a C7 distribution
-Dr. Foster's documentation of a tender spot at C7 and subsequent referral to a spine surgeon
-The absence of any evidence of a specific re-injury after February 28, 2012
-Dr. Maiman's causation-related opinions

The Arbitrator finds Dr. Maiman more persuasive than Dr. Soriano. Dr. Maiman achieved board certification in neurosurgery in 1985. He is chairman of the department of neurosurgery at the Medical College of Wisconsin/Froedtert Hospital. PX 1, p. 5. He performs about 350 to 400 spinal surgeries annually. About 40% of these surgeries involve the cervical spine. PX 1, p. 6. Dr. Soriano, while also board certified in neurosurgery, performs only about 25 to 30 cervical spine surgeries annually. He devotes a portion of his practice to independent medical examinations, the vast majority of which are for defendants. Dr. Maiman treated Petitioner over an extended period while Dr. Soriano [*33] examined Petitioner once, with that examination lasting five to ten minutes. Under cross-examination, Dr. Soriano made two important concessions: Petitioner has disc pathology and was asymptomatic before the accident.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner seeks an award of medical expenses stemming from treatment provided by Dr. Maiman/Medical College of Wisconsin ($ 36,467.98), Froedtert Hospital (various charges from October 5, 2012 and March 2013 totaling $ 38,505.44), MCMC Radiology Services (CT scan, 8/27/12, $ 1,352.00) and OccuCare ($ 2,993.00 for post-operative

therapy performed in 2013). PX 4-5, 7-8. Respondent offered into evidence a print-out of payments its workers' compensation carrier made to Petitioner and various providers, including the Medical College of Wisconsin and Froedtert Hospital. RX 2. The Arbitrator has reviewed both the bills and the print-out. It appears that many of Dr. Maiman's charges, as well as the October 5, 2012 bill from Froedtert Hospital, were in fact paid by the workers' compensation carrier. The parties agree that other medical expenses were paid by the group carrier. Arb Exh 1.

Having found that [*34] Petitioner established causation, and noting Dr. Maiman's testimony as to the need for the surgery and Petitioner's testimony as to his post-operative improvement, the Arbitrator awards the medical expenses claimed by Petitioner, subject to the fee schedule, with the understanding Petitioner is not entitled to a double recovery and that Respondent is entitled to credit for any payments reflected on RX 2.

Is Petitioner entitled to temporary total disability benefits? Is Petitioner entitled to temporary partial disability benefits?

At the hearing, Petitioner claimed two intervals of temporary total disability: March 1, 2012 through April 18, 2012 and May 7, 2012 through May 29, 2013, the date of hearing. Respondent stipulated to the first claimed period and to a second period running from May 7, 2012 through October 14, 2012. Respondent claimed Petitioner was entitled to temporary partial disability benefits from April 19, 2012 through May 6, 2012 and from October 15, 2012 through December 23, 2012. The parties agreed that Respondent paid $ 22,205.09 in benefits (including $ 19,155.54 in temporary total disability and $ 3,049.55 in temporary partial disability) prior to the hearing. [*35] They also agreed that the disputed temporary total disability benefits totaled $ 18,669.95. Arb Exh 1.

Respondent's claim that Petitioner is entitled only to temporary partial disability benefits from October 15, 2012 through December 23, 2012 is premised on its argument that Petitioner failed to pursue an offer of alternative light duty as a thrift store sales associate through an entity known as "ReEmployAbility." That offer is further described in RX 3. Petitioner testified he presented to Jon Bender, the store manager, as required by Respondent, and made Bender aware he was returning to Dr. Maiman the following day. At the return visit, Dr. Maiman imposed an additional work restriction. Petitioner testified he promptly notified Bender of this restriction and followed up with Bender the following week but did not hear anything further from either Bender or Respondent. Respondent did not call any witness to refute Petitioner's testimony on these points. Records in evidence reflect that Respondent paid Petitioner $ 219.63 per week for ten weeks prior to December 23, 2012, at which point Respondent stopped paying benefits in reliance on Dr. Soriano.

The Arbitrator has elected to rely [*36] on Dr. Maiman rather than Dr. Soriano with respect to the issues of causation and work capacity. The Arbitrator finds that Petitioner acted in good faith in pursuing the possibility of a transitional light duty job with an entity other than Respondent. Petitioner continued to pursue this possibility even after Dr. Maiman imposed an additional work restriction on October 18, 2012. There is no evidence indicating that ReEmployAbility and/or Respondent offered work within Dr. Maiman's revised restrictions after October 18, 2012. Dr. Maiman continued to actively treat Petitioner after October 18, 2012.

At the hearing, the parties agreed that the amount of disputed temporary total disability (including the claimed $ 4,266.70 underpayment for the ten-week period preceding December 23, 2012) equals $ 18,669.95. Arb Exh 1. The Arbitrator finds that Petitioner's condition remained unstable and that he was temporarily totally disabled from October 15, 2012 through the hearing of May 29, 2013. The Arbitrator awards Petitioner $ 18,669.95 in temporary total disability benefits based on the parties' agreement and calculations.

Is Petitioner entitled to prospective care?

As of the hearing, [*37] Petitioner was continuing to undergo post-operative physical therapy per Dr. Maiman. Having found that Petitioner established causation vis-a-vis the surgery, and having elected to rely on Dr. Maiman, the Arbitrator awards prospective care in the form of follow-up visits to Dr. Maiman and additional physical therapy as recommended by the doctor.

Legal Topics:

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Przanowski,

Petitioner,

vs.

NO. 11 WC 35540

City of Des Plaines Department of Public Works, 14IWCC1122

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2013 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court.

14IWCC1122

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

DATED: DEC 22 2014
SJM/sj
o-11/13/2014
44

Stephen J. Mathis

Mario Basurto

David L. Gore

14IWCC1122

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Przanowski
Employee/Petitioner

v.

City of Des Plaines Department of Public Works
Employer/Respondent

Case # **11** WC **35540**

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **May 23, 2013, June 18, 2013, July 26, 2013,** and **August 19, 2013.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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. [x] What temporary benefits are in dispute?
[x] TPD [x] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Was there a bona fide job offer?**

FINDINGS

On July 28, 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 $62,064.70; the average weekly wage was $1,193.55.

On the date of accident, Petitioner was 48 years of age, *married* with 2 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 $29,238.03 for TTD, $7,580.63 for maintenance, and $10,000.00 advance against permanency, and $8,990.93 in underpayment of maintenance and TTD, for a total credit of $55,809.59.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $795.70/week for 45 4/7^{ths} weeks, commencing July 29, 2011 through June 12, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $795.70/week for 12 weeks, commencing June 13, 2012 through September 4, 2012, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $29,238.03 for TTD, $7,580.63 for maintenance, and $10,000.00 advance against permanency, and $8,990.93 in underpayment of maintenance and TTD, for a total credit of $55,809.59.

Respondent shall pay Petitioner permanent partial disability benefits, commencing October 29, 2012, of $448.93/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d) 1 of the Act.

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

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

Walter Black

Signature of Arbitrator

October 7, 2013
Date

OCT 8 - 2013

FACTS

Petitioner worked for Respondent in its Department of Public Works as a street maintenance worker. On July 28, 2011, he sustained a right arm work injury when he slipped while attempting to climb the wet steps of a street sweeper. He sought treatment the same day at Alexian Brothers Medical Center Occupational Health Clinic and was referred to Dr. Mark Levin, an orthopedic surgeon at Barrington Orthopedics.

Dr. Levin diagnosed a right shoulder rotator cuff tear. On August 12, 2011, Dr. Levin performed right shoulder arthroscopic surgery consisting of repair of the rotator cuff, labral anterior debridement, and subacromial bursectomy. Petitioner underwent post surgical physical therapy but continued to be symptomatic. Dr. Levin ordered an MRI arthrogram, which revealed a retear mildly retracted. On January 4, 2012, Dr. Levin performed a second arthroscopic procedure on Petitioner's right shoulder consistingof a revision repair of a recurrent rotator cuff tear. Petitioner underwent post-operative physical therapy, work hardening, and a valid functional capacity evaluation.

On June 12, 2012, Dr. Levin released Petitioner with permanent restrictions, as outlined in Petitioner's functional capacity evaluation, of occasional lifting up to 36 pounds, frequent lifting no greater than 18 pounds, and constant lifting no greater than 7 pounds. Petitioner was further limited to no overhead reaching, maximum of 5 pounds lifting at or up to shoulder level, reaching rarely at shoulder level, and no right arm above shoulder level for any work activity. Dr. Levin noted that Petitioner would likely have difficulty driving a large commercial vehicle due to discomfort with twisting at the shoulder.

Petitioner then reported to Respondent and inquired whether Respondent could accommodate Petitioner's permanent restrictions. Respondent advised it could not. Petitioner requested vocational rehabilitation. Respondent did not do so. Petitioner began a self-directed job search within his restrictions and began receiving weekly maintenance benefits commencing June 13, 2012.

Petitioner's claim continued in this manner until Friday, August 31, 2012. On that date, Timothy Ridder, Respondent's assistant director of Public Works and Engineering, contacted Petitioner by telephone and certified mail. Petitioner was ordered to report back to work on September 4, 2012, the Tuesday after Labor Day. Ridder advised that Respondent had determined it could accommodate Petitioner's job restrictions. Ridder followed this conversation with a certified letter to Petitioner the same day. Petitioner was advised that under no circumstances would he be permitted to exceed the permanent restrictions placed upon him by his physician. Petitioner told Ridder that he would need to discuss the matter with his attorney and his physician.

Thereafter, an e-mail exchange occurred between Petitioner's legal representative and Respondent's legal representative further discussing Respondent's offer. In an e-mail dated September 7, 2012, Respondent's legal representative confirmed that the position offered to Petitioner was temporary in nature and would only be available to petitioner for ninety days, with the expectation that Respondent would be in a position within that time frame to offer a permanent position to Petitioner. Respondent's representative stated that Respondent had not yet decided whether it would make the temporary position permanent and that it was, in fact, possible that

Respondent's City Council would need to get involved in order to make this job permanent. Respondent's counsel further advised Petitioner would receive his full wages during this time period.

Petitioner did not return to the position offered by Respondent, and he continued in his job search. Petitioner's representative subsequently responded in an e-mail advising that Petitioner would not abandon his job search efforts for three months to work in a position that was temporary in nature and not expected to last beyond ninety days, as doing so would do little to advance Petitioner in his ultimate pursuit of finding regular and continuous work in a reasonably stable labor market. Petitioner, through his representative, contended that Respondent's attempt to return Petitioner to a temporary job for ninety days did not constitute regular and continuous employment within a reasonably stable, identifiable labor market. Petitioner's counsel indicated that Petitioner would continue to welcome and consider any offer of permanent, regular and continuous employment which existed in a reasonably stable labor market, should Respondent desire to make such an offer.

On September 14, 2012, following a pre-disciplinary hearing, Respondent terminated Petitioner's employment effective September 4, 2012 citing unauthorized absence without leave, refusal to comply with instructions from supervisor, refusal to accept a work assignment, and insubordination. Petitioner's maintenance payments were terminated effective September 4, 2012.

On October 29, 2012, Petitioner found full-time employment as a parts delivery driver for MVP services delivering light parts with the use of his own vehicle. Petitioner's hours gradually decreased to the point that on January 9, 2013, he quit his employment and resumed a self-directed job search.

After beginning employment with MVP Services, Petitioner met with Lisa Helma, a certified vocational rehabilitation counselor with Vocamotive, Inc. on October 31, 2012, for the purpose of a vocational rehabilitation evaluation. Ms. Helma reviewed Petitioner's work history, educational background, medical restrictions, and job search. She also reviewed the position offered by Respondent to Petitioner. Ms. Helma opined that the position Petitioner had located as an auto parts delivery driver for MVP Services was suitable and that the wage he earned from this position, which she calculated to be $14.50 per hour was higher than what she was used to seeing from similar individuals. Ms. Helma opined that based upon his background and physical restrictions Petitioner's current earning capacity would probably be between $9.00 per hour and $11.00 per hour.

With respect to Respondent's August 31, 2012 offer of employment to Petitioner, Ms. Helma opined that the position offered to Petitioner did not exist in a reasonably stable labor market. Ms. Helma opined that the position offered to Petitioner did not directly correlate with any known position in the recognized labor markets. The level of accommodation offered to Petitioner was excessive. If Petitioner were to lose this position, he would not be able to find a similar one in the marketplace.

With respect to the wage which Respondent offered to Petitioner for the position outlined in its August 31, 2012 memorandum, Ms. Helma opined that the amount Respondent agreed to pay Petitioner for this was inflated, as a review of the job duties, all of which involved unskilled labor, typically paid minimum wage to $9.00 per hour.

Ms. Helma opined that based upon Petitioner's present restrictions he could not return to his previous position of employment with Respondent as a street maintenance worker. Ms. Helma opined that Petitioner suffered an impairment of earnings as a result of his work injury, and, although Petitioner was earning $14.50

per hour at the time of her evaluation, it was her understanding Petitioner had lost that job due to the economy and that his most probable wage-earning potential was between $9.00 and $11.00 hourly.

MAINTENANCE

Petitioner declined the temporary 90 day light duty job that was made available to him. Although he did not agree with the tone, manner, or circumstances of being ordered to return to work, he should have done so. By declining a temporary light-duty position, Petitioner conceded to the termination of maintenance.

Therefore, Petitioner is entitled to maintenance through September 4, 2012 and not thereafter.

WAS THERE A *BONA FIDE* JOB OFFER?

Lisa Helma's opinions are persuasive on this issue. Lisa Helma opined that the position offered to Petitioner did not exist in a reasonably stable labor market, that the position offered to Petitioner did not directly correlate with any known position in the recognized labor markets, that the level of accommodation offered to Petitioner was excessive, and that if Petitioner were to lose this position, he would not be able to find a similar one in the marketplace.

The Arbitrator adopts Lisa Helma's opinions.

Furthermore, the temporary 90 day light duty job offer was designed to avoid permanent liability under the Act. It was not offered until the Friday of a Labor Day weekend with an order to report to work for the following Tuesday. The arbitrator is aware that Respondent's witnesses felt that the 90 day job might become permanent. The arbitrator is not persuaded by Respondent's witnesses.

Based upon the foregoing, the Arbitrator finds that there was not a *bona fide* job offer for a permanent position.

NATURE AND EXTENT

The testimonial evidence, the medical evidence, and the vocational evidence demonstrate that Petitioner is incapable of returning to his previous job. Petitioner has chosen the remedy of a wage differential.

If Petitioner not been injured and had been able to continue in his line of employment as a street maintenance operator he would have been earning $65,177.00 annually, or $1,253.40 per week. Petitioner was able to earn $14.50 per hour, or $580.00 per week, as demonstrated by his ability to work as an auto delivery driver for MVP Services, Inc.

Based upon the foregoing, Petitioner is entitled to a wage loss award of $448.93 per week, which is two-thirds the difference between $1,253.40 per week and $580.00 per week, commencing on October 29, 2012 and continuing weekly thereafter at a rate of $448.93 for the duration of his disability.

1 of 100 DOCUMENTS

ERIC ALVAREZ, PETITIONER, v. FOODLINER, INC., RESPONDENT.

NO. 13WC 20686

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

15 IWCC 443; 2015 Ill. Wrk. Comp. LEXIS 444

June 10, 2015

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the [*2] Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 53,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 10 2015

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION 19(b)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JULY 8, 2014 AND SEPTEMBER 11, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings [*3] on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
F. Is Petitioner's current condition of ill-being causally related to the injury?
K. Is Petitioner entitled to any prospective medical care?
L. What temporary benefits are in dispute?
TPD
TTD
M. Should penalties or fees be imposed upon Respondent?

FINDINGS

On the date of accident, **FEBRUARY 12, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ **41,506.40**; the average weekly wage was $ **798.20**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

Respondent [*4] shall be given a credit of $ **8,046.20** for TTD, $ **0** for TPD, $ **0** for maintenance, and $ **3,839.12** for other benefits (PPD advances), for a total credit of $ **11,885.32**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $ 532.13/week for 70 and 6/7 weeks, commencing May 4, 2013 through September 11, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act. Respondent shall pay for the prospective medical treatment recommended by Dr Ellis on June 5, 2013 and April 9, 2014. Specifically, Petitioner is awarded 1) the right wrist MRI and the right to see Dr John Fernandez with respect to the right hand injuries and 2) the right to see Dr John Fernandez with respect to the left hand injuries.

Respondent shall pay to Petitioner penalties of $ 4,581.98, as provided in Section 16 of the Act; $ 12,909.91, as provided in Section 19(k) of the Act; and $ 10,000.00, as provided in Section 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing [*5] and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

09-24-14

Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner's Testimony at Hearing

Eric Alvarez ("Petitioner") is claiming an accidental left wrist injury on February 12, 2013, while employed as a Pre-Loader with Foodliner, Inc. ("Respondent"). At the time of the accident, Petitioner was 38 years old. Petitioner is right hand dominant. Tr., p. [*6] 8-9. Petitioner testified his driver's license is suspended and that he has not had an active driver's license from the date of employment with Respondent through the September 11, 2014 date of hearing. Tr., p. 37-38.

Petitioner testified that on the day of his accident, he was opening a stuck railcar with a gate bar. When he put extra force on the gate bar, the door gave way and yanked both of his hands forward. He felt an immediate pop and pain in his left wrist. Tr., p. 9-10.

Petitioner sought initial medical treatment at Concentra Medical Centers February 14, 2013, on referral from Respondent. Petitioner was provided with light duty work restrictions from Concentra through his last office visit there on March 18, 2013. The Concentra doctors referred Petitioner to Dr Speziale with Midwest Hand Surgery on

March 18, 2014. Tr., p. 10-11. Dr Speziale examined Petitioner on March 21, 2013 and April 22, 2013. On April 22, 2013, Dr Speziale referred Petitioner to Dr Ramsey Ellis. Petitioner was examined by Dr Ellis on May 1, 2013. Concentra, Dr Speziale and Dr Ellis provided Petitioner with light duty work restrictions and Petitioner worked light duty between February 14, 2013 and [*7] May 3, 2013. Tr., p. 10-14.

Petitioner testified that he began having problems with his right hand and wrist while working light duty between February 14, 2013 and May 3, 2013. He was not having any problems with the right hand or wrist before his return to light duty work following the accident. Petitioner testified that while working light duty, he was doing all of his regular job duties, but he was required to perform the duties with his right hand only. He was responsible for loading trucks, driving heavy equipment, carrying tools and cleaning. Tr., p. 24-28.

Petitioner testified that he remained off of work between May 4, 2013, and September 11, 2014 (the date of the second hearing), because Foodliner, Inc., was unable to accommodate the light duty work restrictions. Tr., p. 31-32.

Petitioner was contacted by Dan Varner with Varner Claims Consulting, via a letter sent on May 16, 2013, regarding possible temporary transitional employment with YMCA South Chicago. The initial letter was sent to the wrong address and a letter was re-issued on May 24, 2013. Petitioner was instructed to complete an in-person application by May 28, 2014. RX17. Petitioner completed the application [*8] but was not offered the position because it was filled by the time his background check cleared. Tr., p. 39-40 and 51-52.

Petitioner was contacted by Dan Varner via letters sent on June 19, 2013 and June 20, 2013, regarding possible temporary transitional employment with LBD Enterprises/South Suburban Toys for Kids ("South Suburban Toys for Kids"). Tr., p. 41. Petitioner followed up with the contact at South Suburban Toys for Kids and was given information that led him to believe the job was not within the restrictions set forth by Dr Ellis, hi addition, Petitioner has a suspended driv-

er's license and requires the use of public transportation. Public transportation to and from this placement would require over 2 hours of transportation each way. Petitioner considered this an unreasonable amount of travel. Petitioner did not appear for the temporary transitional employment. Tr., p. 52-54.

Petitioner was contacted by Dan Varner via a letter sent on October 22, 2013, regarding possible temporary transitional employment with Villa Guadalupe Senior Services. Tr., p. 44. Petitioner followed up with the contact at Villa Guadalupe and was given information that led him to believe the job [*9] was not within the restrictions set forth by Dr Ellis. Petitioner did not appear for the temporary transitional employment. Tr., p. 55 and 60-61.

As of the date of the hearing, with respect to the right wrist and hand, Petitioner testified that he has sharp pains with range of motion. His pain increases with household chores and when caring for his daughter. He wears a brace a few hours each day for pain relief. Tr., p. 29-30.

The right hand and wrist treatment recommended by Dr Ellis has not been authorized. Specifically, Dr Ellis prescribed a MRI of the right wrist. Petitioner wishes to undergo the MRI of the right wrist and wants to see Dr Fernandez for a second opinion. Tr., p. 14, 20-22

As of the date of the hearing, with respect to the left wrist and hand, Petitioner testified that he is still having a lot of pain in the area where he underwent the surgery. He experiences an increase in pain with activities of daily living like washing dishes or cooking for his daughter. He has constant numbness and weakness and notices a decrease in strength. He gets sharp pains in his wrist and has to wear a brace for pain relief. Tr., p. 22-24.

Petitioner's last office visit with Dr Ellis [*10] was on April 9, 2014. Dr Ellis referred Petitioner to Dr John Fernandez for a second opinion. As of the hearing date, the Respondent has not authorized the office visit. Petitioner testified that he wants a second opinion with Dr Fernandez with respect to his left hand and wrist. Tr., p. 20-22.

The Arbitrator had the opportunity to observe Petitioner and review his testimony and finds him to be credible.

Medical Records

Petitioner's initial medical treatment was at Concentra Medical Centers on February 14, 2013. Petitioner was referred to Concentra by Respondent. Petitioner provided a history of the February 12, 2013, work accident to the treating doctor. Petitioner indicated that while he was opening a gate on a railcar, the gate became stuck, requiring Petitioner to put extra pressure on the gate bar. The gate bar gave way causing him to jam his left wrist. He felt a pop in his wrist at the time of the accident but continued working. Petitioner's pain on examination was located on the ulnar aspect of the left wrist. Petitioner was diagnosed with a left wrist sprain and prescribed a course of physical therapy. Petitioner was provided with light duty work restrictions of [*11] no lifting, pushing or pulling over 10 pounds. PX1, p. 17-19.

Petitioner attended 11 sessions of physical therapy between February 14, 2013 and March 18, 2013. PX1, p. 24-50.

Petitioner was examined at Concentra on March 18, 2013. On examination there was associated swelling and paresthesias of the dorsum of the left thumb. Petitioner continued to have pain on the dorsal aspect of the volar aspect of the left wrist. Petitioner was referred to Midwest Hand Surgery for orthopedic evaluation and provided with light duty work restrictions of no use of the left hand. PX1, p. 5-8.

On March 21, 2013, Petitioner was examined by Dr Nicholas Speziale, an orthopedic surgeon with Midwest Hand Surgery. Petitioner complained of numbness and tingling in the left thumb and sprain in the left wrist and the ulnar aspect of the hand. Dr Speziale prescribed a MRI of the left wrist and an EMG/NCV of the left upper extremity. PX2, p. 31-33.

The MRI of the left wrist was performed on April 5, 2013. The MRI revealed a partial thickness tear along the articular surface of the dorsal radial ulnar ligament, tendinosis of the extensor carpi ulnaris tendon, a mild degree of tenosynovitis of the extensor digitorum [*12] and indices tendon sheath, and an extruded ganglion surrounding the pisiform bone. PX2, p. 83-84.

An EMG/NCV of the bilateral upper extremities performed on April 5, 2013 was essentially normal. PX2, p. 85-87.

Petitioner was re-examined by Dr Speziale on April 22, 2013. His physical examination on the left side remained unchanged. He complained of numbness over the dorsum of his left thumb and ulnar sided wrist pain. Petitioner complained of right hand pain which he attributed to working light duty exclusively with the right hand. Petitioner was referred to Dr Ramsey Ellis for further evaluation. PX2, p. 26-27.

On May 1, 2013, Petitioner was examined for the first time by Dr Ellis. Dr Ellis reviewed the left wrist MRI films and found that Petitioner had a TFCC tear along its ulnar attachment. On examination, Petitioner complained of ulnar sided wrist pain on the left hand and central dorsal wrist pain on the right hand which Petitioner attributed to overuse. Dr Ellis recommended Muenster splinting on the left hand and provided Petitioner with sedentary work restrictions with no lifting heavier than 3 pounds with the right hand and no use of left hand. PX2, p. 25.

Petitioner was [*13] re-examined by Dr Speziale on May 22, 2013. There was no improvement on the left with the Muenster splint. Dr Speziale prescribed and performed a steroid injection to the ulnar carpal joint of the left wrist. Petitioner was provided with a right wrist cock up splint. PX2, p. 23-24.

On June 5, 2013, Petitioner was re-examined by Dr Ellis. On the left side, Petitioner continued to complain of paresthesias over the dorsal let thumb and pain in the ulnar side of the wrist. He had tenderness to palpation over the first dorsal extensor compartment and a positive Finkelstein's. He had sensitivity of the radial sensory nerve adjacent to the first dorsal extensor compartment and pain with palpation of the TFCC and pain with pronation and supination of the forearm. Dr Ellis opined that Petitioner had failed left wrist conservative treatment and prescribed arthroscopic surgery with debridement of the TFCC. On the right side, Petitioner complained of pain in the right wrist with clunking. He had pain over the lunar triquetral joint and ulnar carpal joint. Dr Ellis Prescribed a MRI of the right wrist. Petitioner was provided with light duty work restrictions of no lifting more than 1/2 pound [*14] with the right hand, no lifting with the left hand and Petitioner must be able to wear bilateral splints at all times. PX2, 21-22.

On July 18, 2013, Petitioner was examined at Chicago Orthopaedics and Sports Medicine, by Dr William Vitello, a Section 12 Independent Medical Examiner hired by the Respondent. Dr Vitello performed an examination on both the right and left wrists. On right wrist examination, flexion is to 30 degrees, extension is to 40 degrees, supination and pronation is 60 to 70 degrees. He has mild crepinis at the DRUJ with pronation and supination. He is diffusely tender over the dorsum of the wrist at the scapholunate interval. Dr Vitello opined that Petitioner had a right wrist sprain with possible DRUJ injury. He recommended a right radiocarpal joint injection at the level of the DRUJ for both diagnostic and potentially therapeutic reasons. On the left wrist examination, range of motion that could be assessed was flexion at 20 degrees, extension to 30 degrees, supination to 60 degrees, and pronation to 70 degrees with pain and tenderness over the ECU and over the TFC. Dr Vitello diagnosed Petitioner with a left TFCC tear and recommended left wrist arthroscopy. Dr [*15] Vitello opined that Petitioner was capable of returning to work with no use of the left wrist and no lifting more than 10 pounds with the right wrist. RX2.

Petitioner underwent left wrist surgery performed by Dr Ellis on August 23, 2013. A left wrist arthroscopy with partial synovectomy and an open repair of the TFCC were performed. During the procedure it was revealed that there was copious dorsal synovitis and a large ulnar dorsal tear. An Arthrex anchor was implanted during surgery. PX2, p. 1-2.

Petitioner attended a post-surgery office visit with Dr Ellis on September 4, 2013. He was to remain off of work and to follow up in one week for suture removal. PX2, p. 20.

On September 11, 2013, Dr Ellis re-examined Petitioner. Petitioner complained of right sided wrist pain and discomfort at the surgical site on the left wrist. Petitioner is to remain off of work and is not allowed to drive. PX2, p. 18-19.

On September 23, 2013, Petitioner was re-examined by Dr Vitello, a Section 12 Independent Medical Examiner hired by the Respondent. The examination was only of the right wrist, not the left wrist or hand. On physical examination of the right wrist, there was flexion to 40 degrees, [*16] extension to 40-50 degrees, supination to 70 degrees and pronation to 70 degrees. He has some mild crepitus along the DRUJ with pronation and supination and he is diffusely tender over the dorsum of the wrist as well as long the ulnar side of the wrist and volar wrist. Petitioner was diagnosed with right wrist synovitis. Dr Vitello recommended a course of physical therapy and a corticosteroid injection to the right wrist. RX3.

Petitioner was examined by Dr Ellis on October 2, 2013. On the left side, Petitioner had minimal swelling but did have mild stiffness at the MP joint. Petitioner was kept off of work and the doctor was waiting on authorization for the recommended treatment on the right wrist. PX2, p. 17, PX4.

Dr Vitello performed a record review in a report dated October 11, 2013. There was no physical examination. Dr Vitello reviewed only the operative report of August 23, 2013 and provided estimated light duty work estimates based on standardized protocols post surgery. Dr Vitello opined that an individual with a TFC repair should go back to sedentary activities including desk work at 6-8 weeks, light duty activity from 8 to 10 weeks, medium activities from 10-12 weeks and [*17] expected maximum medical improvement from 12-14 weeks. RX4.

On October 23, 2013, Dr Ellis re-examined Petitioner. Petitioner complained of left wrist stiffness with pronation, supination, flexion and extension. Dr Ellis prescribed physical therapy and provided Petitioner with light duty restrictions of no lifting more than one pound with the left hand, no use of the right hand and Petitioner must wear bilateral splints at all times while working. PX2, p. 16.

Petitioner began a course of physical therapy at Accelerated Rehabilitation Centers on October 31, 2013. RX7.

Petitioner was examined by Dr Ellis on November 6, 2013. Petitioner complained of increased left wrist pain over the ulnar aspect and slow improvement with therapy. He had symptoms consistent with de Quervain's tenosynovitis of the left wrist. A steroid injection was prescribed and performed to the left wrist. Dr Ellis prescribed additional physical therapy and allowed for light duty restrictions of no lifting more than 3 pounds with the left hand. PX2, p. 15.

Petitioner attended 4 physical therapy sessions through December 23, 2013. RX7.

On February 5, 2014, Dr Ellis re-examined the Petitioner. Petitioner continued [*18] to have persistent left wrist problems despite not working. Dr Ellis prescribed a MRI of the left wrist and allowed light duty work restrictions of no lifting more than 3 pounds with the left hand. PX2, p. 13-14.

A MRI performed on February 17, 2014, revealed resolution of ECU tendinosis and postoperative changes at the ulnar head. No TFCC tear was appreciated. PX2.

On March 19, 2014, Petitioner was re-examined by Dr Vitello, a Section 12 Independent Medical Examiner hired by the Respondent. The examination was only of the left wrist, not the right wrist or hand. On exam there was no synovitis of the wrist. Flexion was to 50-60 degrees and extension is to 50 degrees, radial deviation of 20 degrees, and ulnar deviation of 30 degrees. Dr Vitello found Petitioner to be at maximum medical improvement with respect to his left wrist condition. P is at MMI for the left wrist TFC repair. Dr Vitello opined that he cannot state with certainty what Petitioner's exact limitations and work restrictions would be in regard to the left wrist due to the fact that Petitioner's subjective complaints outweigh the clinical objective findings. RX5.

Petitioner was re-examined by Dr Ellis on April 9, [*19] 2014. Petitioner continued to have pain in the ulnar side of the wrist, the etiology of which was unclear. Dr Ellis referred Petitioner to Dr John Fernandez for a second opinion and provided Petitioner with light duty work restrictions of no lifting more than 3 pounds with the left hand. PX2, p. 11-12.

Dan Varner's Testimony at Hearing

Dan Varner ("Varner"), Owner of Varner Claims Consulting, LLC ("VCC"), was hired by the Respondent in this case. Tr., p. 64. The Respondent hired Varner to place Petitioner in a temporary transitional employment ("TTE") position. Tr., p. 68. Varner testified that he would not receive a referral from a Respondent unless they were unable to accommodate the light duty work restrictions.

Prior to founding VCC, Varner worked for Farmers Insurance in the Claims Division for 28 years. His business is located in Florida but he provides services nationwide. VCC has been in business for five years. VCC is hired by insurance companies and employers to provide alternate light duty work for injured workers where the Respondent is unable

to accommodate the restrictions. Tr., p. 65-68. The alternate light duty work assignments are through non-profit agencies [*20] 99% of the time. Tr., p. 114.

VCC places between 25 and 50 people in alternate work assignments in Illinois each year. Tr., p. 65. Prior to this case, VCC placed between 5 and 8 people who worked with Foodliner in alternate light duty work assignments. Tr., p. 76. VCC is paid by the Respondent when the placement is identified and the packet is emailed to the Respondent. Tr., p. 79-80. Varner testified that his company has 100 percent placement within 48 hours of the referral and 87 percent placement within 24 hours of the referral. Tr., p. 104.

Varner does not know whether the non-profit agencies where he places injured workers receive a tax credit or other state or federal benefit. Tr., p. 80. He does not know whether the Respondent receives a tax credit or other state or federal benefit. He does not know whether the Respondent receives a benefit directly from the non-profit.

Varner does not have a vocational rehabilitation counselor license. No vocational counselor was involved with attempted TTE placements in the current case. Tr., p. 82-83.

Prior to the hearing date, Varner never met Petitioner. Varner never spoke with Petitioner prior to sending the initial placement package. [*21] No interview was ever conducted between Varner and the Petitioner. Varner never reviewed Petitioner's personnel file. Tr., p. 83-84 Varner was provided with work restrictions directly by the Respondent. No HIPPA release signed by the Petitioner authorizing a release of medical documentation to Varner was entered into evidence and to the best of Varner's knowledge no release exists. Varner testified that the individual job placements used in this case were never presented to the treating physicians or the IME doctor to determine whether the jobs were within the current restrictions. Tr., p. 84-85.

Varner testified that TTE is referenced in the Illinois Workers' Compensation Act but he was unable to reference a Section. Varner was unable to cite a study or a statistic that indicated light duty placement benefits the injured worker. No evidence was submitted by Respondent on these issues. Tr., p. 86-91.

Varner testified that he was not aware of a lending/borrowing agreement between Respondent and the prospective non-profits in this case. No evidence was submitted by Respondent on this issue. Tr., p. 95.

Varner is not aware of a contract between Respondent and VCC or Respondent and [*22] the non-profits with respect to who covers the liability insurance in the event Petitioner is injured while working at the non-profit. He does not know who would cover the workers' compensation insurance coverage in the event Petitioner suffered a new accident. No evidence was submitted by Respondent on these issues. Tr., p. 96-101.

Varner does not know whether performing work for a non-profit would nullify Petitioner's group insurance benefits, disability benefits, pension benefits or retirement benefits. No evidence was submitted by Respondent on these issues. Tr., p. 101.

Varner testified that the positions filled by injured workers are never paid positions and there is no possibility that they could lead to full time employment. The Petitioner would not be gaining any transferable skills as a result of the TTE. Tr., p. 103.

In this case, Varner attempted three separate TTE placements.

The first placement was attempted at YMCA South Chicago. Varner sent a letter to the Petitioner dated May 16, 2013. The letter was sent to the wrong address and had to be re-issued on May 24, 2013. Petitioner was expected to appear at the YMCA South Chicago by May 28, 2013 to complete an application. [*23] Varner's office confirmed with the YMCA that Petitioner did appear on May 28, 2013 and completed an application. Varner testified that Petitioner had to go back to the YMCA the following week to complete additional paperwork related to a background check. Varner confirmed the Petitioner completed the paperwork for the background check. The YMCA placement fell through due to the length of time it took for Petitioner's background check to be completed. Foodliner requested a new placement. Tr., p. 69-70.

The second placement was attempted at South Suburban Toys for Kids. Varner sent a letter to the Petitioner dated June 19, 2013. An amended letter was issued on June 20, 2013. Petitioner was expected to start working at South Suburban Toys for Kids on June 21, 2013. The letters issued to the Petitioner indicate the job required lifting with the right hand between 1 and 2 pounds. Varner testified that he was made aware that the correct restrictions were actually no lifting more than 1/2 pound with the right hand, no lifting with the left hand and Petitioner must be able to wear bilateral splints at all times. Varner testified that he verified with South Suburban Toys for Kids that the [*24] correct restrictions could be accommodated. Varner confirmed that Petitioner never presented for this position.

Varner was made aware of the fact that Petitioner required the use of public transportation after the attempted placement at South Suburban Toys for Kids. He testified that he never did a Google Search to determine how long it would take to get to the job via public transportation. He testified that anything requiring more than one hour of travel would not be considered reasonable. He testified that he learned of the transportation issues after the attempted placement and did not attempt another placement because Respondent told him not to. Varner testified that Respondent considered the placement reasonable. Tr., p. 90-94.

The third placement was attempted at Villa Guadalupe Senior Services. Varner sent a letter to Petitioner dated October 22, 2013. Varner testified that the work restrictions used for this placement were provided to him by Foodliner. The restrictions used were lifting, pushing and pulling up to 20 pounds occasionally, up to 12 pounds frequently and up to 6 pounds constantly. The restrictions set forth by Dr Ellis were not considered. Varner confirmed [*25] that Petitioner never presented for this position.

The Arbitrator had the opportunity to observe Varner and review his testimony. The Arbitrator also reviewed Varner's file, entered as Petitioner's Exhibits 6 and 7. The Arbitrator finds Varner to be less than credible.

CONCLUSIONS OF LAW

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 prior to the accident of February 12, 2013, he was not having any problems with his left wrist or right wrist. Immediately after the accident he had pain in his left wrist. His right wrist pain manifested while working light duty following the February 12, 2013 accident.

Petitioner's initial medical treatment was at Concentra Medical Centers on February 14, 2013. Petitioner provided a history of the February 12, 2013, work accident to the treating doctor. Petitioner's pain on examination was located on the ulnar aspect of the left wrist. Petitioner was diagnosed with a left wrist sprain and prescribed a course of physical therapy. [*26] Petitioner was provided with light duty work restrictions of no lifting, pushing or pulling over 10 pounds. PX1, p. 17-19.

Petitioner attended 11 sessions of physical therapy between February 14, 2013 and March 18, 2013. PX1, p. 24-50.

Petitioner was examined at Concentra on March 18, 2013. On examination there was associated swelling and parethesias of the dorsum of the left thumb. Petitioner continued to have pain on the dorsal aspect of the volar aspect of the left wrist. Petitioner was referred to Midwest Hand Surgery for orthopedic evaluation and provided with light duty work restrictions of no use of the left hand. PX1, p. 5-8.

On March 21, 2013, Petitioner was examined by Dr Nicholas Speziale, an orthopedic surgeon with Midwest Hand Surgery. Petitioner complained of numbness and tingling in the left thumb and sprain in the left wrist and the ulnar aspect of the hand. Dr Speziale prescribed a MRI of the left wrist and an EMG/NCV of the left upper extremity. Petitioner was allowed a return to work with restrictions of right handed work only. PX2, p. 31-33.

The MRI of the left wrist was performed on April 5, 2013. The MRI revealed a partial thickness tear along the articular [*27] surface of the dorsal radial ulnar ligament, tendinosis of the extensor carpi ulnaris tendon, a mild degree of tenosynovitis of the extensor digitorum and indices tendon sheath, and an extruded ganglion surrounding the pisiform bone. PX2, p. 83-84.

Petitioner was re-examined by Dr Speziale on April 22, 2013, His physical examination on the left side remained unchanged. He complained of numbness over the dorsum of his left thumb and ulnar sided wrist pain. Petitioner complained of right hand pain which he attributed to working light duty exclusively with the right hand. This is the first complaint of right hand or wrist pain in the medical records. Petitioner was referred to Dr Ramsey Ellis for further evaluation. Petitioner was allowed to work with restrictions of right handed work only. PX2, p. 26-27.

On May 1, 2013, Petitioner was examined for the first time by Dr Ellis. Dr Ellis reviewed the left wrist MRI films and found that Petitioner had a TFCC tear along its ulnar attachment. On examination, Petitioner complained of ulnar sided wrist pain on the left hand and central dorsal wrist pain on the right hand which Petitioner attributed to overuse. Dr Ellis recommended Muenster [*28] splinting on the left hand and provided Petitioner with sedentary work restrictions with no lifting heavier than 3 pounds with the right hand and no use of left hand. PX2, p. 25.

Petitioner was re-examined by Dr Speziale on May 22, 2013. There was no improvement on the left with the Muenster splint. Dr Speziale prescribed and performed a steroid injection to the ulnar carpal joint of the left wrist. Petitioner was provided with a right wrist cock up splint. PX2, p. 23-24.

On June 5, 2013, Petitioner was re-examined by Dr Ellis. On the left side, Petitioner continued to complain of paresthesias over the dorsal left thumb and pain in the ulnar side of the wrist. He had tenderness to palpation over the first dorsal extensor compartment and a positive Fmkelstein's. He had sensitivity of the radial sensory nerve adjacent to the first dorsal extensor compartment and pain with palpation of the TFCC and pain with pronation and supination of the forearm. Dr Ellis opined that Petitioner had failed left wrist conservative treatment and prescribed arthroscopic surgery with debridement of the TFCC. On the right side, Petitioner complained of pain in the right wrist with clunking. He had pain [*29] over the lunar triquetral joint and ulnar carpal joint. Dr Ellis prescribed a MRI of the right wrist. Petitioner was provided with light duty work restrictions of no lifting more than 1/2 pound with the right hand, no lifting with the left hand and Petitioner must be able to wear bilateral splints at all times. PX2, p. 21-22.

On July 18, 2013, Petitioner was examined at Chicago Orthopaedics and Sports Medicine, by Dr William Vitello, a Section 12 Independent Medical Examiner hired by the Respondent. Dr Vitello performed an examination on the bilateral wrists. RX2.

On the left wrist, range of motion that could be assessed was flexion at 20 degrees, extension to 30 degrees, supination to 60 degrees, and pronation to 70 degrees with pain and tenderness over the ECU and over the TFC. Dr Vitello diagnosed Petitioner with a left TFCC tear and recommended left wrist arthroscopy. Dr Vitello opined that Petitioner was capable of returning to work with no use of the left wrist. Dr Vitello opined that Petitioner's left wrist condition and need for medical treatment was related to his work accident of February 12, 2013. Dr Vitello found that Petitioner had a consistent history of a left wrist [*30] injury and his physical presentation coincided with the injury. RX2.

On right wrist examination, flexion is to 30 degrees, extension is to 40 degrees, supination and pronation is 60 to 70 degrees. He had mild crepitus at the DRUJ with pronation and supination. He was diffusely tender over the dorsum of the wrist at the scapholunate interval. Dr Vitello opined that Petitioner was capable of returning to work with no lifting more than 10 pounds with the right wrist. With respect to causal connection, Dr Vitello opined, "This patient has a three-month delay in complaints of the right wrist pain and/or injury from the February 12, 2013 incident. He did not complain of pain in the right wrist according to the medical documentation provided to me to May 22, 2013. Therefore, I cannot definitively say whether this right wrist was involved in the February 12, 2013 accident. He does have finding consistent of right wrist sprain and I recommend a Corticosteroid injection into the right radiocarpal joint at the level of the DRUJ to determine. This is both diagnostic and potentially therapeutic given his complaints." RX2.

Petitioner testified that he has a prior right hand injury that required [*31] surgery when he was a child. Tr., p. 25. He was not having any pain in his right hand or wrist before the accident of February 12, 2013. Tr., p. 24. He began experiencing pain in his right wrist while working light duty. He testified that while working light duty, he essentially was responsible for performing all of his normal job tasks, but he was to perform them right handed. Tr., p. 26-28. The medical records are consistent with this history.

The Arbitrator has had the opportunity to review the medical evidence and the testimony of the Petitioner and finds Petitioner to be credible. The Arbitrator finds a causal connection between Petitioner's present condition of ill-being in the left wrist and the work accident of February 12, 2013. The Arbitrator also finds a causal connection between Petitioner's present condition of ill-being in the right wrist and the work accident of February 12, 2013.

K. Is Petitioner entitled to any prospective medical care?

Petitioner testified that he wishes to undergo the right wrist treatment recommended by Dr Ellis. Specifically, he would like to undergo the second opinion evaluation with Dr John Fernandez recommended by Dr Ellis following [*32] the April 9, 2014 examination. Petitioner would also like to undergo the MRI of the right wrist prescribed by Dr Ellis on June 5, 2013. In addition, he would like to have his right wrist examined by Dr John Fernandez. Tr., p. 20-22.

Based on the Arbitrator's findings in Section "F" above, Petitioner is entitled to the additional medical treatment. The Arbitrator finds this treatment to be reasonable, necessary and causally related to the work accident of February 12, 2013. Respondent shall pay for the MRI of the right wrist and the left wrist and right wrist evaluations with Dr John Fernandez.

L. What temporary benefits are in dispute? TPD and TTD.

TPD Benefits:

Petitioner claims he is entitled to TPD benefits for the period between February 14, 2013 and May 3, 2013. Respondent claims Petitioner is not entitled to any TPD benefits.

Petitioner worked in a light duty capacity for the Respondent between February 14, 2013 and May 3, 2013. Tr., p. 28. He received his full pay while working light duty. Petitioner is not entitled to any TPD benefits.

TTD Benefits:

Petitioner claims he is entitled to TTD benefits for the period of May 4, 2013 through September 11, 2014 (the [*33] date of the hearing). This period represents 70 and 6/7 weeks. Respondent claims Petitioner is entitled to TTD benefits for the periods of May 6, 2013 through June 23, 2013, August 23, 2013 through August 28, 2013, and September 4, 2013 through October 27, 2013.

There is no dispute whether Foodliner could accommodate the light duty work restrictions after May 3, 2013. They could not. If they could have, then they would not have hired Varner. The question is with respect to the attempted TTE placements and whether Respondent can terminate TTD benefits if Petitioner declines the placements.

There is no statutory authority in the State of Illinois for TTE and the Act does not refer to TTE in any Section. Section 8(b) of the Act provides that weekly compensation shall be paid as long as the total temporary incapacity lasts. As stated by our Illinois Appellate Court in *Anders v. Industrial Comm., 332 Ill, App.3d 501, 773 N.E. 2d 746 (4th Dist. 2002),* a worker has not reached maximum medical improvement on the date he was returned to work on a light duty basis and he was entitled to continued temporary total disability benefits as the employer refused to [*34] provide work within the Petitioner's restrictions.

It is clear that the Petitioner's condition has not stabilized. He is not at maximum medical improvement based upon the Arbitrator's findings in Section "K" above. In addition, no doctor has indicated that Petitioner is able to return to work in a full duty capacity without restrictions. Our Appellate Court has held that where the Petitioner's condition has not stabilized and he was still receiving medical treatment, he had not reached maximum medical improvement, and thus TTD was proper. *Mobile Oil Corp. v, Industrial Comm., 327 Ill. App. 3d 778, 764 N.E. 2d 539 (3d Dist. 2002).*

The Arbitrator concludes as follows: The Illinois Workers' Compensation Act makes no mention of TTE. The Petitioner is under active medical care. The Respondent cannot accommodate the Petitioner's work restrictions. CBSC, Inc., the Respondent's workers' compensation carrier, has a financial bias in that it stands to gain by reducing its obligation to pay TTD. There are many unresolved issues concerning TTE, including the merit and purpose of volunteering; who is

responsible for injuries the Petitioner may suffer [*35] while traveling to and from the TTE, or at the site of the TTE while volunteering; does TTE impact Petitioner's pension benefits, disability benefits, retirement benefits, or group insurance benefits; and mileage reimbursement.

The Arbitrator finds that Respondent cannot terminate Petitioner's TTD benefits based on their offering of TTE. A Petitioner has the right to refuse a TTE assignment, regardless of the reason. An injured worker is not required to perform TTE under the Act.

Petitioner is entitled to TTD benefits for 70 and 6/7 weeks, representing the period between May 4, 2013 and September 11, 2014 (the date of the hearing).

Even if TTE was allowed under the Act, in this case Petitioner would be entitled to the TTD benefits for 70 and 6/7 weeks, representing the period between May 4, 2013 and September 11, 2014 (the date of the hearing). There are too many issues with respect to the June and October TTE placements. The issues are raised in Section "M" below.

M. Should penalties or fees be imposed upon Respondent?

After reviewing the testimony and the evidence submitted by the parties, the Arbitrator finds the Petitioner is entitled to attorney's fees under Section [*36] 16 in the amount of $ 4,581.98 and penalties under Sections 19(k) in the amount of $ 12,909.91 and 19(l) in the amount of $ 10,000.00.

In reaching said Decision, the Arbitrator finds that Respondent intentionally failed to pay the TTD benefits. Respondent's conduct was unreasonable, vexatious and in bad faith. Respondent unreasonably delayed the payment of TTD benefits and did not have an honest defense to their delay and non-payment of benefits. In addition, Respondent has no defense for not authorizing the second opinion office visit with Dr Fernandez.

Petitioner worked light duty and received full salary between February 14, 2013 and May 3, 2013. Effective May 4, 2013, Respondent could no longer accommodate the restrictions. This is not in dispute.

Respondent paid TTD benefits May 6, 2013 through June 23, 2013. RX9. Respondent alleges they had a right to terminate benefits because TTE was offered to Petitioner with South Suburban Toys for Kids.

No TTD benefits were paid between June 24, 2013 and August 22, 2013. RX9.

Respondent reinstated TTD benefits effective August 23, 2013, the date of Petitioner's surgery. RX9.

Respondent suspended Petitioner's TTD benefits between August [*37] 29, 2013 and September 3, 2013. RX9. Respondent suspended the benefits because Petitioner "refuses to comply with medical treatment" following the surgery. RX14.

Respondent paid TTD benefits between September 4, 2013 and October 27, 2013. RX9. Respondent alleges they had a right to terminate benefits because TTE was offered to Petitioner effective October 29, 2013, with Villa Guadalupe Senior Services.

No TTD benefits were issued between October 28, 2013 and September 11, 2014 (the date of the hearing). RX9.

June 2013 - Termination of TTD Benefits

Respondent alleges they had a right to terminate benefits because TTE was offered to Petitioner with South Suburban Toys for Kids.

Petitioner was contacted by Dan Varner via letters sent on June 19, 2013 and June 20, 2013, regarding possible temporary transitional employment with South Suburban Toys for Kids. Petitioner was expected to start working at South Suburban Toys for Kids on June 21, 2013. The letters issued to the Petitioner indicate the job required lifting with the right hand between 1 and 2 pounds. RX17.

Petitioner followed up with the contact at South Suburban Toys for Kids and was given information that led him [*38] to believe the job was not within the restrictions set forth by Dr Ellis. In addition, Petitioner had concerns regarding the time it would take to get to and from the TTE each day. He testified that he called the RTA (Regional Transportation Authority), an organization similar to the CTA (Chicago Transit Authority), who provides assistance for public transportation route. Petitioner was told that the placement would require over 2 hours of transportation each way. Petitioner considered this an unreasonable amount of travel.

Petitioner testified that he called the insurance adjuster to express his concerns with the restrictions and the travel times required with the position. This phone call is verified in an email sent by the adjuster with CBSC, Inc., Christopher Neiers, to Varner and Barbara Krieg, a Claims Manager with Foodliner. PX7, p. 70.

Varner testified that he was made aware that the correct restrictions were actually no lifting more than 1/2 pound with the right hand, no lifting with the left hand and Petitioner must be able to wear bilateral splints at all times. Varner testified that he verified with South Suburban Toys for Kids that the correct restrictions could be [*39] accommodated. It is unclear based on the testimony and the evidence presented whether this conversation took place and if it did, when it took place. In addition, Varner did not update the letters to the Petitioner with the corrected restrictions or contact the Petitioner to advise the placement could accommodate the correct restrictions.

Varner testified that he learned of Petitioner's transportation issues after the attempted placement with South Suburban Toys for Kids. He testified that any placement requiring over one hour of travel each way was not reasonable. Varner testified that it is possible a new placement should have been considered based on the transportation issues, but he was told by the Respondent that they considered the placement reasonable and there was no need to attempt another placement.

The Arbitrator finds that the Illinois Workers' Compensation Act makes no mention of TTE and a Petitioner is not required to accept the TTE under the Act. The Respondent's conduct was unreasonable and vexatious and caused an unreasonable delay in the payment of TTD benefits.

Even if TTE was required under the Act, Respondent's conduct in this placement is unreasonable. They [*40] were aware of Petitioner's transportation issues and ignored the issues in the placement. Petitioner testified that he contacted RTA and was told the commute to and from work would take over two hours. No evidence was submitted to refute this assertion. The Arbitrator finds Petitioner credible on this issue. Petitioner's testimony is supported by evidence submitted in PX6 and PX7, showing that he called Christopher Neiers to express concerns over the commute required for this placement. thieu 401-405

Petitioner even offered to accept placement at the YMCA, a placement sought by Varner in May, 2013. The Respondent ignored Petitioner's pleas and used this placement as a way to terminate TTD benefits. The Respondent acted in bad faith.

August and September 2013 -- Termination of TTD Benefits

Petitioner testified that he missed a post-operative visit scheduled on August 28, 2013 because his transportation to the examination fell through. He was unable to re-schedule the examination until September 4, 2013. Petitioner was never issued TTD benefits covering the period between August 29, 2013 and September 3, 2013.

Respondent's Exhibit 14 indicates that TTD benefits were suspended [*41] because Petitioner "refuses to comply with medical treatment". The evidence is clear that Petitioner attended the post-operative office visit on September 4, 2013. This was a routine follow up visit where Dr Ellis recommended follow up examination one week later to consider suture removal.

Petitioner's failure to attend the August 28, 2013 office visit did not impact his recovery in any way. Respondent should have issued the TTD benefits due between August 29, 2013 and September 3, 2013 after he attended the office visit on September 4, 2013 and Dr Ellis confirmed the recovery was not delayed as a result of the missed appointment. Instead,

Respondent used the missed appointment as a way of terminating benefits for the period. Respondent's conduct was unreasonable, vexatious and made in bad faith.

October 2013 – Termination of TTD Benefits

Petitioner was contacted by Dan Varner via a letter sent on October 22, 2013, regarding possible TTE with Villa Guadalupe Senior Services. Petitioner followed up with the contact at Villa Guadalupe and was given information that led him to believe the job was not within the restrictions set forth by Dr Ellis. Petitioner did not appear [*42] for the TTE. Varner testified that the work restrictions used for this placement were provided to him by Foodliner. The restrictions used were lifting, pushing and pulling up to 20 pounds occasionally, up to 12 pounds frequently and up to 6 pounds constantly. The restrictions set forth by Dr Ellis were not considered.

A review of the evidence shows that Respondent used Dr Vitello's October 11, 2013 report to set the restrictions. In this report, Dr Vitello reviewed the operative report of August 23, 2013, and opined with respect to the "typical postoperative protocol" for this type of injury. Dr Vitello opined that an individual with a TFC repair should go back to sedentary activities including desk work at 6-8 weeks, light duty activity from 8 to 10 weeks, medium activities from 10-12 weeks and expected maximum medical improvement from 12-14 weeks. RX4.

The Arbitrator notes that there was no physical examination in connection with this report. Dr Vitello did not perform an examination on Petitioner's left wrist between July 18, 2013 and March 19, 2014. Petitioner's left wrist surgery was performed on August 23, 2013. Petitioner's right wrist was examined by Dr Vitello on September [*43] 23, 2013. No left wrist examination was performed on mat date. Other than the operative report, it does not appear Dr Vitello reviewed any other medical documentation before drafting his October 11, 2013 report.

The Arbitrator also notes that the treating surgeon, Dr Ellis, examined Petitioner on October 2, 2013 and kept the Petitioner off of work due to the left wrist injuries. PX2, p. 17. Varner was assigned the placement on October 21, 2013. Varner's placement letter was issued on October 22, 2013. At that time, Dr Ellis had not even allowed Petitioner a light duty work release.

Petitioner was re-examined by Dr Ellis on October 23, 2013. Petitioner complained of left wrist stiffness with pronation, supination, flexion and extension. Dr Ellis prescribed physical therapy and provided Petitioner with light duty restrictions of no lifting more than one pound with the left hand, no use of the right hand and Petitioner must wear bilateral splints at all times while working. PX2, p. 16. These restrictions were not considered in the TTE placement set up by Varner.

The Arbitrator finds that the Act makes no mention of TTE and a Petitioner is not required to accept the TTE under the Act. [*44] The Respondent's conduct was unreasonable and vexatious and caused an unreasonable delay in the payment of TTD benefits.

Even if TTE was required under the Act, Respondent's conduct in this placement is unreasonable. Respondent did not consider the restrictions of the treating doctor. The job description was not sent to the treating doctor for her opinion on whether the job duties were within Petitioner's abilities. Respondent relied upon Dr Vitello's record review and narrative report where he speculated on Petitioner's current restrictions based on a "typical postoperative protocol". If Respondent wanted to rely on Dr Vitello's opinions, they should have had Petitioner re-examined. At the very least, Dr Vitello should have been provided with all of the post-operative medical records. Dr Vitello's opinions are based on speculation and are not credible. The Respondent's conduct was unreasonable and vexatious and caused an unreasonable delay in the payment of TTD benefits.

For the forgoing reasons, the Arbitrator finds Respondent liable for the following penalties and attorney's fees:

Section 19(l):

Section 19(l) provides in pertinent part, as follows:

"In case the employer [*45] or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of S30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $ 10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." (Emphasis added.) *820 ILCS 305/19(l)* (West 2006).

Penalties under section 19(l) are in the nature of a late fee. *Mechanical Devices v. Industrial Comm'n, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 828 (2003).* In addition, the assessment of a penalty under section 19(l) is mandatory "if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay." *McMahan v. Industrial Comm'n, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998).*

The standard for determining whether an employer has good and [*46] just cause for a delay in payment is defined in terms of reasonableness. *Mechanical Devices, 344 Ill. App. 3d at 763, 800 N.E.2d at 829.* The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Board of Education of the City of Chicago v. Industrial Comm'n, 93 Ill. 2d 1, 9-10, 442 N.E.2d 861, 865 (1982).*

Respondent's termination of TTD benefits in June 2013, August 2013, and October 2013 was not reasonable and caused an unjust delay in the payment of benefits. At all of these times, the Petitioner was under active medical care and the Respondent was unable to accommodate the Petitioner's work restrictions. The Arbitrator found in Section "K" above, the Illinois Workers' Compensation Act makes no mention of TTE and a Petitioner is not required to accept the TTE under the Act. In addition, the Respondent's actions in June 2013, August-September 2013 and October 2013 are egregious, unreasonable and vexatious. The Arbitrator has reviewed [*47] the emails between Respondent, the insurance carrier and Varner, and finds the actions of Respondent to be reprehensible. PX6 and PX7. It is clear that Respondent was searching for a way to terminate the TTD benefits of an injured worker who was under active medical care and had restrictions that prevented a return to work with them.

The Arbitrator awards $ 30.00 a day for each day that TTD was underpaid or unpaid. The period from June 24, 2013 through September 11, 2013 is 445 days. $ 30.00 per day * 445 days would be $ 13,350.00. However, the maximum allowed under Section 19(l) is $ 10,000.00. Therefore, the total amount awarded under Section 19(l) is $ 10,000.00

Section 19(k):

The standard for awarding penalties under section 19(k) is higher than the standard under 19(l). Section 19(k) of the Act provides, in pertinent part, as follows:

"In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation...then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." (Emphasis added.) *820 ILCS 305/19(k)* [*48] (West 2006).

An award of penalties pursuant to section 19(k) is "intended to promote the prompt payment of compensation where due and to deter those occasional employers or insurance carriers who might withhold payment from other than legitimate motives." *McMahan v. Industrial Comm'n, 289 Ill. App. 3d 1090, 1093, 683 N.E.2d 460, 463 (1997),* aff'd, *183 Ill. 2d 499, 702 N.E.2d 545 (1998).* The standard for awarding penalties and attorney fees under section 19(k) of the Act is higher than the standard for awarding penalties under section 19(l) because section 19(k) requires more than an "unreasonable delay" in payment of an award. *McMahan, 183 Ill. 2d 499, 514-15, 702 N.E.2d 545, 552 (1998).* It is not enough for the claimant to show mat the employer simply failed, neglected, or refused to make payment or unreasonably delayed payment without good and just cause. *McMahan, 183 Ill. 2d at 515, 702 N.E.2d at 552.* Instead, section 19(k) penalties are "intended to address situations where there is not only a delay, [*49] but the delay is deliberate or the result of bad faith or improper purpose." *McMahan, 183 Ill. 2d at 515, 702 N.E.2d at 553.*

The evidence shows mat Respondent withheld TTD payments from other legitimate motives. The delay was deliberate and is the result of bad faith and improper purpose. There is no such thing as TTE under the Act. Respondent's attempt to place Petitioner in a TTE and the termination of Petitioner's TTD benefits for "non-compliance" raises to the level required to award penalties under Section 19(k).

It is clear from the email chain found on pages 70-72 of Petitioner's Exhibit 7 that there were issues with the placement attempted by Varner. There were issues raised by the Petitioner to the insurance company about both the transportation required and whether the job duties were within his work restrictions. Instead of addressing these concerns, the Respondent ignored them and advised Varner that the placement was reasonable. In addition, concerns about the TTE were raised by the Petitioner's Attorney in an email sent to the insurance adjuster on June 27, 2013. Similar issues were raised by Petitioner's Attorney in a [*50] letter sent to Respondent's Attorney on November 1, 2013. These concerns were dismissed by the Respondent, their attorney, their insurance carrier and Gamer.

Respondent's actions warrant the award of penalties under Section 19(k).

TTD benefits are due for 70 and 6/7 weeks, representing the period between May 4, 2013 and September 11, 2014. The total amount of TTD benefits due is $ 37,705.14. Through the date of the hearing, Respondent had paid $ 11,885.32 in TTD benefits and PPD advances. The total amount outstanding is $ 25,819.82. Penalties under Section 19(k) are 50% of the unpaid total, or $ 12,909.91.

Section 16:

Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. *820 ILCS 305/16* (West 2006).

Having found the Respondent's actions towards Petitioner to be unreasonable and vexatious, and having found the delay was deliberate and the result of bad faith and improper purpose, the Arbitrator awards attorney's fees under Section 16. The Arbitrator awards 20% of the total penalties, or $ 4,581.98 (20% *($ 12,909.91 + $ 10,000.00)).

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewStandards of ReviewGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAN PERKINS,

Petitioner,

15IWCC0468

vs.

NO: 09 WC 044791

TURNER INDUSTRIES GROUP,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of medical expenses, TTD, PPD penalties and fees, and evidentiary rulings and being advised of the facts and law, modifies the Second Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Second Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

Appearing before the Commission on May 5, 2015, the parties stipulated that the Order within the Second Corrected Decision of the Arbitrator erroneously gave Respondent credit in the amount of $255,199.31 for benefits paid to Petitioner under Section 8(b) of the Act. The parties agree that the proper amount of the credit should have been $235,199.31. The Commission, therefore, modifies the Second Corrected Decision of the Arbitrator to reflect this.

Modifying the credit Respondent is to receive for benefits paid to Petitioner under Section 8(b) of the Act necessitates that the Second Corrected Decision of the Arbitrator be modified further as to properly reflect the total amount of credit Respondent is to receive. Respondent, in addition to paying Petitioner benefits under Section 8(b), also paid Petitioner $18,836.79 in maintenance benefits as provided in Section 8(a) of the Act. Thus, the total amount Respondent paid to Petitioner under Sections 8(b) and 8(a) is $254,036.10. It is this total amount for which Respondent receives credit.

The parties also stipulated before the Commission on May 5, 2015, that Petitioner's motion under Section 19(f) is withdrawn and shall have no effect. Said motion was filed to cure the defect in the Second Corrected Decision of the Arbitrator. The Commission addressed this in the paragraphs immediately above.

15IWCC0468

The Commission affirms and adopts all other findings contained within the Second Corrected Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,243.00 per week for a period of 73.72 weeks, commencing November 25, 2009, through April 24, 2011, 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 $1,243.00 per week for a period of 89.29 weeks, commencing April 25, 2011, through January 8, 2013, that being the period of time Petitioner was entitled to maintenance benefits as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,243.00 per week for life, commencing January 9, 2013, as provided in §8(f) of the Act, for the reason that the injuries sustained caused permanent total disability for work.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $19,284.23 for medical expenses under §8(a) of the Act.

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 in the amount of $254,036.10 for amounts paid to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner penalties of $9,365.14, as provided in §16 of the Act and $15,608.57, as provided in §19(k) of the Act.

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

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

DATED: JUN 19 2015
KWL/mav
O: 05/05/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
)SS.
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
2nd CORRECTED

15IWCC0468

Case # 09 WC 44791

Consolidated cases: _____

Dan Perkins
Employee/Petitioner

v.

Turner Industries Group
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **December 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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 **Evidentiary rulings, Vocational Rehabilitation**

FINDINGS

15IWCC0468

On **September 24, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$115,409.84**; the average weekly wage was **$2,219.42**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$235,199.31** for TTD, **$0** for TPD, **$18,836.79** for maintenance, and **$0** for other benefits, for a total credit of **$254,036.10**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,243.00**/week for **73.72** weeks, commencing **November 25, 2009 through April 24, 2011**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$1,243.00**/week for **89.29** weeks, commencing **April 25, 2011 through January 8, 2013**, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of **$255,199.31** for TTD, **$0** for TPD, **$18,836.79** for maintenance, and **$0** for other benefits, for a total credit of **$274,036.10**.

Respondent shall pay reasonable and necessary medical services of **$19,284.23**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of **$1,243.00**/week for life, commencing **January 9, 2013**, as provided in Section 8(f) of the Act.

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

Respondent shall pay to Petitioner penalties of **$9,365.14**, as provided in Section 16 of the Act; **$15,608.57**, as provided in Section 19(k) of the Act; and **$0**, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

6/2/14
Date

ICArbDec p. 2

JUN 4 - 2014

STATEMENT OF FACTS

On September 24, 2009, Petitioner, Dan Perkins, was employed as a journeyman carpenter by Respondent, Turner Industries Group.

Petitioner testified that he graduated from High School in 1978 and began work as a carpenter at the age of 20, eventually joining Local 174 in April of 1985. For 29 years prior to his date of accident, Petitioner worked as a carpenter and held no other occupation. Petitioner provided that he did not go through an apprenticeship to become a carpenter. He did not have any OSHA training and had no computer training.

Petitioner testified that as a carpenter, he worked on various types of job sites including residential, commercial and concrete jobs. Petitioner's job duties included building homes, framing, finishing, building scaffolding and building bridges. While performing his job duties, Petitioner did a lot of heavy lifting, including lifting lumber weighing up to 80 pounds and concrete forms which could weigh from 20 to 100 pounds.

Petitioner testified that on September 24, 2009, he was building scaffolding at the CITGO refinery. While he was standing on the tips of his toes, reaching upward and pushing with his right arm to pass a 40 pound metal pan to a coworker, he felt pain in his right shoulder.

On September 24, 2009, Petitioner presented to Physician's Immediate Care complaining of right shoulder pain from a lifting accident at work. Petitioner was seen by Dr. Ronald Gregus who recommended a MRI of the right shoulder. (PX 11)

Petitioner underwent a MRI of the right shoulder on September 28, 2009, which revealed 1) subscapularis tendon tear with 1 cm retraction from lesser tuberosity, 2) subscapularis muscle strain/partial tearing, and 3) dislocated intrascapular long head of the biceps tendon, medially. (PX 11)

Following the MRI, Petitioner was referred to Dr. Roderick Birnie at the University of Chicago Medical Center who diagnosed Petitioner with a right shoulder subscapularis avulsion, with long head of the biceps subluxation. Dr. Birnie recommended surgical repair of the right rotator cuff. (PX 1)

On October 1, 2009, Petitioner was seen on a referral from Dr. Gregus by Dr. John H. Lee of Adventist Health Partners. Dr. Lee examined Petitioner's right shoulder and diagnosed a subscapularis tear with dislocated biceps tendon. Dr. Lee also noted neck pain upon his examination of Petitioner. During the examination, Petitioner exhibited a positive axial compression test and tenderness in the cervical spine. Surgery was discussed and Dr. Lee recommended that Petitioner follow up in 3 to 4 days for a recheck of his shoulder and neck. (PX 6)

On November 4, 2009, Petitioner was seen by Dr. Theodore Suchy for a Section 12 Examination at the request of Respondent. Dr. Suchy opined that Petitioner could perform light duty work with no use of the right hand and recommended continued rehabilitation. Dr. Suchy further opined that there was a causal relationship between the injury Petitioner sustained on September 24, 2009 and the development of a subscapularis tear with biceps tendon dislocation. (RX 2)

On November 25, 2009, Petitioner underwent right shoulder arthroscopy with biceps tenotomy, arthrscopic subacromial decompression, open rotator cuff repair, and open biceps tenodesis performed by Dr. Birnie at

University of Chicago Medical Center. The pre and post-operative diagnoses were complete tear rotator cuff subscapularis and subluxed biceps tendon. (PX 1)

Following surgery, Petitioner underwent a course of treatment at Brightmore Physical Therapy and continued to follow up with Dr. Birnie. (PX 1, PX 13)

While following up with Dr. Birnie on February 23, 2010, it was noted that Petitioner was complaining of occasional neck pain, along with continued shoulder issues. On April 6, 2010, Dr. Birnie again noted Petitioner's complaints of neck pain which he said were present prior to the shoulder surgery, but had significantly worsened since. Dr. Birnie assessed Petitioner with trapezial myositis contributing to pain in his neck and recommended physical therapy for that pain along with continued therapy for his shoulder. (PX 1)

Petitioner continued to follow up with Dr. Birnie and began a course of work conditioning in May of 2010. (PX 1, PX 13)

On June 29, 2010, Dr. Birnie recommended a cervical MRI, which was performed on June 30, 2010. The cervical MRI revealed mild spondylosis of the cervical spine with mildly bulging discs at C3-4 through C6-7. There was also mild to moderate impingement of the neural foramina bilaterally at C5-6 and on the right at C6-7 secondary to uncovertebral joint hypertrophy. (PX 12)

Petitioner continued physical therapy through July 9, 2010. (PX 13)

On August 3, 2010, Petitioner followed up with Dr. Birnie. The doctor noted that Petitioner still had shoulder discomfort and recommended a FCE to determine permanent restrictions. (PX 1)

On September 27, 2010, Petitioner was seen by Dr. Nikhil Verma for a Section 12 examination at the request of Respondent. Dr. Verma diagnosed Petitioner with mild persistent right shoulder pain with possible cervical radiculopathy status post injury. Dr. Verma opined that the condition of Petitioner's right shoulder was causally related to his September 24, 2009 work accident. He further stated that Petitioner had reached MMI and recommended a FCE to determine Petitioner's physical capabilities. Dr. Verma did not opine on causation as it related to Petitioner's cervical spine. (RX 1)

On January 17, 2011, Petitioner underwent a FCE at ATI Physical Therapy, which indicated that Petitioner could function at the medium physical demand level. Petitioner was able to occasionally lift 53 pounds floor to chair, 28 pounds above shoulders bilaterally, 21.6 pounds with his right arm and 26.2 pounds with his left arm, and carry 37 pounds with his right arm and 66.4 pounds with his left arm. The physical therapist at ATI noted that these capabilities were below the heavy physical demands of his previous occupation as a carpenter. (PX 8)

On January 20, 2011, Petitioner was seen by Dr. Leonard Cerullo. The doctor noted that he had seen Petitioner for lower back and neck pain in October of 2008, after which he was seen by Dr. Villoch in May of 2009. Petitioner underwent lumbar and cervical injections in May of 2009 and underwent physical therapy, after which he was "fairly stable." Dr. Cerullo noted Petitioner's September 24, 2009 work injury and the neck and shoulder pain he had experienced since that time. Dr. Cerullo diagnosed possible cervical radiculopathy in addition to the shoulder injury. He recommended an EMG/NCV of the right upper extremity. (PX 4)

On March 1, 2011, Dr. Birnie released Petitioner to return to work within the restrictions outlined by the January 17, 2011 FCE. (PX 1)

On March 14, 2011, Petitioner was seen by Dr. Christine Villoch for lower back and neck pain at North Shore Pain Center. (PX 2) Dr. Villoch noted Petitioner's accident, pain in his neck the day after the accident, and continued neck pain and discomfort through the date Petitioner was seen by Dr. Villoch. (PX 2)

Petitioner testified concerning the current condition of his right arm. He explained that "just about anything" caused him pain. Petitioner provided that when he performs activities such as using a drill, sawing or mowing grass, he experiences pain in the right shoulder and neck, sometimes going down into his right arm and hand. Petitioner indicated that if he reads for too long, holding the book at 90 degrees hurts his arm. When he drives a long distance or is stuck in traffic, he has to take his right hand off the steering wheel or he will develop pain. He further explained that he drops things a lot. He stated that his right hand will simply release and will let objects go.

After being released from care with permanent restrictions, Petitioner was not offered any light duty work by Respondent.

Vocational History

In 2011, Petitioner began working with Coventry vocational services. He testified that he took a test to determine what kind of job he should look for. Petitioner then performed a job search with the help of a vocational counselor from Coventry from April 2011 through January 8, 2013. (PX 20)

Petitioner testified that he looked for jobs doing just about anything, including working at Home Depot, Lowes, and Menards as well as searching for jobs such as TV repair, armored truck delivery and appliance repair. Petitioner testified that he looked for close to 1,000 jobs. He was not successful in finding a job over this time period.

On January 10, 2013, Petitioner received a letter from a company called Catalyst RTW offering him home based employment through a company called AllFacilities. Petitioner provided that he never applied to Catalyst and was not referred to Catalyst by Coventry. Petitioner stated that nobody from Catalyst ever interviewed him, spoke with him, or evaluated him in any way before offering this work opportunity.

On March 8, 2013, Petitioner interviewed with Kelly Koelling from AllFacilities via telephone. Petitioner was offered a position at that time, doing phone surveys from home to get information from various companies. Petitioner began this activity with AllFacilities on March 25, 2013.

Petitioner was paid $9.00 per hour and was instructed on how to submit his hours to AllFacilities. After beginning his work with AllFacilities, Petitioner's TTD checks were reduced from $1,234.00 per week to $991.41 per week. Petitioner's job consisted of going down a list of phone numbers and addresses for businesses and calling each business to ask for information and confirm the locations of the business.

For each of the businesses contacted, Petitioner filled out a form showing what information he was able to receive from the company and what questions they answered. Those forms are contained in Petitioner's Exhibit 27. The goal for each employee, set by AllFacilities, was to have the employee complete at least 16 calls per hour and get at least 2 "A leads" per hour, which meant answering at least 97% of the questions on the survey forms. Whereas a "B lead" was a form with only the majority of the questions answered. Petitioner testified that he tried as hard as he could to get "A leads" and make all the calls he was required to for the day.

According to Petitioner, the first time he was contacted by anyone from AllFacilities, after the three day training period, was on May 8, 2013 when he received a call from Wendy at AllFacilities. He told her that the phone

AllFacilities had provided him was buzzing terribly and that his arm and right hand both hurt when he was sitting at the desk working. Petitioner stated that while on the phone with Wendy, Kelly Koelling broke in on the line and told him that the only thing keeping him from working was himself and that he needed to get back to work.

On May 29, 2013, Petitioner received a letter from AllFacilities criticizing his work product as he had not completed enough "A leads" and AllFacilities felt there was a discrepancy between Petitioner's daily time sheets and the phone bill record of calls made from his work line. (RX 7) Petitioner testified that his time tracking sheets were "very accurate" and that the only possible explanation for the mismatch between the sheets and the phone records was that the calls he made that were not answered may not have shown up on the phone records. In June of 2013, the forms were amended to allow Petitioner a means by which to mark when calls were not answered.

In June of 2013, Petitioner was also referred by Dr. Birnie to Dr. Gregory Hawley for treatment of post injury depression. (PX 1, PX 3) Dr. Hawley's notes from June 17, 2013 reflect that Petitioner's job for the past three months with AllFacilities had been causing him stress and made him worse. He felt that the workers' compensation carrier was trying to get him to quit and his irritability and anger had grown over the previous three months. Petitioner also suffered from a depressed mood. Petitioner was prescribed medication to assist him. (PX 3)

On July 10, 2013, Petitioner was terminated by AllFacilities, citing his failure to produce enough "A leads" and not meeting his hourly work requirements. (RX 7)

On July 15, 2013, Petitioner followed up with Dr. Hawley. The doctor noted Petitioner was upset after being terminated by AllFacilities and was continuing to experience irritability and anger. Petitioner was again prescribed medication. (PX 3)

Petitioner testified that while working for AllFacilities, he experienced a great deal of anxiety. He got more aggravated and mad as time went on. He was angry that he was made to take a job that he had never applied for. Petitioner had no desire to work out of his home. He explained that out of all of the job leads he was given while searching for employment, this at-home work was the one job that he would not have applied for himself. Petitioner also experienced anxiety, which manifested itself as a lack of sleep, scratching his hands, and chewing on his lips. Petitioner testified that he had never received psychological treatment prior to this or had any problems with anxiety prior to working for AllFacilities.

On cross-examination, Petitioner testified that while working with Coventry, he applied for about 1,000 jobs and filled out job search logs when he contacted each employer. Most of his contacts were made by phone with a little over 100 contacts made in person. Petitioner also went to the library to apply for jobs online.

Petitioner testified that while working for AllFacilities, he turned in his work hours to AllFacilities via a pre-paid envelope they provided to him. Petitioner stated that he had been contacted once by AllFacilities about not turning his sheets in a timely fashion.

Petitioner testified that the last time he looked for a job was the last job lead he was provided with by Coventry.

On re-direct examination, Petitioner explained that AllFacilities never told him he was not filling out the forms correctly for his call logs. He tried to get at least two "A leads" per hour, but stated that it was virtually impossible.

Petitioner was never informed by AllFacilities that his odds of getting a job with AllFacilities after the subsidized period of employment was less than .5%. He took the job because he knew that his workers' compensation benefits would have been reduced or stopped if he didn't.

On re-cross examination, Petitioner testified that he was still receiving benefits, but getting the reduced rate he was getting while working for AllFacilities.

Testimony of Susan Entenberg

Susan Entenberg is a certified rehabilitation counselor (CRC), which she explained is the national certification for rehabilitation counselors. According to Ms. Entenberg, job placement is helping an individual look for appropriate employment and is a form of vocational rehabilitation. Ms. Entenberg explained that there is a code of ethics that applies to vocational rehabilitation counselors and it is contained in Petitioner's Exhibit 23.

In December of 2009, Petitioner met with Alan Olken from Ms. Entenberg's office, and a counselor from Coventry at the request of Petitioner's attorney. After that first meeting, Ms. Entenberg herself had met and spoken with Petitioner on numerous occasions over the years.

Ms. Entenberg drafted her first report regarding Petitioner on November 29, 2012. At that time, she reviewed medical records and Petitioner's job search through that date. At that time Petitioner had applied to over 600 jobs with only two interviews and no job offers. (PX 14) She felt that Petitioner's job search had been very diligent. Prior to Petitioner's accident, he worked as a journeyman carpenter, which is a heavy job with lots of overhead work. Based upon Petitioner's permanent restrictions, Ms. Entenberg opined that he was unable to return to that profession. Ms. Entenberg further testified that Petitioner's previous employment gave him no transferrable skills within his restrictions.

Based upon Petitioner's work experience, lack of computer skills, lack of transferrable skills, rural geographic area, and diligent yet unsuccessful job search, it was Ms. Entenberg's opinion that no stable labor market existed for him. (PX 14)

On February 18, 2013, Ms. Entenberg produced another report. That same day, she had the opportunity to speak with Renee Concolino, a CRC from Catalyst whose name appeared on the January 10, 2013 letter to the Petitioner offering him a job with AllFacilities. Ms. Entenberg's report further details information regarding the functioning of Catalyst as a company, which she received from Ms. Concolino and Tom King, a marketing representative from Catalyst. Ms. Entenberg describes Catalyst as an "insurance claims based resource" that establishes home-based telecommuting employment with a company called AllFacilities. Catalyst is paid a referral fee by the referring insurance company, then installs a telephone line into the injured person's home, also at the carrier's expense. The insurance carrier then fully subsidizes the first 400 to 750 hours of work through AllFacilities. Catalyst is paid an additional fee from the insurance carrier upon an offer of employment from AllFacilities to the injured person. (PX 15)

After reviewing the information regarding Petitioner's job offer from Catalyst, Ms. Entenberg concluded that "the job with AllFacilities is not a legitimate job offer." She noted that Petitioner had been offered this job without ever applying for it. Furthermore, the insurance carrier paid a fee of $4,500 plus expenses of set up for Petitioner to be placed in this position, in addition to paying a full subsidy of Petitioner's wages for up to the first 750 hours he worked at AllFacilities. There was no guarantee of employment after the subsidized period and no objective standards to determine Petitioner's job performance. She concluded that the job with AllFacilities was non-competitive employment and a stable labor market did not exist in the general economy within those parameters. (PX 15)

Prior to testifying in this matter, Ms. Entenberg also reviewed the depositions of Renee Wallace and Kelly Koelling. She further reviewed Petitioner's daily tracking sheets, tally sheets and call logs from his work with AllFacilities.

After reviewing the AllFacilities work information and depositions, Ms. Entenberg's opinions regarding Petitioner's employability had not changed. She further opined that the activity of a home based survey worker at AllFacilities was not a real job and that work with AllFacilities was not competitive employment. Since the work performed by Petitioner at AllFacilities was subsidized, it did not constitute competitive employment or a substantial gainful activity. There is no stable labor market with similar work. Ms. Entenberg noted that Ms. Koelling testified she was not aware of any competition performing the same work as AllFacilities. The survey taking position with AllFacilities is not skilled work.

Based upon the fact that a CRC signed the letter from Catalyst when Petitioner was offered a job with AllFacilities, Ms. Entenberg felt that Catalyst was holding itself out as a vocational rehabilitation vendor for Petitioner and that Renee Wallace from Catalyst was holding herself out as a vocational rehabilitation counselor. Ms. Entenberg had also looked at the website and promotional materials from Catalyst RTW and concluded that they hold themselves out as vocational rehabilitation providers.

When it was explained to Ms. Entenberg that approximately .4% (that is 4/10 of 1%) of the referred cases from Catalyst to AllFacilities end up as full time employees after the subsidized work period, she explained that one of the factors considered in *National Tea v. Industrial Commission* regarding the appropriateness of vocational rehabilitation is the prospect of return to work, and that a .4% employment number is miniscule and does not represent a good job prospect at all.

Ms. Entenberg concluded that Catalyst and AllFacilities are simply an insurance based resource to put people on a job "with a great possibility of failure."

On cross-examination, Ms. Entenberg pointed out that Petitioner had already had training set up to begin his activities for AllFacilities before the interview with AllFacilities had even taken place. Again, she testified that Catalyst was holding itself out as a vocational rehabilitation provider.

On redirect examination, Ms. Entenberg clarified that the work done by Petitioner with AllFacilities was not telemarketing. She further stated that she had never referred a client to Catalyst because they do not provide a legitimate service to the injured employee.

On recross-examination, Ms. Entenberg testified that Petitioner was paid by AllFacilities and that they could hire or fire him. She testified on further re-direct examination that the position with AllFacilities was not a real job, as it was completely subsidized and AllFacilities charged administration fees and fees for interviews.

Testimony of Lisa Helma

Lisa Helma is a certified rehabilitation counselor (CRC). She confirmed that CRC is the national certification for rehabilitation counselors. According to Ms. Helma, job placement is a form of vocational rehabilitation.

Ms. Helma met with Petitioner in this matter and produced a report dated February 27, 2013. Ms. Helma reviewed Petitioner's medical records, educational history, vocational history, and the records from his job search. She concluded that Petitioner could not return to his previous occupation as a carpenter. She further opined that, based upon his unsuccessful but diligent rehabilitation efforts for the 20 months prior to meeting

with Ms. Helma, in addition to his age, limited education, narrow work history, and physical restrictions, Petitioner was totally disabled from employment. Ms. Helma also reviewed information regarding Catalyst RTW and concluded that the position with Catalyst RTW was not a legitimate position as it does not exist in the normal labor market. Ms. Helma also had the opportunity to speak directly with Renee Wallace from Catalyst and review Catalyst RTW promotional materials. Ms. Helma concluded, "Given the fact that the insurance company must pay for placement, along with the first 400 to 700 hours of employment, as well as Catalyst's sales literature, it is the opinion of this consultant that Catalyst's mission is to lower the cost of insurance claims. It does not provide for a stable labor market." (PX 17)

Ms. Helma explained that Petitioner's previous work as a carpenter was heavy in some aspects of the work. Ms. Helma opined that Petitioner could not return to his previous profession as a construction carpenter within his permanent physical restrictions and that he had suffered a loss of his career.

Ms. Helma reviewed Petitioner's job search while working with Coventry and opined that Petitioner had performed a diligent job search during that time. There was no indication that Petitioner was ever non-compliant during his job search with Coventry.

After reviewing Petitioner's case, Ms. Helma found that schooling or training was not a reasonable option for Petitioner. She stated that given his situational factors, including his age and lack of work since 2009, schooling would have simply increased the time Petitioner was out of the work force and actually would make him less marketable.

After reviewing Petitioner's age, restrictions, prior education and job search, Ms. Helma opined that there was no stable labor market available to Petitioner.

Ms. Helma testified that she had personally conducted research regarding home based employment and found that while there is a stable labor market for home based work, it must be based on the individual's background and only certain fields of employment have the ability to work from home. Most home based opportunities were based in the medical or information technology fields and required certain educational degrees. Ms. Helma concluded that Petitioner was not a qualified candidate for home-based employment.

Ms. Helma reviewed the depositions from Renee Wallace and Kelly Koelling, as well as the correspondence from AllFacilities to Petitioner and daily tracking and tally sheets filled out by Petitioner for Catalyst. After reviewing the information regarding Petitioner's work with AllFacilities, Ms. Helma concluded that the home based survey associate position with AllFacilities was not a real job. She further stated that Petitioner developed no transferrable skills while at AllFacilities and that the work with AllFacilities was not competitive employment, as the position was subsidized. Ms. Helma explained that Petitioner's position at AllFacilities was not a legitimate position as it was not a position that normally exists in the labor market. Furthermore, the position at AllFacilities provided no transferrable skills, was subsidized employment, and the majority of people referred to work by Catalyst were sent to AllFacilities for this type of work. Ms. Helma's research was unable to find any other position like the one at AllFacilities. According to Ms. Helma, Catalyst RTW held themselves out as a vocational rehabilitation provider by informing Petitioner that they had found him employment and arranging training. Further, the letter from Catalyst informing Petitioner of the position with AllFacilities was signed by a CRC. (RX 1 in deposition transcript of Renee Wallace (RX 4))

Ms. Helma went on to indicate that she believed there may be ethical issues involved with placement through Catalyst RTW. She explained that Catalyst made no disclosures of possible conflicts. Also, the fees from Catalyst were to be refunded if the individual was not placed in a position. Ms. Helma explained that her company, Vocamotive, never pays an employer for placement and no employer ever pays them, so there is no

ethical issue. When presented with the proposition that .45% (less than ½ of 1%) of the referrals from Catalyst turn into full time employment with AllFacilities after the subsidized work period, Ms. Helma opined that same did not establish a stable labor market. Finally, Ms. Helma opined that the work at AllFacilities was not evidence of a stable labor market for Petitioner as there was no evidence that AllFacilities had any competition.

Ms. Helma testified that if Renee Wallace's testimony that she was not providing vocational services to Petitioner in this case was accurate, then that the individual who was directing the decisions of Catalyst RTW to return Petitioner to work would have been acting as a vocational counselor in this case. In this instance, that person would have been the insurance adjuster, if the insurance adjuster knew that by referring the file to Catalyst, Petitioner was going to be placed with AllFacilities.

Deposition Testimony of Renee Wallace – October 30, 2013

Renee Wallace is the vice-president of vocational services for Catalyst RTW. She has been with Catalyst for about 10 years and was with a company called Expediter for 12 years prior to that, where she was a vocational consultant managing a home-based employment program. She has a bachelor's degree in business and personnel management and a certification as a workers' comp professional (CWCP) from Michigan State University. The CWCP is a week long course in general workers' compensation with a test at the end to get a certification. (RX 4 @ 4-6)

Ms. Wallace manages the other vocational consultants at Catalyst, performs labor market surveys and vocational assessments and represents the company at various trade shows and functions. Ms. Wallace explained that the majority of Catalyst's work is in their home-based return to work program. Referrals for this program come from insurance companies. She provided that Petitioner was referred to Catalyst by ESIS, the insurance carrier. After receiving the referral, Catalyst reviewed Petitioner's restrictions then scheduled him for an interview with AllFacilities. (RX 4 @ 7-8)

Petitioner's attorney objected to the vocational opinions of Ms. Wallace, stating that Ms. Wallace was acting as a vocational rehabilitation counselor by scheduling an interview with AllFacilities, even though Ms. Wallace is not a certified rehabilitation counselor. Petitioner moved to strike all testimony from Ms. Wallace on the grounds that she is not qualified to render vocational opinions. (RX 4 @ 8; 11; 12-13; 16; 95)

This interview was scheduled by a vocational counselor, Renee Concolino, that was supervised by Ms. Wallace. Petitioner was not met with by anyone from Catalyst prior to scheduling the interview with AllFacilities. Ms. Wallace explained that "the purpose of the interview was to place him with AllFacilities in a home-based customer service associate position." (RX 4 @ 10-12)

Ms. Wallace provided that Petitioner was offered a position as a customer survey associate by AllFacilities. This job involves contacting businesses to verify the contact information for the company, obtain the name of a decision maker, then ask a set of survey questions. (RX 4 @ 13). She indicated this was a sedentary job, requiring less than two pounds lifting and allowing Petitioner to work from home in whatever position they choose. The rate of pay for this job is $9.00 per hour. (RX 4 @ 14-15).

Ms. Wallace testified that the job at AllFacilities is subsidized by the insurance carrier. The first 400-750 hours of the job, or 10 to 20 weeks, is subsidized by the insurance carrier. Once the individual meets the productivity standard of 16 dials per hour and two completed surveys per hour, the subsidy ends and their employment is ongoing. (RX 4 @ 15)

Petitioner was sent a letter with a job description and an application for employment at AllFacilities that he needed to fill out prior to the interview. (RX 4 @ 16) Petitioner was offered a job at AllFacilities and began training on March 19, 2013. After training, Petitioner's first full day of work was March 25, 2013. (RX 4 @ 18-19)

On April 30, 2013, a review letter was drafted regarding Petitioner's job performance in which there were discrepancies between his tally sheets and time records. Subsequently, AllFacilities terminated Petitioner. From the beginning of his work with AllFacilities through the date of his termination, Petitioner was not contacted by Catalyst and Petitioner did not contact Catalyst. (RX 4 @ 20)

Ms. Wallace went on to testify that between 5 and 10 percent of people who go through the interview process with AllFacilities complete the subsidy period and go on to continued employment with AllFacilities. After an individual has completed the subsidy period, Catalyst follows up with them from 8 to 10 weeks, then closes their file. They are not aware of what happens to those people afterward. (RX 4 @ 22-23)

According to Ms. Wallace, after an individual has worked as a survey worker for a period of time, they're given training on data entry. There are some positions within AllFacilities that could be moved on to or other jobs could be found in the general labor market. (RX 4 @ 24) The job with AllFacilities is a full time, 40 hour per week job. (RX 4 @ 26)

On cross-examination, Ms. Wallace explained that she took the 5 day workers' compensation class at Michigan State University in 2004, while she was an employee of Catalyst. The course was held somewhere in Michigan, in a hotel, other than on the campus of Michigan State and was taught by a number of instructors. According to Ms. Wallace, this class covered all aspects of workers' compensation in five days. (RX 4 @ 27-29) Ms. Wallace indicated that she is not a certified vocational rehabilitation counselor (CRC) and is not certified in the State of Illinois. (RX 4 @ 31)

Ms. Wallace testified that Dan Heit is the current owner of Catalyst RTW and was the previous president of Expediter which also does home-based employment work. She provided that Catalyst markets to workers' compensation insurance companies in the United States. They do not market themselves to the Illinois Trial Lawyers' Association or to the Workers' Compensation Lawyers' Associations in the State of Illinois. (RX 4 @ 33-36)

Ms. Wallace testified that although Catalyst's marketing materials mention that they incorporate rigorous behavior management methods, they did not incorporate any in this case. She provided that the materials also mention cognitive restructuring, but none was offered in this case. Furthermore, where the materials indicate that Catalyst offers support, Ms. Wallace testified that the letters they sent him during his work with AllFacilities constituted that support. She stated that no meeting was ever set up with Petitioner, indicating it was on him to contact Catalyst if he needed anything. (RX 4 @ 37-39)

Ms. Wallace testified that approximately 90% of Catalyst's work is with AllFacilities. Catalysts' clients are the insurance companies, self-insured companies or TPAs. Ms. Wallace stated that Catalyst holds itself out as offering labor market surveys, transferrable skills analysis, earning power assessments and job development, but none of those were offered to Petitioner. (RX 4 @ 40-41)

Ms. Wallace testified that Catalyst's literature markets that workers' compensation cases settle for less money when they are involved in the case. (RX 4 @ 44-45) Catalyst also markets that if the individual is non-cooperative, declines the offer of work or is terminated for cause they will document those facts and be available for testimony. (RX 4 @ 46, 48) Ms. Wallace stated she testifies on behalf of Catalyst from 25 to 30

times per year. (RX 4 @ 47) Ms. Wallace agreed that cases where people are otherwise unemployable are the types of cases that they work on. (RX 4 @ 51)

Ms. Wallace testified that Petitioner's phone records did not line up with his logs, leading to his termination. However, she did not have his phone records or information regarding what phone number he was placing calls from. (RX 4 @ 52-53). She did not check the phone records to see if they were in fact a mismatch with the logs. (RX 4 @ 53-54). She added that all calls made by Petitioner while working for AllFacilities were cold calls and he asked the same questions all day. (RX 4 @ 54)

Ms. Wallace agreed that part of their marketing campaign is that they can reduce the costs for workers' compensation insurance companies and that by showing that some sort of work is available, they could reduce the value of a possible permanent total case. (RX 4 @ 54-55) She stated that "We do market for those impossible cases or cases going to perm total, yes." (RX 4 @ 55)

Ms. Wallace testified that she was not familiar with the Code of Professional Ethics for rehabilitation counselors. [(RX 4 @ 55) (PX 1 – Code of Ethics, attached to RX 4)] She is not familiar with the rule that the obligation of a rehab counselor is to the client, who would be Petitioner in this case. (RX 4 @ 60) She is not familiar with any of the rules regarding ethics for vocational rehab counselors. (RX 4 @ 61) Ms. Wallace claimed that they were not hired to perform and vocational services to Petitioner, but simply to place him in a position. (RX 4 @ 64)

Ms. Wallace testified that Petitioner was referred by the workers' compensation insurance company to Catalyst on the same day that they terminated Petitioner's vocational rehabilitation through Coventry. (RX 4 @ 67-68) (Ex. 2 and 3, attached to RX 4) Ms. Wallace did not recall whether she had been informed that all vocational rehab efforts prior to the referral to Catalyst had failed or that Petitioner had applied to 902 employers prior to December 21, 2012. (RX 4 @ 69) She stated that nobody from Catalyst analyzed Petitioner's work history, verbal skills, communication skills, reading skills or tolerance for working in a home-based environment. (RX 4 @ 69-70) Ms. Wallace further indicated that she was not familiar with the Illinois Supreme Court case of *National Tea v. Industrial Commission*. (RX 4 @ 70)

Ms. Wallace estimated that in 2013, 230 cases had been referred to Catalyst by workers' compensation insurance companies. In 2012 there were 285 referrals and somewhere between 200 and 300 in 2011. (RX 4 @ 73-74) Approximately 98% of these cases are unemployed when referred to Catalyst. About 90% of these people are referred for home-based survey work. 100% of the home-based survey workers are initially subsidized by the workers' compensation insurance carrier. About 50% of the referred injured workers agree to the initial interview. Catalyst charges a fee of $4,750 whether the injured worker accepts the interview or declines it, it does not matter. (RX 4 @ 75-77) Ms. Wallace is aware that an injured worker declining an interview may give the insurance company a basis to cut that person off their benefits. (RX 4 @ 79) If the person accepts the interview, AllFacilities receives $375.00. (RX 4 @ 80) This fee to AllFacilities is paid whether the person accepts or declines the job. (RX 4 @ 81) If the individual accepts the job, there is approximately a $1,100.00 charge by Catalyst to set the individual up for work in their home. She stated that of the 90% of cases that are referred to AllFacilities by Catalyst, maybe 10% of those cases have aptitude testing, transferrable skills analysis, interest testing, or other such things done on them. Of the cases that are referred by Catalyst to AllFacilities around 5% do not receive job offers. (RX 4 @ 82- 83) If the interview has occurred by AllFacilities and no job offer is made, a portion of the $4,750 paid to Catalyst is returned, based upon how much work they had done to that date, ranging from a $3,000 to $4,000 refund to the insurance company. (RX 4 @ 83-84) If the interview is done by AllFacilities and the job is not offered, AllFacilities normally refunds the $375 they were paid as well. (RX 4 @ 84-85)

Ms. Wallace testified that the injured worker's work with AllFacilities is subsidized for the first 400 to 750 hours. (RX 4 @ 85). During the subsidy period, in addition to the subsidized wages, AllFacilities is paid a weekly $180 administration fee by the insurance company. She provided that every two weeks, the injured worker receives a paycheck from AllFacilities who then invoices Catalyst and Catalyst invoices the carrier. Catalyst pays AllFacilities the weekly subsidy for each worker up front, then bills the insurance carrier to pay them. (RX 4 @ 86-87)

Ms. Wallace testified that as of the date of the deposition, approximately 15 to 20 individuals were performing the task of a home survey worker for AllFacilities and being subsidized by a workers' compensation carrier. (RX 4 @ 89) Ms. Wallace further estimated that between 5 and 7 workers were working for AllFacilities, past their subsidy period, and past the 1,000 hours it requires to get benefits. (RX 4 @ 90)

When asked whether Petitioner receiving less money from the workers' compensation carrier in this case after he was fired by AllFacilities was a successful outcome for Catalyst RTW, Ms. Wallace stated, "One of the outcomes is that the insurance carrier can save money, yes." (RX 4 @ 95)

On re-direct examination, Ms. Wallace testified that the 10% of cases that are referred to companies other than AllFacilities are sent to charities or non-profits, depending on the individual's needs, restrictions and language barriers. Those jobs are paid. (RX 4 @ 95-96)

Ms. Wallace explained that the $180 administration fee per week charged by AllFacilities was for monitoring sessions, additional training sessions, or other additional work that needs to be done. (RX 4 @ 98)

Deposition Testimony of Kelly Koelling – October 30, 2013

Kelly Koelling is the human resource manager for AllFacilities. Ms. Koelling had been employed by AllFacilities for about one year. She holds bachelor's degrees in behavioral analysis, business from Kaplan University and a master's degree in industrial organizational psychology from Capella University. Ms. Koelling has worked in human resources for 15 to 20 years. Ms. Kaplan does employee evaluations, hiring, maintaining, overseeing hourly reports, time records, policy procedures, and benefits administration. (RX 3 @ 4-7) She provided that AllFacilities specializes in data management in the energy field by calling businesses and generating customers for energy companies. (RX 3 @ 8)

Ms. Koelling testified that there are currently 15 to 20 employees working at AllFacilities, which is located across the street from Catalyst RTW. There are ten in-house employees and 7 or 8 doing survey work at home. 90% of the at-home workers are referred there by Catalyst. (RX 3 @ 9-10)

Ms. Koelling testified that she does the monitoring and evaluations of the at-home workers. She provided that after the data is collected by at-home survey callers, the data is brought in-house where internal employees will contact individuals collected from the leads to try to strike up business for AllFacilities' energy clients. (RX 3 The at-home customer service associates are provided with call lists and call companies from those lists. (RX 3 @ 10-12)

When an individual is referred from Catalyst, Ms. Koelling reviews their application and calls them for an interview. Approximately 80% of those interviewed are offered positions. She stated that the interview and application are meant to see if the person can have a conversation, answer questions accurately, completely and cooperatively. (RX 3 @ 12-13)

After a job offer is made, the individual is scheduled for training, sent all of the materials related to their positions, payroll, and equipment and are trained via phone. The new employee is paid $9 per hour after the subsidy period. After 6 months, the pay could increase by $1 per hour, based upon performance standards. Ms. Koelling provided she is the person who does the evaluations of the work submitted, making sure they are working their hours, turning in their work and that the hours represent the time that they are actually working. Employees also receive a bi-weekly check for $125 dollars for health care. (RX 3 @ 14-16)

Ms. Koelling testified that the subsidy period at the beginning of an employee's work with AllFacilities lasts for 750 hours, or approximately 19 weeks at 40 hours per week, with no overtime. Some employees have continued working at AllFacilities past the subsidy period. Some employees have also transferred to data collection within AllFacilities. (RX 3 @ 16-17) Ms. Koelling added that she has received a call in the past for an at-home employee reference check when that employee was applying for a job with another call center. (RX 3 @ 18-19)

Ms. Koelling testified that Petitioner was referred to AllFacilities through Catalyst RTW. (RX 3 @ 20). Ms. Koelling interviewed Petitioner on March 8, 2013. (RX 3 @ 21). After the interview, Petitioner was sent payroll and job documentation and was scheduled for training, which was conducted over the phone. (RX 3 @ 22-23)

Ms. Koelling explained that when the worker makes a call, they are required to fill out a survey form. The purpose of the forms is to collect business leads for AllFacilities. The employee has the responsibility to fill out the survey form boxes during the calls, then sending the survey forms to AllFacilities. The worker also keeps a daily tally sheet of all calls made. These daily sheets are sent to Ms. Koelling. (RX 3 @ 24-29)

Ms. Koelling provided that at-home callers are expected to obtain two A-leads per hour, meaning that 97-100% of the information is completed on the survey. Phone records are used to verify that the worker is making the required calls. (RX 3 @ 30). Ms. Koelling utilizes an internal report to compare reported dials from the worker to the phone bill. The phone bill is compared to the tally sheet turned in by the employee each week. (RX 3 @ 32)

Ms. Koelling claimed that the dials reported by Petitioner's tally sheets differentiated from the phone bills by 55 to 70 off per day, which she claimed was consistent since the onset of his employment. Ms. Koelling stated she wrote Petitioner a letter addressing the issue and scheduled him for monitoring. The monitoring included listening to calls and making suggestions and tips afterward. (RX 3 @ 33-36) The bills from the phone lines get sent directly to AllFacilities. (RX 3 @ 38)

Ms. Koelling testified that after being placed on probation, Petitioner continued with his failure to meet his goal of A-leads. She ran another productivity report, which she claims showed that Petitioner was falsifying his dials, due to the variance between the phone bills and his tally sheets. Ms. Koelling then terminated Petitioner for not meeting his A-leads and not working full time hours. (RX 3 @ 38-40)

Ms. Koelling explained that 30-40% of employees have difficulty reaching their A-leads, but monitoring usually will assist them in correcting that. (RX 3 @ 44)

On cross-examination, Ms. Koelling explained that the referrals received from Catalyst are for people with some type of disability. In the year she has worked for AllFacilities, she estimated that Catalyst had referred about 50 cases to them. (RX 3 @ 49-50) The fee for an interview for home-based work from AllFacilities is $375. This fee is charged whether or not the person accepts a job with AllFacilities. She stated that AllFacilities pays to set up the equipment and phone for the at-home workers. When AllFacilities bills, they bill Catalyst, not the workers' compensation insurance company. (RX 3 @ 52-54)

Ms. Koelling provided that AllFacilities currently had 15 to 20 employees, six of whom were at-home employees. (RX 3 @ 54-55, 62) 5 other employees are management, not referred by Catalyst. Of the 5 to 9 remaining employees, 4 are office employees, making calls based off of the surveys taken by the at-home callers. (RX 3 @ 57-59) These 4 are not subsidized, but Ms. Koelling did not know if they came from Catalyst. Currently there were 3 unsubsidized home-call workers and 3 subsidized workers, all of whom were referred by Catalyst. (RX 3 @ 60-61).

Ms. Koelling explained that Petitioner's interview took 20 minutes to a half hour. She indicated that Petitioner's home environment, psychological skills, and reading skills were not tested. Ms. Koelling was not aware that money could be taken from an individual who declined an interview with her. Sha also provided that Petitioner's work experience in an indoor environment was not evaluated. (RX 3 @ 66-68)

Ms. Koelling testified that she was Petitioner's supervisor. (RX 3 @ 69). She also testified that the job of customer service associate is not advertised anywhere but Craigslist and had not been advertised at all for weeks prior to the deposition. (RX 3 @ 71)

Ms. Koelling explained that she earned her bachelor's degree in a year and a half while working. (RX 3 @ 74) Her master's degree would be from Capella University, an online university, but she had not finished it yet. (RX 3 @ 74)

Ms. Koeling indicated that approximately 80% of referrals from Catalyst who are interviewed are offered the job and 60-70% of those accept the position. (RX 3 @ 77) After the initial 750 hours of work, if the worker can prove that they have health insurance, they will receive the $125 twice a month extra to use toward that. A 401K plan with 3% matching is also offered to full time employees. No other benefits are offered. Ms. Koelling estimated that she spends 10 to 15 hours per week, out of her 40 hour work week, working with Catalyst referrals. (RX 3 @ 78-82)

Ms. Koelling testified that she was not aware of Petitioner's issues with his job that lead him to the care of a psychiatrist. She was not aware that Petitioner was placed on medication in his attempt to stay on the job. Ms. Koelling testified that was not aware of any of the litigation or medical issues involved in this or any of her cases. (RX 3 @ 82-84)

Ms. Koelling did recall a report from Petitioner about a buzzing sound in his phone, but did not recall cutting into a conversation between Petitioner and Wendy, another AllFacilities employee, and telling Petitioner that he was the only thing keeping himself from doing his job, rather than the pain in his hand, arm and shoulder that he was complaining of. (RX 3 @ 84-85) She stated that when Petitioner called to complain of the buzzing in his phone, the phone company was called to go to his house and address the buzzing. She noted Petitioner received a new phone. (RX 3 @ 89)

On re-direct examination, Ms. Koelling explained that they do not get referrals at AllFacilities exclusively from Catalyst. Ms. Koelling explained that the people who work for them that are no longer subsidized, work 40 hours per week and receive a paycheck. (RX 3 @ 91-92) She also testified that the decision to hire is not made prior to an interview. (RX 3 @ 95)

Specific Evidentiary Ruling

During the deposition of Renee Wallace, counsel for Petitioner objected to all opinions given by Ms. Wallace, stating that she was unqualified to give any vocational opinions in this matter. While the arbitrator agrees that Ms. Wallace is not qualified to render vocational opinions, Ms. Wallace did not actually testify to any vocational opinions. Rather, Ms. Wallace's testimony was limited to information regarding Catalyst, AllFacilities, and the subsidized work activities provided to Petitioner through those companies. Therefore, Petitioner's objection and movement to strike the testimony of Ms. Wallace is denied.

With respect to issue (F) Whether Petitioner's current condition of ill-being is causally related to his work accident, the Arbitrator hereby finds:

On the date of accident, September 24, 2009, Petitioner presented to Physician's Immediate Care complaining of right shoulder pain from a lifting accident at work. Petitioner was seen by Dr. Ronald Gregus who recommended a MRI of the right shoulder. Petitioner underwent the MRI of the right shoulder on September 28, 2009, which revealed 1) subscapularis tendon tear with 1 cm retraction from lesser tuberosity, 2) subscapularis muscle strain/partial tearing, and 3) dislocated intrascapular long head of the biceps tendon, medially.

Following the MRI, Petitioner was referred to Dr. Roderick Birnie at the University of Chicago Medical Center who diagnosed Petitioner with a right shoulder subscapularis avulsion, with long head of the biceps subluxation. Dr. Birnie recommended surgical repair of the right rotator cuff.

On October 1, 2009, Petitioner was seen on a referral from Dr. Gregus by Dr. John H. Lee of Adventist Health Partners. Dr. Lee examined Petitioner's right shoulder and diagnosed a subscapularis tear with dislocated biceps tendon. Dr. Lee also noted neck pain upon his examination. During the examination, Petitioner exhibited a positive axial compression test and tenderness in the cervical spine. Dr. Lee recommended that Petitioner follow up in 3 to 4 days for a recheck of his shoulder and neck.

On November 4, 2009, Petitioner was seen by Dr. Theodore Suchy for a Section 12 Examination at the request of Respondent. Dr. Suchy opined that Petitioner could perform light duty work with no use of the right hand and recommended continued rehabilitation. Dr. Suchy further opined that that there was a causal relationship between the injury Petitioner sustained on September 24, 2009 and the development of a subscapularis tear with biceps tendon dislocation.

On November 25, 2009, Petitioner underwent right shoulder arthroscopy with biceps tenotomy, arthrscopic subacromial decompression, open rotator cuff repair, and open biceps tenodesis performed by Dr. Birnie at University of Chicago Medical Center. The pre and post-operative diagnoses were "complete tear rotator cuff subscapularis and subluxed biceps tendon."

Following surgery, Petitioner underwent a course of treatment at Brightmore Physical Therapy and continued to follow up with Dr. Birnie. On February 23, 2010, Dr. Birnie noted that Petitioner was complaining of occasional neck pain, along with continued shoulder issues. On April 6, 2010, Dr. Birnie again noted Petitioner's complaints of neck pain which he said were present prior to the shoulder surgery, but had significantly worsened since. Dr. Birnie assessed Petitioner with trapezial myositis contributing to pain in his neck and recommended physical therapy for that pain along with continued therapy for his shoulder.

Petitioner continued to follow up with Dr. Birnie and began a course of work conditioning in May of 2010. On June 29, 2010, Dr. Birnie recommended a cervical MRI, which was performed on June 30, 2010. The cervical MRI revealed mild spondylosis of the cervical spine with mildly bulging discs at C3-4 through C6-7.

There was also mild to moderate impingement of the neural foramina bilaterally at C5-6 and on the right at C6-7 secondary to uncovertebral joint hypertrophy.

On August 3, 2010, Petitioner followed up with Dr. Birnie. Dr. Birnie noted that Petitioner still had shoulder discomfort and recommended a FCE to determine permanent restrictions.

On September 27, 2010, Petitioner was seen by Dr. Nikhil Verma for a Section 12 examination at the request of Respondent in this matter. Dr. Verma diagnosed Petitioner with mild persistent right shoulder pain with possible cervical radiculopathy status post injury. Dr. Verma opined that the condition of Petitioner's right shoulder was causally related to his September 24, 2009 work accident. He further stated that Petitioner had reached MMI and recommended a FCE to determine Petitioner's physical capabilities. Dr. Verma did not opine on causation as it related to Petitioner's cervical spine.

On January 17, 2011, Petitioner underwent a FCE at ATI Physical Therapy, which indicated that Petitioner could function at the medium physical demand level. Petitioner was able to occasionally lift 53 pounds floor to chair, 28 pounds above shoulders bilaterally, 21.6 pounds with his right arm and 28.2 pounds with his left arm, and carry 37 pounds with his right arm and 66.4 pounds with his left arm. The physical therapist at ATI noted that these capabilities were below the heavy physical demands of Petitioner's previous occupation as a carpenter.

On January 20, 2011, Petitioner was seen by Dr. Leonard Cerullo. The doctor noted that he had seen Petitioner for lower back and neck pain in October of 2008, after which he was seen by Dr. Villoch in May of 2009. Petitioner underwent lumbar and cervical injections in May of 2009 and underwent physical therapy, after which he was "fairly stable." Dr. Cerullo noted Petitioner's September 24, 2009 work injury and the neck and shoulder pain he had experienced since that time. Dr. Cerullo diagnosed possible cervical radiculopathy in addition to the shoulder injury. He recommended an EMG/NCV of the right upper extremity.

On March 1, 2011, Dr. Birnie released Petitioner to return to work within the restrictions outlined by the January 17, 2011 FCE.

On March 14, 20111, Petitioner was seen by Dr. Christine Villoch for lower back and neck pain at North Shore Pain Center (Petitioner is not claiming that his lower back pain is related to his work accident in this case, but that the neck pain is related). Dr. Villoch noted Petitioner's accident, pain in his neck the day after the accident, and continued neck pain and discomfort through the date Petitioner was seen by Dr. Villoch.

It is clear from the testimony of Petitioner and the medical records in this case that Petitioner had no previous issues with or medical treatment for his right shoulder. There are also no records in evidence to reflect that he had not reached a stable medical condition after his cervical treatment in May of 2009. Dr. Cerullo even notes in his January 20, 2011 record that Petitioner had become stable. However, after his September 24, 2009 work accident, Petitioner's right shoulder and cervical spine were continuously painful and required treatment. Immediately after the accident, Petitioner began treating for his injured right shoulder. Within one week of the accident, the records reflect that Petitioner was also examined for neck pain and stiffness by Dr. Lee.

There is no evidence or testimony in this case to dispute the causal connection between Petitioner's September 24, 2009 work accident and his right shoulder injury. In fact, both of Respondent's IME physicians, Dr. Verma and Dr. Suchy opined that the condition of Petitioner's right shoulder was causally related to his work accident. Also there is no evidence or testimony in this case to dispute the causal connection between the September 24, 2009 work accident and the condition of Petitioner's cervical spine. Although Petitioner had some cervical

treatment in May of 2009, Dr. Cerullo noted that Petitioner had become stable, but had an accident in September of 2009 which began the cervical pain anew.

The Arbitrator finds the testimony of Petitioner in this case regarding his medical conditions is honest and credible. After September 24, 2009, he had consistent pain and discomfort in the spine, necessitating medical treatment with Dr. Birnie, Dr. Cerullo, and Dr. Villoch, as well as diagnostic testing and physical therapy.

Respondent contends that the absence of Petitioner's previous treatment records for his cervical spine should lead to a presumption that those records were negative for Petitioner, Respondent has offered no evidence or testimony to dispute causal connection of the cervical spine in this case and has offered no evidence or testimony to cast doubt on Dr. Cerullo's notation that Petitioner had been reasonably stable after the May 2009 treatment and had cervical pain begin after the September 24, 2009 accident.

In addition to the shoulder and cervical injuries, Petitioner also sought treatment for psychological issues after beginning work with AllFacilities. The records reflect that Petitioner was referred from Dr. Birnie to Dr. Hawley, a psychiatrist, for treatment of post injury depression. Petitioner testified that he became more and more angry and frustrated while working for AllFacilities and needed to seek treatment. Dr. Hawley prescribed medication which was helpful. Dr. Hawley's Axis I Diagnosis included mood disorder, anger, alcohol abuse and pain disorder. Records indicate alcohol abuse condition has developed over the last few months. Petitioner had never sought psychological treatment before his treatment with Dr. Hawley. Respondent has offered no evidence or testimony to dispute the causal connection between Petitioner's post injury depression and his work related injury on September 24, 2009.

Therefore, based upon a review of all evidence and testimony in this case, the Arbitrator hereby finds that the current conditions of ill-being with respect to Petitioner's right shoulder and cervical spine, as well as the permanent physical restrictions associated with those injuries, are causally related to his September 24, 2009 work accident. Further, the Arbitrator finds that the psychological treatment received by Petitioner from Dr. Hawley was causally related to his September 24, 2009 work accident.

With respect to (J.) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator hereby finds:

As detailed above, the Arbitrator has found that Petitioner's cervical spine and right shoulder current conditions of ill-being are causally related to his September 24, 2009 work injury.

Based upon the requisite causal relationship and the review of the medical records and testimony in this case, the Arbitrator further finds that all care and treatment for Petitioner's right shoulder and neck were reasonable and necessary treatment.

Therefore, the Arbitrator orders Respondent to pay outstanding medical bills as follows:

Provider	Beginning	Ending	Total Charges	Balance
Dr. Hawley	6/17/2013	8/19/2013	$465.00	$465.00

Dr. Jurak	6/28/2013	4/25/2013	$78.00	$78.00
Dr. Peter Analytis	2/4/2011	2/4/2011	$1,160.00	$1,160.00
Morris Hospital	2/4/2011	2/4/2011	$450.00	$450.00
Northshore University Medical	1/20/2011	11/10/2011	$14,711.23	$14,711.23
Open MRI of Plainfield	6/30/2010	3/17/2011	$2,420.00	$2,420.00
Balance			$19,284.23	$19,284.23

The Arbitrator hereby order respondent to pay reasonable and necessary medical services of $19,284.23, as provided in Sections 8(a) and 8.2 of the Act.

With respect to (K.) What temporary total disability and maintenance benefits are in dispute, the Arbitrator hereby finds:

TTD

Following his injury on September 24, 2009, Petitioner was placed on light duty restrictions and testified that he continued working within those restrictions for Respondent through November 24, 2009. On November 25, 2009, Petitioner underwent right shoulder surgery and was placed on an off work status by his treating physician, Dr. Birnie. On December 8, 2009, Petitioner was cleared by Dr. Birnie to return to work with restrictions of no pushing, pulling, lifting or overhead use of the right upper extremity. There is no evidence that Respondent offered Petitioner light duty work within those restrictions.

On May 18, 2010, Dr. Birnie amended Petitioner's restrictions to waist level lifting only, no overhead use of the right arm and no lifting over 20 pounds even at waist level. Again, there is no evidence that light duty work was offered to Petitioner within those restrictions.

Petitioner remained on those restrictions through March 1, 2011 when he was placed at MMI and discharged by Dr. Birnie within the restrictions outlined by the FCE. Those restrictions include occasionally lifting 53 pounds floor to chair, 28 pounds above shoulders bilaterally, 21.8 pounds with his right arm and 26.2 pounds with his left arm, and carrying 37 pounds with his right arm and 66.4 pounds with his left arm.

Again, Respondent failed to offer light duty work within Petitioner's permanent restrictions and on April 25, 2011, Petitioner began vocational rehabilitation with Coventry, per the vocational rehabilitation plan filed with the Workers' Compensation Commission. (PX 21)

Based upon all evidence and testimony in this case, the Arbitrator hereby finds that Petitioner was temporarily and totally disabled from November 25, 2009 through April 24, 2011, a period of 73.72 weeks, as provided in Section 8(b) of the Act.

Maintenance

From April 25, 2011 through January 8, 2013, Petitioner underwent a job search which was assisted by a vocational rehabilitation company referred by the insurance carrier, Coventry. Petitioner's job search logs during that time are contained in Petitioner's Exhibit 20. Both Susan Entenberg and Lisa Helma reviewed the job search logs and the vocational records of Coventry. They opined that Petitioner had performed a diligent job search during that period of time. Their testimony stands unrebutted regarding the job search.

The Arbitrator has reviewed the job search logs and has concluded that Petitioner's job search was diligent and appropriate.

Based upon all evidence and testimony in this case, the Arbitrator hereby finds that Petitioner was due maintenance benefits from April 25, 2011 through January 8, 2013, while he was undergoing vocational rehabilitation efforts directed by Coventry.

Respondent shall pay Petitioner maintenance benefits of $1,243.00/week for 89.29 weeks, commencing April 25, 2011 through January 8, 2013, as provided in Section 8(a) of the Act.

With respect to (L.) What is the nature and extent of Petitioner's injuries, the Arbitrator hereby finds:

On March 1, 2011, Petitioner underwent a FCE which showed that he was capable of occasionally lifting 53 pounds floor to chair, 28 pounds above shoulders bilaterally, 21.8 pounds with his right arm and 26.2 pounds with his left arm, and carrying 37 pounds with his right arm and 66.4 pounds with his left arm. Petitioner was released with permanent restrictions consistent with the FCE findings by Dr. Birnie.

There is no dispute that Petitioner has permanent physical restrictions that prevent him from returning to his usual and customary occupation as a journeyman carpenter.

The main question before the Arbitrator is whether Petitioner qualifies as an odd lot permanent total pursuant to Section 8(f) of the Act or whether he is entitled to a wage differential pursuant to Section 8(d)(1). In that light, the Arbitrator must also determine whether a stable labor market exists for Petitioner and whether the position Petitioner was placed in with AllFacilities, through Catalyst RTW, at the request of the workers' compensation insurance carrier, was a legitimate job and whether it represents a stable labor market for Petitioner.

A Petitioner can satisfy his burden of proving he is not capable of obtaining gainful employment by showing either of the following: 1) that work was not available, in other words a diligent but unsuccessful attempt to find work; or 2) that based upon his age, experience, training, and education, he is unable to perform any but the most unproductive tasks for which no stable labor market exists. *Alano v. Industrial Commission*, 282 Ill.App.3d 531, 534-5 (Ind. Comm. Div. 1996).

The burden is on the employee to initially prove that his condition is such that he is unable to perform any services for which there is a reasonably stable market. The burden then shifts to the employer to show that some kind of suitable work is regularly and continuously available. *Sterling Steel Casting Co. v. Industrial Commission*, 74 Ill.2d 273, 384 N.E.2d 1326, 1329, 24 Ill.Dec. 168 (1979).

The only vocational opinions offered in this case by either party were the opinions of Susan Entenberg and Lisa Helma, each of whom testified at trial. Both Ms. Entenberg and Ms. Helma opined that no stable labor market exists for Petitioner. Respondent has offered no vocational opinion to dispute Ms. Entenberg or Ms. Helma.

Petitioner has fulfilled both of the methods of proving odd lot disability outlined by *Alano*. Through a diligent yet unsuccessful job search and the unrebutted vocational opinions of Ms. Entenberg and Ms. Helma, Petitioner has proven that his condition is such that he is unable to perform any services for which there is a reasonably stable labor market. Therefore, the burden of proving that a stable labor market exists shifts to the employer.

Respondent in this claim relies upon the argument that a stable labor market exists for Petitioner based upon at-home activities he performed for AllFacilities.

After having reviewed all the depositions and evidence in this case, the Arbitrator concludes that Respondent has not proven a stable labor market exist for Petitioner. The Arbitrator finds Petitioner is an odd lot permanent total, and awards permanent total benefits under Section 8(f) of the act. The Arbitrator finds that the activities performed by Petitioner at All Facilities did not constitute competitive employment, did not constitute a real job, and provided Petitioner with no transferrable skills that would lead to a real job. The activities performed for AllFacilities are not part of any known sector of the United States labor market.

A review of the testimony and evidence in this case reveals that the system of referrals from a workers' compensation insurance company to Catalyst RTW and from Catalyst RTW to AllFacilities is suspect. As detailed below, the at-home work positions with AllFacilities are not competitive employment. It is clear that a referral to AllFacilities through Catalyst RTW has a nearly non-existent chance of turning into long term employment. Less than ½ of 1% of the individuals referred to AllFacilities from Catalyst in the last 3 years continue their employment with AllFacilities after their subsidized work period has ended. Catalyst's purpose in cases such as the one at bar is to assist companies in saving money on workers' compensation claims and even markets itself as providing lower workers' compensation settlements when they have been involved in a case. (RX 4 @ 44-45). Catalyst specifically markets that if an individual is non-cooperative, declines the offer of work or is terminated for cause they will document those facts and be available to testify for Respondent. (RX 4 @ 46, 48). Ms. Wallace testifies about 25 to 30 times per year, or more than twice every month. (RX 4 @ 47). A review of the testimony of Ms. Wallace and Ms. Koelling leads the Arbitrator to the conclusion that the system in place between Catalyst and AllFacilities is not a legitimate attempt to return the injured worker into the job market. Ms. Entenberg explained in her testimony that Petitioner was doomed to fail.

Ms. Helma's research revealed that Catalyst even champions itself as working with "impossible or non-existent medical release(s)" and calls itself "The Resolution Authority." Catalyst admittedly markets itself as a company that will reduce the value of insurance claims (see the *$1,000,000.00* bill attached as PX4 to the deposition of Renee Wallace, RX 4). As noted above, this does not appear to be a legitimate attempt to return the injured worker into the workforce. The activities provided for an injured worker at AllFacilities through Catalyst RTW are part of a complex scheme that does not appear to provide a real job. There is no benefit to the injured worker, based upon the credible testimony of Ms. Entenberg and Ms. Helma, the only vocational counselors who rendered opinions in this case. Through Catalyst and AllFacilities, an insurance company can pay to give short term, fully subsidized work activity to individuals for whom no real competitive stable labor market exists.

In this case, from April 25, 2011 through January 8, 2013, Petitioner searched for work assisted by a vocational counselor from Coventry. During that time Petitioner applied for hundreds of positions, as detailed in his job search logs. Both Susan Entenberg and Lisa Helma testified, after a review of Petitioner's job search logs, that Petitioner had performed a diligent job search while working with Coventry. Despite his diligent efforts, he received no job offers.

On January 8, 2013, vocational services through Coventry were unilaterally terminated by the adjuster for the workers' compensation insurance carrier involved in this case, Jaynee Stump of ESIS. Petitioner's Deposition Exhibit #2, attached to RX 4, is a letter from Coventry dated January 8, 2013, indicating that their file in this case had been closed at the request of the account (ESIS). On that same date, Ms. Stump filled out an online referral to Catalyst RTW, as documented in Petitioner's Exhibit 3, attached to RX 4.

Petitioner then received a letter from Catalyst RTW dated January 10, 2013 informing him that "home-based employment" had been identified for him within the restrictions imposed by Dr. Birnie. Although the letter included with it an application to fill out, the Arbitrator notes that training had already been scheduled and

Petitioner had already been assigned a supervisor at AllFacilities, Kelly Koelling. Of specific importance is that no vocational rehabilitation counselor referred Petitioner to Catalyst RTW. Renee Wallace from Catalyst contended in her deposition testimony that Catalyst was never performing vocational rehabilitation when they placed Petitioner with AllFacilities, even though the January 10, 2013 letter from Catalyst is countersigned by a certified vocational rehabilitation counselor and both signatories on the letter are identified as vocational counselors. (RX 4 @ 57-58; RX 7)

During their depositions in this case, Ms. Koelling from AllFacilities and Ms. Wallace from Catalyst RTW each testified regarding the arrangement between the two companies and how the job offers through AllFacilities come about. Ms. Wallace testified that Catalyst receives referrals from insurance companies, then sets up interviews with AllFacilities. The purpose of Petitioner's interview was "to place him with AllFacilities in a home-based customer service associate position." Approximately 90% of Catalyst's work is with AllFacilities. Ms. Koelling explained that the interview and application are required simply to see if the person can have a conversation, answer questions accurately, completely and cooperatively.

When a case is referred from an insurance company to Catalyst, the insurance company is charged a fee of $4,750.00 by Catalyst to set up an interview with AllFacilities. This fee is paid to Catalyst whether the individual accepts or declines the interview. AllFacilities is also paid $375.00 by the insurance company to interview the individual. However, if the injured worker is not offered a job by AllFacilities, AllFacilities refunds that $375.00 and Catalyst refunds a portion of the $4,750.00 they had been paid, which can range from a refund of $3,000 to $4,000 depending on the amount of work Catalyst had done to that date. (RX 4 @ 83-85)

When the injured worker begins their activities with AllFacilities, their work is fully subsidized by the insurance company for the first 400 to 750 hours. During that time, all wages are paid by the insurance company and AllFacilities is paid an additional administration fee of $180.00 per week. A review of the records indicates that the carrier was charged $39.00 per day by Catalyst as the "employment administration fee." Catalyst is charging $195 per week while AllFacilities is charging $180 per week. Catalyst profit is $15 per week for the "administrative fee." Bills from AllFacilities are not sent directly to the insurance company, but rather are sent to Catalyst, who obtains the payments for them from the carrier. Ms. Wallace explained that Catalyst pays AllFacilities the weekly subsidy for each referred worker up front, and then bills the insurance carrier for it. Upon reviewing the invoices from Catalyst to the workers' compensation insurance carrier in this case, the Arbitrator notes that although Petitioner was paid $9.00 per hour, Catalyst charges the insurance carrier $10.30 per hour, apparently adding another fee upon that charge to the carrier. (PX 29; PX 32). Catalyst RTW is therefore earning a profit of $1.30 per hour on top of the wages of Petitioner. This is $52.00 per week in profit for Catalyst RTW.

After the subsidy period, if the injured worker retains their employment with AllFacilities, they are paid directly by AllFacilities. However, in the years 2011, 2012 and 2013, Ms. Wallace estimated that 735 cases had been referred to Catalyst, of which 90%, or approximately 661 cases were referred by Catalyst to AllFacilities. As of the date of her deposition, Ms. Koelling explained that 3 unsubsidized workers were employed by AllFacilities that she knew had been referred by Catalyst. The Arbitrator notes that of the approximately 661 referrals from Catalyst to AllFacilities in 2011, 2012 and 2013, Ms. Koelling was aware of only 3 individuals who remained at AllFacilities past the subsidized work period and through her October 30, 2013 deposition date. Two of the three surviving employees were hired in the last 12 months prior to her deposition. This would equate to approximately .45% of the workers referred to AllFacilities by Catalyst in 2011, 2012 and 2013 who have retained employment at the unskilled, sedentary positions offered by AllFacilities. This is less than 1/2 of 1%, or less than one out of 200

After reviewing the transcripts from Ms. Wallace and Ms. Koelling's depositions, both Ms. Entenberg and Ms. Helma testified that the work offered by AllFacilities was not competitive employment. Both Ms. Entenberg and Ms. Helma cited the fact that the work was wholly subsidized. Ms. Entenberg, in her February 18, 2013 report, further noted that there was no guarantee of employment after the subsidized period and that Petitioner had never even applied with Catalyst for a job before being offered a position. In addition, Ms. Helma testified that she had performed research attempting to find another job like the one offered to Petitioner at AllFacilities, but found none. She felt that the position offered to Petitioner was not a legitimate job as it did not exist in a stable labor market. Both Ms. Entenberg and Ms. Helma also testified that Petitioner's subsidized position at AllFacilities was not a real job.

It is clear from the record that Petitioner did not apply to work for AllFacilities but rather was given a position at AllFacilities, through Catalyst, at the request of the Jaynee Stump, the workers' compensation insurance adjuster. Had the insurance company not requested and fully paid for Petitioner to be retained by AllFacilities through Catalyst, it is clear that he would never have been placed in that position. There was no competition for this position as the insurance company paid Catalyst to arrange the interview, paid AllFacilities to hold the interview, paid Petitioner's wages while at AllFacilities, paid an administration fee to AllFacilities to allow Petitioner to perform this activity, and would have gotten a refund of their initial costs if AllFacilities had not offered Petitioner work. Furthermore, the testimony of Ms. Helma and Ms. Entenberg is that positions like the one at AllFacilities do not exist in the general job market, with Ms. Helma further noting that there appears to be no competition for AllFacilities. The position with AllFacilities was wholly subsidized by the workers' compensation insurance company and was clearly not found in a competitive job market. This is not competitive or real employment.

The Arbitrator further adopts the opinions of Ms. Entenberg and Ms. Helma that Petitioner gained no transferrable skills from his work at AllFacilities. As Ms. Helma explained in her testimony, although some job market exists for at home work in certain fields, there are specific qualifications for those fields. Ms. Helma explained that fields such as vocational rehabilitation professionals and health care professionals had at home opportunities, but required qualifications that Petitioner does not possess. Ms. Helma concluded that Petitioner is not qualified for at home work. Respondent introduced a document from the U.S. Census Bureau regarding home based employment in the United States in 2010. (RX 9) However, the Arbitrator finds that information to be irrelevant in this case. The document introduced does not detail the qualifications needed and it is unclear how those general statistics apply to Petitioner's case. There is no supporting evidence suggesting the statistics have any probative value in this case. The only two vocational opinions offered in this claim, from Ms. Entenberg and Ms. Helma, concurred with one another that there is no stable labor market for Petitioner and that he gained no transferrable skills from his time at AllFacilities.

In addition, the Arbitrator concludes that Catalyst RTW held themselves out as a vocational rehabilitation vendor operating in the State of Illinois in their written communications. Specifically, the letter of January 10, 2013 which is signed by a Renee Concolino, MS, CRC and Renee Wallace, CWCP, who are collectively identified by the letter as "vocational consultants." (RX 7)

Section 8(a) of the Act states:

> Any vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution. The employee or employer may petition to the Commission

to decide disputes relating to vocational rehabilitation and the Commission shall resolve any such dispute, including payment of the vocational rehabilitation program by the employer.

After reviewing the evidence, the Arbitrator concludes that Catalyst RTW misrepresented themselves by holding themselves out as a vocational rehabilitation provider, when the testimony of Renee Wallace specifically denied providing vocational services to Petitioner. Rather, she testified that Catalyst was simply providing job placement services at the request of the insurance adjuster, Jaynee Stump. (RX 4 @ 57-58, 99-100) However, based upon the unrebutted testimony of both Lisa Helma and Susan Entenberg, the Arbitrator further concludes that the activity of job placement, as performed in this case by Catalyst at the request of the insurance adjuster is a form of vocational rehabilitation.

Furthermore, one can deduce that Jaynee Stump, the insurance adjuster, was attempting to perform vocational rehabilitation services when she terminated Petitioner's vocational services from Coventry and retained Catalyst to place Petitioner in at home service work. Ms. Stump and Ms. Wallace each acted as vocational rehabilitation counselors despite their lack of proper qualifications.

The Arbitrator accords little weight to the evidence that Petitioner falsified his phone call records as claim by the witness from AllFacilities, or did not complete enough "A" leads per hour. Petitioner appeared credible in his testimony. There is no suggestion anywhere in the record that at any time Petitioner behaved in an inappropriate manner. It appears that Petitioner made a good faith attempt to succeed at the activity supplied by AllFacilities, even to the point where he sought psychiatric care due to increased stress and anxiety. He performed an activity he did not want to do, and according to Lisa Helma, he was unfit to perform. Susan Entenberg testified it was doomed to fail.

The Arbitrator notes that both Susan Entenberg and Lisa Helma have indicated their concerns that vocational ethical violations may have been made in this case by Catalyst and anyone acting as a vocational counselor without proper credentials to do so. Ms. Entenberg, in her December 3, 2013 report specifically states that there were violations of the canons of ethics that apply to vocational rehabilitation counselors by Catalyst RTW in this case. She further states that if Catalyst was not providing vocational rehabilitation services in this case, then the adjuster from ESIS was providing those services. (PX 16)

The Arbitrator has serious concerns that the vocational rehabilitation code of ethics (PX 23) was breached in this matter. Because the Workers' Compensation Commission is not the appropriate forum for such an investigation, the Arbitrator recommends a referral of this matter to the appropriate review board or body to investigation apparent violations of the ethical cannons for vocational rehabilitation counselors. The consequences for Petitioner of the vocational decisions made by uncertified individuals in this case, in violation of Section 8(a) of the Act, were real and should be examined accordingly.

Based upon all evidence and testimony in the record, the Arbitrator hereby finds that Petitioner was permanently and totally disabled, pursuant to Section 8(f) of the Act, as of July 9, 2013.

With respect to (M.) Whether penalties and attorneys' fees should be imposed on Respondent, the Arbitrator hereby finds:

The Arbitrator has reviewed all records and evidence in this matter and finds that Respondent has had no reasonable basis for reducing the benefits after January 8, 2013. Petitioner should have been paid $1,243.00 per week through the date of hearing, rather than having his benefits reduced to $991.41 per week. The

withholding of such benefits was done vexatiously and solely for the purpose of delay. The withholding of these benefits was based upon a complex scheme involving Catalyst RTW, AllFacilities with no intent of providing any real chance of future employment, transferrable skills or a real job. Petitioner was systematically referred to a job that does not exist in any known sector of the United States labor market. As detailed above, Petitioner performed a diligent, yet unsuccessful job search in this case and the only two vocational counselors who have rendered opinions, Susan Entenberg and Lisa Helma, both opined that no stable labor market exists for Petitioner.

Petitioner's workers' compensation benefits have been diminished since he started working for AllFacilities, then was discharged by All Facilities, all of which is consistent with the marketing plan of Catalyst RTW. As Ms. Entenberg pointed out, Catalyst and AllFacilities are simply an insurance based resource to put people on a job "with a great possibility of failure." Respondent's referral of Petitioner to Catalyst was not made to further Petitioner's vocational rehabilitation goals or to fulfill the purpose of the Act to promote the health and welfare of the citizens of the state and to afford protection to workers by providing prompt and equitable compensation for workplace injuries (See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-181, 384 N.E.2d 353, 356-357 (1978)). Rather, the referral was made only to vex Petitioner and lessen his compensation by sending him to a job that is not real.

In denying compensation, Respondent has not met the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances, as required by *Continental Distrib. Co. v. Indus. Comm'n*, 98 Ill.2d 407, 456 N.E.2d 847 (1983), *Bd. of Educ. v. Indus. Comm'n*, 93 Ill.2d 20, 442 N.E.2d 883 (1982) ("*Norwood*" case) and *Bd. of Educ. v. Indus. Comm'n*, 93 Ill.2d 1, 442 N.E.2d 861 (1982) ("*Tully*" case). The Court in *Norwood* stated that the question whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. 442 N.E.2d at 885. Moreover, the Appellate Court has noted that the burden of proof of the reasonableness of its conduct is upon the employer. *Consol. Freightways, Inc. v. Indus. Comm'n*, 136 Ill.App.3d 630, 483 N.E.2d 652, 654 (1985); accord, *Ford Motor Co. v. Indus. Comm'n*, 140 Ill.App.3d, 488 N.E.2d 1296 (1986).

The Arbitrator finds Respondent's behavior in this case to be unreasonable, vexatious and solely for the purpose of delay.

Accordingly, the Arbitrator finds that Respondent shall pay penalties under §19(k) in the amount of $15,608.57, representing fifty percent of the total amount due to date in unpaid benefits and medical expenses. The Arbitrator calculated this amount as follows:

Respondent in this matter began paying Petitioner a reduced rate of $991.41 per week, rather than $1,243.00 per week on January 9, 2013, based upon the work activity he was performing at AllFacilities. From January 9, 2013 through the date of trial, December 6, 2013, Pespondent continued payments of $991.41. Therefore, Respondent has underpaid Petitioner $251.59 per week for 47.43 weeks = $11,932.91 due in underpaid benefits.

$11,932.91 in underpaid benefits + $19,284.23 unpaid medical = $31,217.14

$31,217.14 / 2 = $15,608.57 due pursuant to Section 19(k)

SECTION 16

Pursuant to §16 of the Act, the Arbitrator finds that Respondent shall pay attorneys' fees calculated upon twenty percent of the unpaid TTD and maintenance to date; twenty percent of the unpaid medical expenses to date and

twenty percent of the §19(k) award. Accordingly, Respondent shall pay the sum of $9,365.14 in attorneys' fees, with the remainder of Petitioner's attorneys' fees, if any, to be paid by Petitioner to his attorneys. This award was calculated by the Arbitrator as follows:

$15,608.57 in Section 19(k) + $11,932.91 in underpaid benefits, as detailed above + $19,284.23 in outstanding medical = $46,825.71.

$46,825.71 x .2 = $9,365.14 in Section 16 fees.