2016 IL App (1st) 143129WC

NO. 1-14-3129WC

Opinion filed: February 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

EVELYN FARRAR, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (United Airlines, Inc., Appellee).	)	Appeal from the Circuit Court of Cook County. No. 14-L-50223 Honorable Roberto Lopez Cepero, Judge, presiding.

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

OPINION

¶ 1 The only issue raised in this workers' compensation appeal is whether section 13-217 of the Code of Civil Procedure (the Code) (735 ILCS 5/13-217 (West 1994)) applies to claims filed under the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2012)) that are dismissed for want of prosecution. Section 13-217 of the Code allows a party to refile an action within one year after the action has been dismissed

for want of prosecution regardless of whether the statute of limitations has expired during the pendency of the original filed action.

¶ 2 The facts leading up to this appeal are undisputed. The claimant, Evelyn Farrar, worked as a pilot for the employer, United Airlines, Inc., when she timely filed a proof of claim under the Act. The Illinois Workers' Compensation Commission (the Commission) dismissed her claim for want of prosecution, and she did not file a petition to reinstate her claim within 60 days pursuant to Commission Rule 9020.90(a) (50 Ill. Adm. Code 9020.90(a) (2012)). Instead, she filed a new claim for the same accident over 11 months after the Commission dismissed the first claim. When she refiled her claim, the statute of limitations on her claim had expired.

¶ 3 The employer moved to dismiss the new claim, arguing that it was untimely under the Act's statute of limitations and on *res judicata* grounds. In response, the claimant argued that, pursuant to section 13-217 of the Code, she had one year to refile her claim even though the statute of limitations had expired. The arbitrator granted the employer's motion to dismiss the claim, holding that section 13-217 did not apply to claims under the Act that are dismissed for want of prosecution. The Commission affirmed and adopted the arbitrator's decision, and the circuit court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 4 BACKGROUND

¶ 5 The parties agree that the claimant sustained an accidental injury arising out of and in the course of her employment on April 19, 2003, when turbulence caused injuries to her neck. The employer began paying the claimant's medical expenses and temporary

total disability benefits. The claimant's medical treatments after the accident included a cervical fusion at the C5-6 and C6-7 levels in January 2007.

¶ 6 On February 19, 2008, the claimant filed an application for adjustment of claim under the Act. The last day the employer paid any compensation in connection with the accident was July 30, 2008. On April 28, 2011, an arbitrator dismissed the claimant's claim for want of prosecution. The claimant did not file a petition to reinstate the claim. Instead, on April 13, 2012, the claimant filed a new application for adjustment of claim for the same work-related accident.

¶ 7 The parties do not dispute that the statute of limitations had expired on the claimant's claim prior to the time she filed her new application for adjustment of claim. The employer moved to dismiss the claim, arguing that it was untimely under the applicable statute of limitations and that the previous dismissal for want of prosecution became a final judgment when the claimant did not timely file a petition to reinstate the claim pursuant to Commission Rule 9020.90. In response, the claimant cited section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)) as authority for refiling the claim within one year after it was dismissed for want of prosecution, regardless of the language of Commission Rule 9020.90 or whether the statute of limitations had expired.

¶ 8 The arbitrator granted the employer's motion to dismiss the claim. The arbitrator held that the prior dismissal of the claim for want of prosecution became a final judgment on the merits and that the new claim was barred by *res judicata*. The arbitrator also held that section 13-217 of the Code did not apply to claims under the Act that are dismissed for want of prosecution. Therefore, the arbitrator concluded, the claimant's refiled claim

was also untimely under the applicable statute of limitations. The Commission affirmed and adopted the arbitrator's decision, and the circuit court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 9 ANALYSIS

¶ 10 The issue that we must decide is whether section 13-217 of the Code applies to workers' compensation claims that are dismissed for want of prosecution.

¶ 11 Section 13-217 of the Code provides that in personal "actions specified in Article XIII of [the Code] or any other act or contract where the time for commencing an action is limited, if *** the action is dismissed for want of prosecution ***, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, after *** the action is dismissed for want of prosecution." 735 ILCS 5/13-217 (West 1994).[1] "The purpose of section 13-217 [of the Code] is to extend the limitations period to enable plaintiffs to refile a case when their complaints suffer defects, primarily procedural in nature, which have resulted in dismissal without resolution on the merits." *National Underground Construction Co. v. E.A. Cox Co.*, 273 Ill. App. 3d 830, 834, 652 N.E.2d 1108, 1111 (1995).

¶ 12 Under the language of the Act, however, the legislature granted the Commission the authority to "make and publish procedural rules and orders" governing the litigation

[1] "The version of section 13-217 in effect is the version that preceded the amendments to Public Act 89-7 (Pub. Act 89-7, eff. March 9, 1995), which our supreme court found unconstitutional in its entirety." *Domingo v. Guarino*, 402 Ill. App. 3d 690, 698 n.3, 932 N.E.2d 50, 58 n. 3 (2010).

of claims before it so that the process and procedure before it "shall be as simple and summary as reasonably may be." 820 ILCS 305/16 (West 2012). Therefore, when the Act or the Commission's rules regulate a procedural area or topic, the Act or the Commission's rules apply, not the Code. *Preston v. Industrial Comm'n*, 332 Ill. App. 3d 708, 712, 773 N.E.2d 1183, 1188 (2002).

¶ 13 Neither the Act nor the procedural rules implemented by the Commission have adopted section 13-217 of the Code, or similar language, for workers' compensation claims that are dismissed for want of prosecution. See 50 Ill. Adm. Code 9020.10 *et seq.* (2012). Instead, Commission Rule 9020.90(a) governs the reinstatement of claims that have been dismissed for want of prosecution as follows: "Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call." 50 Ill. Adm. Code 9020.90(a) (2012). Commission Rule 9020.90(b) requires the claimant to set forth the reasons the case was dismissed and the grounds relied upon for reinstatement. 50 Ill. Adm. Code 9020.90(b) (2012). The determination of whether the case should be reinstated must be based on "standards of fairness and equity" after considering the grounds relied on by the claimant and any objections of the employer. 50 Ill. Adm. Code 9020.90(c) (2012).

¶ 14 Therefore, when the Commission dismisses a workers' compensation claim for want of prosecution, the claimant has 60 days from receipt of the dismissal order to file a petition for reinstatement. A claimant seeking to reinstate a claim also has the burden of alleging and proving facts to justify reinstatement. *Roberts v. Industrial Comm'n*, 96 Ill.

2d 475, 477, 451 N.E.2d 857, 857 (1983); *Banks v. Industrial Comm'n*, 345 Ill. App. 3d 1138, 1140, 804 N.E.2d 629, 631 (2004). Whether to allow or deny a claimant's request to reinstate the claim rests with the sound discretion of the Commission. *Roberts*, 96 Ill. 2d at 477, 451 N.E.2d at 857; *Banks*, 345 Ill. App. 3d at 1140, 804 N.E.2d at 631. In addition, the 60-day time limit for filing a petition to reinstate is jurisdictional in nature. *TTC Illinois, Inc./Tom Via Trucking v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 344, 354, 918 N.E.2d 570, 579 (2009). As a result, a claimant's failure to timely file a petition for reinstatement following a dismissal for want of prosecution results in a final judgment with respect to the claimant's rights to recover workers' compensation benefits arising from the claim.

¶ 15 The claimant argues that there is no conflict between Commission Rule 9020.90 and section 13-217 of the Code because section 13-217 provides for "refiling" while Commission Rule 9020.90 provides for "reinstatement." Therefore, the claimant argues, section 13-217 of the Code should apply. We disagree.

¶ 16 "In construing rules and regulations promulgated by an administrative agency, the same rules used to interpret statutes apply." *Mora v. Industrial Comm'n*, 312 Ill. App. 3d 266, 271, 726 N.E.2d 650, 653 (2000). "The fundamental rule of statutory construction is to ascertain the intent of the lawmakers." *Id.* "In ascertaining the legislative intent, we must look at the specific language of the rule or regulation and evaluate the wording in its entirety." *Id.*

¶ 17 The wording of Commission Rule 9020.90 in its entirety reveals the Commission's intent that Commission Rule 9020.90 be the sole means for reviving a workers'

compensation claim that is dismissed for want of prosecution. Commission Rule 9020.90 details specific requirements for a petition to reinstate, prescribes a 60-day time limitation for petitioning to reinstate, and sets out a discretionary standard for deciding whether to reinstate. The application of section 13-217 of the Code to allow the refiling of workers' compensation claims that have been dismissed for want of prosecution, beyond 60 days, up to a year after dismissal, after the statute of limitations has expired, and without a showing of any justification for refiling would render the requirements of Commission Rule 9020.90 meaningless.

¶ 18 Therefore, in the present case, because the claimant failed to file a petition to reinstate her original claim pursuant to Commission Rule 9020.90, the Commission properly dismissed her refiled claim on *res judicata* and statute of limitations grounds.

¶ 19 CONCLUSION

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

¶ 21 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Evelyn C. Farrar,

Petitioner,

vs.

United Airlines,

Respondent.

14IWCC0118

NO: 12 WC 13163

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of statute of limitations 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 July 1, 2013 is hereby affirmed and adopted.

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.

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

DATED: FEB 19 2014

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gal
O: 2/13/14
45

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0118

Evelyn C. Farrar
Employee/Petitioner

v.

United Airlines
Employer/Respondent

Case # **12** WC **13163**

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 **Svetlana Kelmanson**, Arbitrator of the Commission, in the city of **Chicago**, on **June 13, 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statute of limitations and res judicata**

14IWCC0118

FINDINGS

On the date of accident, **4/19/2003**, 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 the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

ORDER

This claim is barred by the statute of limitations and the doctrine of *res judicata*.

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

6/28/2013
Date

ICArbDec19(b)

JUL - 1 2013

14IWCC0118

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The sole issue in the instant 19(b) proceeding is whether Petitioner's application for adjustment of claim was untimely filed or, alternatively, is barred by the doctrine of *res judicata*.

The facts are not in dispute. The parties stipulate that on April 19, 2003, Petitioner, a pilot, sustained an accidental injury arising out of and in the course of her employment with Respondent. After the accident, Respondent began paying temporary total disability and medical benefits. As a result of the work injury, Petitioner underwent cervical fusion surgery in January of 2007. On February 19, 2008, Petitioner's former attorney, James Tutaj, filed an application for adjustment of claim on her behalf, which was assigned claim No. 08WC06935. Respondent paid no workers' compensation benefits to Petitioner since June 30, 2008. On April 28, 2011, Arbitrator Lammie dismissed claim No. 08WC06935 for want of prosecution. Petitioner never filed a petition to reinstate.

On April 13, 2012, Petitioner, *pro se*, filed an application for adjustment of claim arising out of the same work accident on April 19, 2003.[1] The case was assigned claim No. 12WC13163. The parties stipulate that "[n]o payments have been made pursuant to Section 8(j) of the Act that would extend the time for filing an Application for Adjustment of Claim." On July 16, 2012, the firm of Nilson, Stookal, Gleason & Caputo entered its appearance of Petitioner's behalf.

Respondent's defense in case No. 12WC13163 is two-fold. Respondent argues that the dismissal of claim No. 08WC06935 became final upon the expiration of the period to file a petition to reinstate pursuant to the Commission rules. As such, the dismissal of claim No. 08WC06935 operates as *res judicata* in case No. 12WC13163. Alternatively, Respondent argues that claim No. 12WC13163 was filed after the running of the statute of limitations applicable to workers' compensation claims. Petitioner responds that she filed claim No. 12WC13163 within a year after the dismissal of claim No. 08WC06935, which is allowed by the Code of Civil Procedure.

It is well established that procedural aspects of matters before the Commission are governed by the Workers' Compensation Act (the Act) and the Rules Governing Practice Before the Illinois Workers' Compensation Commission (the Rules), rather than the Code of Civil Procedure. Preston v. Industrial Comm'n, 332 Ill. App. 3d 708, 712 (2002). Rule 7020.90 provides, in pertinent part: "Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call." The 60-day limit for filing a petition to reinstate is jurisdictional in nature. TTC Illinois v. Workers' Compensation Comm'n, 396 Ill. App. 3d 344, 354 (2009).

The record is silent as to when Petitioner learned of the dismissal of claim No. 08WC06935. The Arbitrator infers from the filing of a duplicate application for adjustment of claim on April 13, 2012, that Petitioner or her former attorney learned of the dismissal more than 60 days before April 13, 2012, and filed a duplicate claim rather than an untimely petition to reinstate.

The defense of *res judicata* may be invoked in proceedings before the Commission. See Scott v. Industrial Comm'n, 184 Ill. 2d 202, 219 (1998); J & R Carrozza Plumbing Co. v. Industrial Comm'n,

[1] The Arbitrator notes that although Attorney Tutaj did not complete the appearance section of the application for adjustment of claim, he signed the proof of service on Respondent.

307 Ill. App. 3d 220 (1999). Under the doctrine of *res judicata*, a final judgment by an adjudicative tribunal on the merits is conclusive as to the rights of the parties and their privies, and operates as an absolute bar to a subsequent action involving the same claim, demand or cause of action. J & R Carrozza Plumbing, 307 Ill. App. 3d at 223. The claim need not be tried and decided by the arbitrator or the Commission. For instance, a settlement approved by the Commission operates as a final adjudication of all matters in dispute up to the time of the settlement that arose out of the same work accident. J & R Carrozza Plumbing, 307 Ill. App. 3d at 224-25. In a civil case, the supreme court has held that when a suit is dismissed for want of prosecution and the refiling period expires, the dismissal constitutes a final judgment on the merits because the order effectively ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. See S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander, 181 Ill. 2d 489, 502 (1998).

Here, the dismissal of claim No. 08WC06935 is a final judgment with respect to Petitioner's rights to recover workers' compensation benefits from Respondent arising out of the work accident on April 19, 2003. As such, it operates as *res judicata* in case No. 12WC13163, which arises out of the same work accident.

Furthermore, claim No. 12WC13163 was filed after the running of the statute of limitations. Section 6(d) of the Act provides that "unless the application for compensation is filed with the Commission within 3 years after the date of accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred." 820 ILCS 305/6(d) (West 2011). Section 8(j) of the Act further provides that the statute of limitations is tolled during the time period the employee receives non-occupational disability benefits from a group plan contributed to by the employer. 820 ILCS 305/8(j) (West 2011). As noted, the parties stipulated that Respondent paid no workers' compensation benefits to Petitioner after June 30, 2008, and "[n]o payments have been made pursuant to Section 8(j) of the Act that would extend the time for filing an Application for Adjustment of Claim."

Accordingly, the Arbitrator finds that Petitioner's claim No. 12WC13163 is barred.

2016 IL App (1st) 151693WC

NO. 1-15-1693WC

Opinion filed: February 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

UNITED AIRLINES, INC.,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County.
	)	
v.	)	No. 13-MR-53
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Kristine Isern, Appellee).	)	Honorable Roberto Lopez Cepero, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Kristine Isern, a flight attendant for the employer, United Airlines, Inc. (United), injured her knee on a flight from Denver, Colorado, to New York's La Guardia airport. She did not work as a flight attendant on the flight from Denver to New York, but flew as a passenger. At the time of her injury, she resided in Boulder, Colorado, and worked on United's flights originating out of John F. Kennedy

International Airport (JFK airport) in New York City. She was flying to New York the day before she was scheduled to work on a United flight originating from JFK airport.

¶ 2 The claimant filed a claim under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2012)) and maintained that, at the time she injured her knee, she qualified as a "traveling employee" under the Act. The arbitrator agreed and awarded her benefits under the Act. On review, the Illinois Workers' Compensation Commission (the Commission) reversed the arbitrator, finding that the claimant did not qualify as a traveling employee but was merely on her regular commute to work when she sustained her knee injury. The circuit court reversed the Commission's decision and reinstated the arbitrator's decision. United now appeals the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 At the time of her injury, the claimant lived in Boulder, Colorado, but her job duties were exclusively on United's flights originating out of JFK airport in New York City. When she traveled from her residence to report for work at her base airport, she usually traveled from her home in Boulder, Colorado, to the airport in Denver and then on one of United's flights from Denver to New York. United did not pay the claimant for her time to travel from Colorado to New York and did not reimburse her for any travel expenses, meals, or hotel costs for traveling to or staying in New York. It paid her only for the time she performed flight attendant duties on aircraft departing JFK airport. The claimant began earning wages when the aircraft departed the gate at JFK airport and until the flight arrived at its destination.

¶ 5 United did not require its New York City based employees to reside in the New York City area, and the claimant testified that United had no control over where she lived. The record includes testimony that 80% of United's New York based flight attendants commuted to New York from areas outside the New York City area. In 2006, United offered the claimant a transfer to the Denver airport as her base airport so she could work from an airport closer to her chosen residence (Boulder, Colorado), but she declined the transfer and chose to keep JFK airport as her base airport. She testified that this was her personal preference and that it was her personal choice to commute to New York from Colorado. United did not derive any benefit from her choice to reside in Colorado.

¶ 6 United provided its flight attendants with free parking at their base airports. They could elect to have free parking privileges at a different airport instead, pending availability, but it provided parking at only one airport. The claimant elected to have parking privileges in a United employee parking lot at the airport in Denver. Therefore, she did not have parking privileges at JKF airport. She could use her employee-parking pass at the Denver airport while working, vacationing, or picking up a friend at the airport.

¶ 7 The claimant's accident occurred on September 13, 2011, on a flight from Denver to La Guardia airport in New York. She was scheduled to work the following day, September 14, 2011, on a United flight out of JFK airport. She did not perform any job duties on the flight from Denver to La Guardia. Even though she was not working on September 13, 2011, she wore her flight attendant uniform to the Denver airport and

while boarding her flight in order to get through airport security and avoid checking any bags. Another United employee testified that this was a violation of United's policies.

¶ 8 The claimant used a leisure travel pass to fly from Denver to New York on September 13, 2011. United provided its employees with unlimited amounts of leisure travel passes that allowed the employees fee-waived travel on any of United's flights. The claimant booked flights for her commute to New York using a leisure travel pass in the same way she booked fee-waived flights for vacations or other leisure travel.

¶ 9 Use of a leisure travel pass required the claimant to fly on standby. Revenue-generating passengers were assigned seats before any fee-waived passengers, including flight attendants commuting to their base airports. In addition, flight attendants commuting to their base airports on leisure passes did not have any preference or priority over other standby passengers. Accordingly, United had not guaranteed the claimant a seat on the flight from Denver to La Guardia. The claimant testified that she could have commuted to New York by flying on a different airline or by other means of travel. She made the decision to fly on a United flight, and United had no control or preference concerning how she traveled to and from her base airport to report for work.

¶ 10 The accident occurred shortly after the claimant boarded her flight. After locating her assigned seat, she went to the lavatory on the plane to change out of her flight attendant's uniform and into her regular clothes. She returned to her seat and caught her foot where the seat row was bolted to the floor. She heard a pop in her left knee and felt her knee collapse. She testified that there was no defect in the seat. When she stood up

to exit her seat at the end of the flight, her knee collapsed. She was provided a wheelchair to exit the plane.

¶ 11 The claimant had a room at the Pan America Hotel in New York City to stay the night before reporting for work at JFK airport the next day. United was not involved in arranging for the hotel stay and did not reimburse the claimant for her hotel, meals, or any other expenses for staying in New York. The hotel's van took her to a hospital where she received emergency care and was diagnosed with a sprain of the lateral collateral ligament of the knee. She subsequently underwent a magnetic resonance imaging test on September 22, 2011, which showed a tear of the anterior cruciate ligament. On October 18, 2011, she underwent knee surgery that consisted of an anterior cruciate ligament reconstruction with debridement of the lateral meniscus and lateral condyle. The claimant's physician, Dr. McCarty, released her to work full duty as a flight attendant on April 9, 2012. Since then, the claimant has worked full duty and has not sought any further medical treatment stemming from the accident.

¶ 12 Sometime after the accident, the claimant transferred her base airport to the San Francisco, California, airport because her husband was working in Napa, California. At the time of the hearing, the claimant spent most of her time in Napa although her permanent residence remained in Colorado. The claimant had transferred her parking privileges to the San Francisco airport and drove from Napa to the San Francisco airport for work. She no longer had parking privileges at the Denver airport. If the claimant stayed at her residence in Colorado, she had to pay to park at the Denver airport in order to fly to her base airport in San Francisco.

¶ 13 At the arbitration hearing, the parties disputed the issue of whether the claimant's injury arose out of and in the course of her employment. In resolving this dispute, the arbitrator found that the claimant qualified as a traveling employee for purposes of awarding compensation under the Act. The arbitrator stated that there was a lack of case law on the issue, but was obligated to follow prior Commission decisions finding that a flight attendant traveling to her work domicile qualified as a traveling employee. Therefore, the arbitrator found that she sustained a compensable accident that arose out of and in the course of her employment and awarded temporary total disability benefits, medical expenses, and permanent partial disability benefits in the amount of 25% of loss of use of the left leg.

¶ 14 United sought a review of the arbitrator's decision before the Commission. The Commission reversed the arbitrator's finding that the claimant was a traveling employee at the time of her injury. The Commission noted that after the arbitrator filed his decision, the supreme court filed an opinion in *Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, 1 N.E.3d 535, in which the court discussed the criteria for establishing traveling employee status within the meaning of the Act. The Commission determined that the supreme court's analysis in *Venture-Newberg* applied to the facts of the present case and that the analysis established that the claimant did not qualify as a traveling employee at the time of her accident.

¶ 15 The Commission emphasized that the claimant chose to live in Colorado, that United did not tell the claimant where to live, that United did not derive any benefit from her choice to live in Colorado, that United did not compensate the claimant for her time

or travel expenses incurred during her voluntary commute, that the claimant selected her own flight and did not receive any preferential treatment from United as a commuting employee, and that there was no evidence that the claimant's travel "was determined by the demands or exigencies of her job." The Commission concluded that "[h]er travel on that date arose out of the personal choices she made to maintain her residence in Colorado" and maintain her base airport in New York. Therefore, the claimant's travel was "due to her personal choice only."

¶ 16 The claimant appealed the Commission's decision to the circuit court. The circuit court reversed the Commission's decision and reinstated the arbitrator's decision. The circuit court believed that the undisputed facts were distinguishable from the facts in *Venture-Newberg*. Specifically, the circuit court noted that the claimant in the present case, unlike the employee in *Venture-Newberg*, was not a temporary employee. At the time of the arbitration hearing, the claimant had worked for United for approximately 16 years. In addition, the circuit court believed that the claimant's transportation on September 13, 2011, was "necessary to the exigencies of her work." For this conclusion, the circuit court emphasized that United paid for her parking at the airport in Denver and provided her with free air travel to her base airport. The court concluded that United preferred that the claimant "take certain mode of transportation" in commuting to work. The circuit court concluded that when the claimant boarded the flight from Denver to New York, she "essentially began her work." The circuit court believed that the claimant's regular commute to work ended when she "set foot in the airport after getting

out of her car" and that, at that time, she "effectively was in the course of her employment when she was injured." United appeals the circuit court's judgment.

¶ 17 ANALYSIS

¶ 18 The issue that we must decide is whether the claimant was a traveling employee when she injured her knee on the United flight from Denver to New York.

¶ 19 In order for an injured worker to recover compensation benefits under the Act, the worker has to show that her injuries arose out of and in the course of her employment. *Jensen v. Industrial Comm'n*, 305 Ill. App. 3d 274, 277, 711 N.E.2d 1129, 1132 (1999). The issue of whether an injury arose out of and in the course of employment is usually a question of fact that will not be reversed unless it is contrary to the manifest weight of the evidence. *Id.* at 277-78, 711 N.E.2d at 1132. "In order for a finding to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *Id.* at 278, 711 N.E.2d at 1132. The claimant, however, argues that the proper standard of review in the present case is *de novo*. When the facts are undisputed and susceptible to but a single inference, our review is *de novo*. *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13, 991 N.E.2d 868. In the present case, however, the circuit court improperly reversed the Commission's decision under either standard of review. Therefore, we need not decide which standard of review applies. See *Venture-Newberg*, 2013 IL 115728, ¶ 14 ("Because [the employee's] argument fails under either standard ***, we need not resolve the parties' dispute regarding the standard of review.").

¶ 20 Generally, an employee injured while going to or returning from her place of employment has not sustained an injury that arose out of or in the course of the employment. *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534, 537, 428 N.E.2d 165, 166 (1981). In explaining the purpose of this rule, the supreme court stated that "the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest." *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43, 210 N.E.2d 209, 211 (1965). An exception to this rule applies when an employee qualifies as a "traveling employee." "A 'traveling employee' is one whose work duties require him to travel away from his employer's premises." *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶ 20, 27 N.E.3d 678. A traveling employee is considered to be "in the course of" her employment from the time she leaves her home until she returns. *Id.* An injury sustained by a traveling employee "arises out of" her employment if she is injured while engaging in conduct that was reasonable and foreseeable. *Id.*

¶ 21 In order to qualify as a traveling employee, the work-related travel "must be more than a regular commute from the employee's home to the employer's premises." *Id.* ¶ 22. Our supreme court recently discussed this requirement and the criteria for an employee to qualify as a traveling employee in *Venture-Newberg*. We agree with the Commission that the *Venture-Newberg* court's analysis controls our analysis in the present case.

¶ 22 In *Venture-Newberg*, the employee was a union pipefitter who took a temporary job assignment at a job site that was located 200 miles away from his home because there was no work available locally. *Venture-Newberg*, 2013 IL 115728, ¶ 4. He was not

required to take the job and could not have taken the job if his local union had a job available. *Id.* ¶ 22. The employer expected the employee to work at the job site 7 days a week, 12 hours per day; therefore, he and another union member decided to stay at a local motel. *Id.* ¶ 4. The motel was located 30 miles from the job site. *Id.* ¶ 5. The employer did not make the motel arrangements or tell the workers where to stay. *Id.* ¶ 22. On the second day of the job assignment, the employee was injured in a vehicle accident during the drive from the motel to the jobsite. Id. ¶ 5. He sought compensation benefits under the Act. *Id.*

¶ 23 The employee testified that the employer wanted workers to be within an hour's drive of the jobsite, so that they were available for work when needed. *Id.* at ¶ 7. Other testimony established that while the employer desired the workers to be close to the job site, it did not direct workers where to stay and did not require workers to relocate to be closer to the job site. *Id.* In addition, the employer did not reimburse the workers for travel expenses or compensate them for travel time. *Id.* On appeal, the supreme court addressed the issue of whether the employee qualified as a "traveling employee" when he sustained his injuries in the vehicle accident. *Id.* ¶ 12.

¶ 24 In its analysis, the court noted that the claimant was not a permanent employee of the employer. *Id.* ¶ 24. The court further noted:

> "[N]othing in [the employee's] contract required him to travel out of his union's territory to take the position with [the employer]. *** [H]e made the personal decision that the benefits of the pay outweighed the personal cost of traveling. [The employee] was hired to work at a specific location and was not directed by

> [the employer] to travel away from this work site to another location. Rather, [the employee] merely traveled from the premises to his residing location, as did all other employees. Finally, [the employer] did not reimburse [the employee] for his travel expenses, nor did it assist [the employee] in making his travel arrangements. Due to these facts, the Commission's conclusion that [the employee] was a traveling employee was against the manifest weight of the evidence." *Id.*

¶ 25 Under a similar analysis, the undisputed facts of the present case establish that United had no control over where the claimant chose to live and derived no benefit from her choice to live in Colorado. The claimant's job duties were on flights departing JFK airport, and she earned wages only for her time working as a flight attendant on those flights. She did not perform any job duties during her travel from Colorado to New York. United did not pay her for her time traveling from Denver to New York and did not reimburse her for her overnight stay in New York prior to beginning her workday the following day. The claimant's decision to fly to La Guardia airport the day before her assigned work duties at JFK airport was not directed or arranged by United.

¶ 26 The claimant's choice of residence was a personal decision that the benefits of living in Colorado outweighed the personal cost of traveling from Colorado to New York. At the time the claimant injured her knee, she was engaged in her regular commute from her chosen residence to the city where her job assignment was located. These facts are substantially similar to the facts outlined by the supreme court in *Venture-Newberg* and establish that the claimant was not a "traveling employee" at the time she injured her

knee. She was simply injured while commuting from her residence to the city of her base airport the day before she was to report to her work site.

¶ 27 The circuit court found it significant that, unlike the injured worker in *Venture-Newberg*, the claimant in the present case was a permanent employee. At the time of the arbitration hearing, she had worked for United approximately 16 years. The circuit court also found it significant that United provided the claimant with parking privileges at the airport in Denver and that the claimant almost always used her leisure travel pass on United flights to reach her work. We do not believe that these facts qualified the claimant as a traveling employee.

¶ 28 Although the supreme court did note that the injured employee in *Venture-Newberg* was a temporary employee, the court's analysis focused on facts that showed that the employee was injured during his commute from his chosen residence. This same analysis applies in the present case, regardless of whether the claimant was a temporary or permanent employee. In its analysis, the *Venture-Newberg* court discussed a policy concern it had in allowing the employee to qualify as a traveling employee under the facts of that case. The court stated, "[W]hile an employee who chooses to relocate closer to a temporary job site can receive benefits if injured on the way to work, an employee who permanently resides close to the job site is not entitled to benefits if injured on the way to work." *Id.* ¶ 25. This policy statement emphasizes that the court focused on the nature of the claimant's travel, not on the permanency of his employment.

¶ 29 Also, this policy concern noted by the supreme court in *Venture-Newberg* is the same in the present case. A United flight attendant with JFK airport as his or her base

airport and who permanently resides in the New York City area would not be entitled to benefits as a traveling employee if he or she is injured during his or her regular commute to the airport. Likewise, a United flight attendant based out of the same airport should not qualify as a traveling employee if she is injured in her regular commute to JFK airport merely because she chose to live in Colorado instead of New York City and had a longer commute. Whether the claimant resides in New York City or in Colorado is a personal decision in which United has no interest.

¶ 30 The circuit court also focused on the claimant's parking privileges at Denver airport and that she commuted on a fee-waived United flight. These facts do not transform the claimant from a regular commuter into a traveling employee. The evidence at the hearing established that United provided its flight attendants with free parking at the airport from which the flight attendants were based. A flight attendant could choose to have a parking pass at another airport instead, but was allowed parking at only one location. The claimant's selection of the location of her parking privileges was her personal choice and stemmed from her choice of residence. It does not qualify her as a traveling employee.

¶ 31 The Commission's analysis correctly emphasized the facts showing that United did not compensate the claimant for her time or expenses for commuting to New York from Colorado. The claimant selected her own mode of transportation and lodging for the commute. United had no control over what modality of transportation the claimant chose to arrive at JFK airport or even when she arrived in the New York City area. The

claimant was injured in a flight to La Guardia airport on the day before she was scheduled to work on a United flight out of JFK airport.

¶ 32 The claimant did not have to pay for the flight from the Denver airport to La Guardia airport because she chose to fly standby while using a leisure travel pass. However, the pass was an employment benefit available to all United employees for personal travel regardless of how far the employees had to commute to work. The pass was not a benefit offered to the claimant because she resided in Colorado while working out of JFK airport. United did not provide her with preferential status on fee-waived flights as a commuting employee. The claimant's decision to use a leisure travel pass to commute from Colorado to New York did not transform her regular commute into a demand or exigency of her job. The method and time of travel was the result of her personal choices for her own benefit and from which United derived no benefit. Under these facts, the Commission ruled correctly in finding that the claimant did not qualify as a traveling employee at the time of her injury. See *Pryor*, 2015 IL App (2d) 130874WC, ¶ 29 ("[T]he claimant was injured during a regular commute from his home to his employer's premises, before he embarked upon a work trip away from his employer's premises. Thus, the Commission's finding that the claimant's injury did not arise out of or in the course of his employment was not against the manifest weight of the evidence.").

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we reverse the judgment of the circuit court and reinstate the Commission's decision.

¶ 35 Reversed; Commission decision reinstated.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kristine Isern,

Petitioner,

vs.

No. 12WC026238

14IWCC0585

United Airlines, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of whether the accident arose out of and in the course of Petitioner's employment, notice, causal connection, medical expenses, temporary disability, permanent disability, penalties pursuant to sections 19(l) and 19(k), attorney fees pursuant to section 16 and "TTD 8(j) credit and medical bill stipulation," and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

BACKGROUND

The Petitioner, Kristine Isern, filed an application for adjustment of claim against her employer, United Airlines, Inc. (hereinafter Respondent) seeking workers' compensation benefits for an injury she sustained to her left knee on September 13, 2011.
Page 2

The claim proceeded to an arbitration hearing under the Worker's Compensation Act on July 23, 2013. At the conclusion of the hearing, the Arbitrator found that there was a compensable accident that arose out of and within the course and scope of Petitioner's employment and also found that the medical condition and treatment were

causally connected to the incident. The arbitrator cited to Susanne Larson v. United Airlines, Inc., 2005 Ill. Wrk. Comp. LEXIS 265 (finding that the petitioner, a flight attendant, was entitled to the status of a traveling employee while commuting from her home to her work domicile) in support of his findings.

Respondent, United Airlines filed a timely notice of appeal to the Illinois Workers' Compensation Commission on October 2, 2013 arguing *inter alia* that the Petitioner was not a traveling employee at the time when she sustained an injury to her right knee and for that reason the alleged injury is not compensable thereby rendering the remainder of the arbitrator's findings moot.

This appeal comes before the Illinois Worker's Compensation Commission for ruling on the threshold issue as to whether Petitioner was a traveling employee at the time of the incident as this finding forms the necessary predicate for the resolution of all other issues pending on appeal.

FACTS

The facts in this case are undisputed. On September 13, 2011 Petitioner drove from her home in Boulder, Colorado to the Denver Airport. She was to fly from Denver to her home base or "domicile" in New York City to work a flight scheduled to depart from New York's JFK Airport the following day, September 14, 2011. She was attired in her flight attendant's uniform in order to allow her to pass through security and to permit her to carry the baggage necessary to make her trip, including her flight manual, (which she was required to carry when working as crew aboard a flight). Her airport parking was paid for by her employer as it would have been at any airport of her choosing, including JFK if she chose to reside in New York.

Upon arriving at the airport in Denver the Petitioner cleared security using her airline identification. She boarded the United airplane that was scheduled to depart at around 2:00 pm to New York, La Guardia airport. After boarding the aircraft she changed out of her airline uniform and into "civilian" wear for personal comfort. She was assigned a regular seat.

As Petitioner was returning to her seat with her tote bag after changing her clothing, her foot caught on the assembly which bolted the seats to floor. She heard an audible "pop" and her left knee collapsed.

The Petitioner reported the incident to the purser aboard the flight and continued her travel to New York. The Petitioner took aspirin and upon arrival to New York left the aircraft by wheelchair.

The Petitioner testified that she arrived in New York at around 8:00 pm. She was scheduled to fly out the next morning on a flight crew. She intended to spend the night at the Pan American Hotel, a commuter pad. The hotel was neither selected by, nor paid for by the Respondent.

The Petitioner sought emergency medical treatment upon arrival in New York. She contacted the Flight Attendant Service Center in the early morning hours of

September 14, 2011 in order to notify her employer that she would not be able to work her scheduled flight and would have to go on "sick list". The Petitioner received treatment, including surgical reconstruction of her ACL and torn lateral meniscus. She was released to full duty work on April 10, 2012 and underwent mandatory re-certification on May 2, 2012.

At the time of the incident, Petitioner was a 16 year employee of Respondent employed as a flight attendant and resided in Boulder, Colorado. She was based out of New York City and regularly flew internationally out of Kennedy Airport. She customarily drove her private vehicle from her home in Boulder to Denver Airport where she would park in the employee parking lot, board a United Airlines flight and commute to New York City where she was "domiciled".

The Petitioner flew as a non-revenue passenger on United Airline flights to reach her base of employment. She was not compensated for her "commuting time", she did not wear her uniform and had no responsibilities aboard these flights from her place of residence to her home base or "domicile". The Petitioner's duties to her employer did not begin until she joined a flight crew in her domicile city.

The Respondent was aware that many flight attendants chose to reside in locations other than where they were domiciled. The Respondent did not require that the Petitioner, or any other flight attendant, live in any particular location or within any specific proximity to their domicile. Where the Petitioner chose to reside was entirely within her discretion and was not influenced by or under the control of the Respondent.

The Respondent derived no benefit from the Petitioner's choice of residence. In 2006 the Respondent offered Petitioner a transfer to Denver which she declined, choosing instead to continue commuting. The Respondent provided the Petitioner with unlimited leisure flight passes which allowed her to travel without cost anywhere in the world, including from Denver to New York.

The Petitioner used a free leisure travel pass provided by the Respondent for her commute from Denver to New York City on September 13,2011. This leisure travel pass did not guarantee the Petitioner a seat on this or any flight. The Petitioner made the flight selection herself. She did not receive any compensation, reimbursement or vouchers for meals or personal expenses incurred the evening prior to her scheduled flight on September 14, 2014.

At trial the Respondent called Robert Krabbe who is employed as a Human Resources Generalist for United Airlines. He testified that flight attendants are not compensated for the time they spend commuting to base airports even if they fly on a United aircraft. Flight attendants are paid on a per-trip basis. Pay commences when the aircraft departs a gate until the flight arrives at its destination.

All airline employees are given the same travel pass privileges, which include unlimited world-wide pass travel that is free in main cabin seats. A commuting flight attendant is given no priority in the use of travel passes. Respondent United Airlines does not control where any employee lives or how they get to work.

14IWCC0585

ANALYSIS

The Arbitrator noted in his decision the paucity of any Appellate or Supreme Court case law explaining the doctrine of the traveling employee. For that reason the Arbitrator cited and followed the holding in Susanne Larson v. United Airlines, Inc.,case number 03 WC 966 and 05 ILWCC 0298. The arbitrator's decision was filed on August 15, 2013.

On December 19, 2013 the Illinois Supreme Court filed its decision in The Venture- Newburg-Perini, Stone & Webster v. Illinois Workers' Compensation Commission 2013 IL 115728, Docket No. 115728. The Illinois Supreme Court determined that the Petitioner in Venture-Newberg was not a traveling employee at the time of the accident and explained the criteria for what constitutes a traveling employee within the meaning of the Workers' Compensation Act. The Court's analysis is instructive for the instant case while the facts are not identical.

The Venture- Newberg case arose out of a vehicle accident which occurred when two workers were driving from a motel where they were temporarily lodged while working on a project located about 200 miles from their Local 137 union territory in Springfield, Illinois. Petitioner Daugherty and his co-worker McGill were affiliated with Pipefitters Local 137 in Springfield, Illinois. Due to a lack of available work in the local area both men took positions with Venture at their Cordova plant. While working at the plant Petitioner Daugherty was expected to work 12 hours per day, 7 days a week for the duration of the temporary job.

At hearing, Petitioner Daugherty testified that Venture-Newberg wanted workers to be within an hour's drive from the plant, so that they would be available to work as needed. Daugherty and McGill took accommodations at a motel located about 30 miles from the Cordova plant. Venture did not direct employees where to stay or what route to take to work. Daugherty was not compensated for his travel expenses or his travel time. In Venture- Newberg the Supreme Court discussed two seminal Illinois cases dealing with the issue of "traveling employees".

In Wright v. Industrial Comm'n, 62 Ill. 2d 65(1975) and Chicago Bridge & Iron,Inc. v. Industrial Comm'n, 248 Ill.App.3d 687 (1993). The Supreme Court has found that injuries arising from three categories of acts are compensable:1) acts the employer instructs the employee to perform; 2) acts which the employee has a common law duty to perform while performing the duties for his employer; and 3) acts which the employee might reasonably be expected to perform incident to his assigned duties. Petitioner claims the third category applies to her case. The Supreme Court in Venture-Newberg applied the analysis in both the Wright and Chicago Bridge & Iron cases, but distinguished Venture-Newberg on its facts.

In both the Wright and Chicago Bridge cases, the Petitioners were regular employees who were required to travel to remote locations for their job and were reimbursed for travel. The Supreme Court noted that the Venture-Newberg Petitioner was

not required to travel to remote locations and was not reimbursed for his travel from the lodge to the work-site, noting that "nothing in Daugherty's contract required him to travel out of his union's territory to take the position with Venture."

Similar to the facts in Venture- Newberg, Petitioner Isern made a personal choice to live in Boulder, Colorado and to travel from Denver to New York which was her home base or domicile.

The Respondent received no benefit from the Petitioner's choice of residence and exerted no control as to where the Petitioner chose to reside. There is no evidence that the Respondent offered employment to the Petitioner only out of the New York domicile. On the contrary, the Petitioner acknowledged that Respondent had offered to relocate her domicile to Denver and she declined.

The Respondent did not direct the Petitioner to reside hundreds of miles from her domicile. Petitioner accepted the employment and selected her residence with full knowledge that she would be commuting hundreds of miles to her home base. When offered a domicile close to her residence, Petitioner declined.

Similar to the Venture- Newberg situation the Respondent did not compensate the Petitioner for her time or travel expenses associated with her voluntary commute from Denver to New York City. The Petitioner selected her own flight utilizing leisure travel passes available to all airline personnel. The Respondent did not offer preferential utilization of the passes based on Petitioner's status as a commuting employee.

The Petitioner selected and paid for her own hotel accommodations, transfers and meals in New York on the evening prior to her assigned flight. She flew into LaGuardia on September 13, 2011 and was scheduled as flight crew the following day, September 14, 2011 out of JFK. The Respondent, United Airlines exerted no control over what modality of transportation the Petitioner chose to arrive at her domicile to report for work. As with any employee the expectation was that Petitioner would arrive on time and fit for service.

The evidence did demonstrate that the Respondent was aware that the Petitioner resided in Colorado. The evidence further showed that flight attendants routinely availed themselves of the privilege of free leisure passes in order to commute from their homes to their domiciles to report for service. There was no evidence presented however that the Petitioner's travel from Denver to New York on September 13, 2011 was determined by the demands or exigencies of her job. Her travel on that date arose out of the personal choice she made to maintain her residence in Colorado and maintain her domicile in New York.

It is important to note that in this case the Petitioner was also not assigned by her employer to travel from some location, Chicago O-Hare, by way of example and join her flight crew in her domicile. If such were the case Petitioner would be a traveling employee and she would be acting at the instruction of or benefiting the employer as a result of her travel to her domicile. This was not the circumstance in the present case. Here, the Petitioner was traveling due to her personal choice only.

Clearly, the Petitioner's job required that she travel for her employer. The employee is designated as "traveling" when she travels away from her employer's

premises. Hoffman v. Industrial Comm'n 109 Ill 2d 194,199(1985). Here, the segment of travel that was a function of the Petitioner's personal choice rather than her work

assignment terminated when she would report to work at her domicile at JFK. The employer's "premises" for purpose of this analysis would be JFK rather than Denver.

The Supreme Court of Illinois held that the Venture- Newberg claimant was not a traveling employee because he made the personal decision to accept a position with Venture at a plant located approximately 200 miles from his home and Venture did not direct the claimant to accept the position at the Cordova plant. The Supreme Court explained that the claimant "made the personal decision to accept the position at Cordova and the additional travel and travel risks that it entailed." Likewise, in the case at bar, the Commission finds that Petitioner was not a traveling employee when she injured her left knee on September 13, 2011. Petitioner made the personal decision to accept a position with Respondent as a flight attendant based in New York although she lived in Colorado. Respondent did not direct Petitioner to accept the position. By accepting a position that required her to travel from Colorado to New York for work, Petitioner also accepted the travel risks that were entailed, including the risk of injury during the commute.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on August 15, 2013, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay 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.

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

DATED: JUL 17 2014
SM/msb
o-05/01/14
44

Stephen J. Mathis

David L. Gore

Mario Basurto

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

KRISTINE ISERN
Employee/Petitioner
v.
UNITED AIRLINES, INC.
Employer/Respondent

Case # 12 WC 26238

14IWCC0585

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 **July 23, 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 _____

FINDINGS

On **9-13-11**, 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 **$43,999.80**; the average weekly wage was **$846.15**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of **$11,749.83** under Section 8(J) of the Act, Medical Benefits
Respondent is entitled to a credit of $4,080.00 under 8(J) of the act for a non-occupational disability benefits.

ORDER

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

Respondent shall be given a credit of **$11,749.83** for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall be given credit for $4,080.00 for non-occupational disability benefits paid under Section 8(J) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $564.10 /week for 33-1/7 weeks, commencing 9-14-11 through 5-2-12, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9-13-11 through 8-15-13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $0.00 for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $(see attached).73, as provided in Section 8(a) of the Act, pursuant to the medical fee schedule.

Respondent shall be given a credit of $11,749.83 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $507.69/week for 53.75 weeks, because the injuries sustained caused the 25% loss of the left leg , as provided in Section 8(e) 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.

David A. Kane
Signature of Arbitrator

August 15, 2013
Date

AUG 15 2013

(I) BRIEF SUMMARY OF THE RELEVANT LAY TESTIMONY

(Ia) THE TESTIMONY OF KRISTINE ISERN

Ms. Isern has been employed for the last 16 years as a flight attendant for respondent. (TR.pg. 14) On 9-13-11, Petitioner was based in New York City but resided in Boulder, Colorado. (See TR. pg. 15) She was based in New York City as a flight attendant for respondent for almost 16 years. During that entire time period she made her home was in Boulder, CO. (TR. pg. 15)

At all times herein relevant, Ms. Isern would travel on a United Airlines flight from Denver, CO to her New York domicile/base. (TR. pg. 16) At no time did anyone ever tell the petitioner that she shouldn't be living in Colorado and commuting to New York. (TR. pg 16) There is no job requirement written at United Airlines requiring a flight attendant who is based in New York City which required her to reside in the New York area. (TR. pg. 16) At the time of petitioner's injury, 80% of the New York based flight attendants commuted to New York from other areas outside the New York Area. (TR. pg. 19)

On 9-13-11, Ms. Isern was flying from Denver, Colorado to New York's La Guardia Airport. (TR. pg. 19) Ms. Isern's flight was scheduled to arrive in New York at around 8:00pm. (TR. pg. 20) Ms. Isern was scheduled to work a flight out of New York in the early morning hours of 9-14-11. (TR. pg. 20)

When Ms. Isern arrived at the Denver Airport, she parked her vehicle in the Landslide Employee Lot. (TR. pg. 20) Ms. Isern uses a

United swipe card to gain access to the United Airlines employee only parking lot, the Landslide lot. (TR. pg. 20-21) Ms. Isern does not pay anything for her parking privileges in the United Landslide lot. (TR. pg. 21) United allows Ms. Isern to park for free in Denver and also allows Ms. Isern to board a United flight from Denver to New York free of charge. (TR. pg. 22) Ms. Isern always flew 100% of the time on United, when going from Denver to New York. (TR. pg.22) As mentioned, previously, Ms. Isern paid nothing toward her airline ticket from Denver to New York, United provided that benefit. (TR. pg. 23) Ms. Isern could not have afforded to purchase her own airline tickets to commute from Denver to New York and back. (TR. pg. 25-27)

Ms. Isern commutes back and forth from Denver to New York between two and eight times per month. (TR. pg. 28) Ms. Isern wears her United work uniform when a boarding flight from Denver to New York as it provides her with baggage exemptions and security ease. (TR. pg. 28-30)

On the 9-13-11 flight from Denver to New York City, and while attempting to get into her seat, Ms. Isern's left foot got caught on the area where the seats are bolted to the airplane floor causing her left knee to move sideways. (TR. pg. 30) When Ms. Isern's left knee moved sideways, she heard a loud pop in her left knee. (TR. pg. 30) As the flight progressed, Ms. Isern's left knee got worse and she eventually reported what had occurred to the purser on the flight, Loucona Cornio. (TR. pg. 32)

When the plane arrived in New York City, Ms. Isern tried to stand up and her entire left knee collapsed. (TR.pg.33) Ms. Isern was taken off the flight by United Airlines personnel in a wheel chair. (TR. pg. 33) Ms. Isern let her United domicile know that very day, 9-13-11, how her accident had occurred. (TR. pg. 34)

Ms. Isern stays at the Pan American Hotel routinely on the night before the flights she works. (TR. pg. 34) Ms. Isern was taken from the airport to the Hotel and then to the Elmhurst Memorial Hospital by the Pan American's Hotel shuttle. (TR. pg. 39) From the Elmhurst Memorial Hospital emergency room, Ms. Isern phoned the flight attendant service center letting them know how her accident occurred and that she would not be able to work her flight on 9-14-11.(TR.pg. 35-39) After being discharged from the emergency room, Ms. Isern went back to the Pan American Hotel. (TR.pg. 40)

From the Pan American Hotel, Ms. Isern called her supervisor at her United domicile, Patti Troy, and reported her injury and how it had occurred. (TR. pg. 40) Ms. Isern also faxed her supervisor on 9-15-11, a hand written accident report. (TR. pg. 44-44 and petitioner's exhibit #9)

Her injury to the left knee caused Ms. Isern to come under the care and treatment of Dr. McCarthy an orthopedic surgeon. Dr. McCarthy restricted Ms. Isern's ability to work from 9-14-11 through 4-10-12. (TR. pg. 47) Ms. Isern underwent a complete reconstruction of her left knee on 10-18-11 at the Boulder Surgery Center to repair a

complete anterior cruciate ligament (ACL) rupture as well as a meniscal tear. (TR. pg. 47-48)

Ms. Isern needed to attend a required requalification course for United after she concluded treatment before United allowed her to return to work. This completed this retraining or requalification course on 5-2-12 (TR. pg. 51 & 52)

(IIb) A SUMMARY OF THE TESTIMONY OF ROBERT CRABBE

Mr. Crabbe admitted that United Airlines travel benefits are used by United employees to commute to and from there domicile. (TR. pg. 142)

United Airlines employees routinely use there travel passes to commute to and from where they live and where they work. (Tr. pg. 144) This is a fact acknowledged by all Senior United Executives. (TR. pg. 144) Ms. Isern was also provided with a free parking pass at the United Airlines employee parking lot in Denver, Colorado, which helped facilitate her ability to commute.

(II) APPLICABLE LAW

The issue of law in this case is whether a flight attendant traveling from where she lives to her work domicile qualifies her as a traveling employee for workman's compensation purposes when injured going to her work domicile. This issue has been decided previously by the Illinois Workers Compensation Commission on several previous occasions. Most recently and the controlling case

law can be found in Susanne Larson v. United Airlines, Inc., Case No. 03 WC 966 & 05IWCC0298. (Please see attached Decision)

Commissioner Pigatt, DeMunno and Basurto all found that petitioner in the Larson case was entitled to the status of traveling employee while commuting from her home to her work domicile. This Arbitrator notes that the facts in this matter at bar are almost identical to the facts in the Susanne Larson case.

In Larson, the Commission stated:

"...In so doing the Commission rejects the position that Petitioner was merely "in transit" and on her way to work so as to take her out of the course of her employment at the time of her fall. Rather, the record supports a finding that Petitioner is properly considered a traveling employee under the Act in that her work for Respondent clearly created the necessity for travel."

"In support, the Commission notes that in order to make her international flight Petitioner was required to fly from Colorado to Chicago. This Commission notes that Petitioner chose to live in Colorado. Nevertheless, Respondent approved the arrangement, reimbursed a majority of the monthly parking expense as a matter of course and supplied Petitioner with unlimited flight passes to use on her flight to Chicago with a diminimus portion of the flight cost taken out of Petitioner's pay."

"Petitioner's parking at the Colorado airport up to a set limit of $25.00. Petitioner pays $10.00 per month out of her own pocket to park at the airport in Colorado in order to fly to Chicago and catch her next international flight. (T.11) Petitioner is not paid while flying to Chicago. Petitioner is paid only for the international leg of her trip."

These facts in Larson, as previously mentioned by this Arbitrator, are exactly similar to the facts of Ms. Isern's case.

As such this Arbitrator finds the Larson case on point and controlling and as such finds Ms. Isern at the time of her injury to be entitled to the status of a traveling employee.

The Arbitrator notes, however, that while bound by Commission precedent to decide this issue in favor of Petitioner, the only case law on this rather narrow point of law is Commission precedent; there is no Appellate or /supreme Court case law on point. In the absence of Commission case law, the Arbitrator may well have found Respondent's arguments persuasive. However, Commission precedent is binding on the Arbitrator.

(III) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING THE ACCIDENT THE ARBITRATOR FINDS AS FOLLOWS:

Due to the legal precedent contained in the body of paragraph (II) of this decision, the Arbitrator finds petitioner to have been a

traveling employee on 9-13-11. The question surrounding the accident concerning a traveling employee is whether the conduct leading up to the accident was reasonable and foreseeable.

The Arbitrator again notes that despite the Respondent's cogent arguments, the Commission case law supports Petitioner's claim and the Arbitrator finds petitioner to have incurred a compensable accident that arose out of and in the course of her employment on 9-13-11.

(IV) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING CAUSAL CONNECTION THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes respondent's contention and dispute in this case was really only based on whether petitioner's accident out of and in the course of her employment. It is quite obvious to the Arbitrator when looking at petitioner's exhibits #1 and 2 that proper histories of petitioner's injury to her left knee on 9-13-11 are duly recorded. Dr. McCarthy, petitioner's treating surgeon, clearly relates petitioner's left knee injury with internal derangement to the accident 9-13-11 which is detailed on her first visit. No other doctor indicates a contrary opinion. (See pet#2)

As such the Arbitrator finds petitioner's left leg injury is causally related to her compensable accident of 9-13-11 as previously described herein.

(V) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING NOTICE THE ARBITRATOR FINDS AS FOLLOWS:

Notice in this case was given to the respondent by petitioner on numerous occasions. First, petitioner let the purser on her flight know shortly after the occurrence how the accident occurred. In addition, petitioner was taken off the flight by the United Airlines flight attendants. Second, she was taken by the personnel to the emergency room. Third, she explained to the service center that she would be unable to work her 9-14-14 flight. Fourth, in the morning hours of 9-14-11 petitioner called Patti Troy her supervisor in New York and explained how the accident occurred. Fifth, Ms. Isern faxed into her domicile on 9-15-11 a written accident report.

For all of these reasons the Arbitrator finds petitioner gave proper notice on numerous occasions.

(VI) IN SUPPORT OF THE ARBITRATOR'S FINDING CONCERNING TTD, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes both sides stipulated that petitioner was temporarily and totally disabled at least from 9-14-11 through 4-10-12. Respondent's only dispute with respect to this period was concerning liability which has been previously found by the Arbitrator. Petitioner testified to needing to attend a requalification course before being able to return to flying. She completed the first available retraining course following her 4-10-12 medical release on 5-2-12. Petitioner returned to work on 5-3-12.

As such, the Arbitrator finds petitioner to have been temporarily and totally disabled from 9-14-11 through 5-2-12.

(VII) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING MEDICAL EXPENSES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that Respondent did not introduce any evidence to rebut Petitioner's claim that the medical bills submitted were reasonable and necessary to cure or relive her condition of ill-being.

The Arbitrator awards the petitioner $35,699.73 in medical expenses pursuant to the fee schedule less respondent's 8(j) of $11,749.83 for a total due in unpaid medical of $23,949.90. These amounts are for the amounts submitted and Respondent is only liable for the amounts as set forth in the medical fee schedule.

(VIII) IN SUPPORT OF THE ARBITRATOR'S DECISION CONCERNING NATURE AND EXTENT THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and after considering the entire record, the Arbitrator finds that Petitioner sustained the complete and permanent loss of use of the left leg to the extent of 25% thereof under section 8(e) of the Act.

(IX) IN SUPPORT OF ARBITRATOR'S DECISION CONCERNING PENALITES AND FEES THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator has carefully considered whether penalties and attorney's fees should be imposed. Despite the Commission precedent, the Arbitrator believes that Respondent has reasonable arguments regarding the compensability of this case. The Arbitrator therefore declines to impose penalties or fees.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY BUCIO,

Petitioner,

vs. NO: 12 WC 13065

DIVERSIFIED RECYCLING,

Respondent.

15IWCC0750

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner worked for Respondent, assisting in the processing and sorting of recyclable materials. Prior to November 6, 2011 he had never been prescribed glasses or contact lenses.

2. On November 6, 2011, Petitioner was tasked with fixing a conveyor belt, which required him to drill holes into metal. He was working with his supervisor indoors, but there was inadequate lighting. Due to this inadequacy, he removed the safety goggles he was wearing in order to obtain better vision.

3. While drilling, a bracket broke and Petitioner felt something in his left eye. He then

went to the restroom and noticed a black spot in his eye.

4. Petitioner informed his supervisor, and was provided with some eye drops, which did not solve the problem. Subsequently the supervisor recommended that Petitioner rub Vick's Vapor Rub on his face.

5. Three days later Petitioner began losing his eye sight in his left eye.

6. On February 7, 2012 Petitioner was diagnosed with ocular penetration and was referred to the Illinois Eye Infirmary.

7. On February 18, 2012 he complained of left eye pain, redness and photo phobia. He underwent emergency surgery to remove metal out of his eye, and did not return to work until March 5, 2012. However, at that time he still had no vision in his left eye. The following day Petitioner brought a letter in authored by his doctor, which indicated that he was legally blind in his left eye. He was subsequently terminated.

8. On May 22, 2012 Petitioner received a contact lens from the Illinois College of Optometry. He must return for a new lens every 6 months for the remainder of his life. With the lens, he testified that he can see "a little bit," but cannot distinguish small things, such as facial features, at a distance of 7 feet. At a distance of 20 feet he is unable to distinguish a man from a woman.

9. Petitioner underwent an Independent Medical Examination (IME) with Dr. Golden-Brenner on December 16, 2013. Using the American Medical Association's "Guides to the Evaluation of Permanent Impairment," Dr. Golden-Brenner found a 0.4% of an eye impairment rating. Dr. Golden-Brenner also noted that Petitioner was a 45 year old Laborer at the time of accident, noted his current earnings of $14.25/hr. at his place of new employment (which is more than what he earned working for Respondent), and noted that Petitioner must visit an optometrist every 6 months for the remainder of his life to receive new contact lenses. However, Petitioner can only wear the lenses 8-10 hours daily, which means he must navigate the rest of each day without vision in his left eye. He also must use lubricating drops in his eye.

Regarding permanent partial disability, the Commission views the evidence in a slightly different manner than does the Arbitrator, and thus modifies the award up to a 45% loss of use of Petitioner's left eye.

Using the American Medical Association's "Guides to the Evaluation of Permanent Impairment" evaluation, the Commission finds that the appropriate permanent partial disability award is a 45% loss of use of Petitioner's left eye. The impairment finding of Dr. Golden-Brenner is credible and unrebutted. Furthermore, Petitioner was only 45 years old at the time of accident, which is not a significant detriment to his employability, as is evidenced by the fact that he now earns more than he did pre-accident.

15IWCC0750

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 72.9 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 45% loss of use of Petitioner's left eye.

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 $42,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 2 8 2015
DLG/wde
O: 7/30/15
45

David L. Gore

Mario Basurto

Stephen Mathis

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

15IWCC0750

☐ 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

ANTHONY BUCIO
Employee/Petitioner

v.

DIVERSIFIED RECYCLING
Employer/Respondent

Case # **12** WC **13065**

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 11, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 6, 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 **$350.00**; the average weekly wage was **$18,200.00**.

On the date of accident, Petitioner was **45** years of age, ***single*** 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 **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

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

ORDER

- Petitioner has incurred medical bills in the amount of $30,458.44 as stipulated by the parties. The Arbitrator orders that pursuant to Section 7080.2 of the Administrative Code, "Payments of Proceeds on Litigation", Respondent will pay the fee schedule amount of Petitioner's bills directly to Petitioner's attorneys for the benefit of Petitioner. Respondent is ordered not to pay the providers directly.

- Respondent will pay to Petitioner TTD for 1 and 3/7 weeks at a rate of $286.00 per week.

- The Arbitrator finds that Petitioner has lost 25% of the vision in his left eye and is entitled to 40.5 weeks of compensation at a permanency rate of $286.00.

- The Arbitrator orders the Respondent to pay for future in medical in the form of the costs of necessary contact lenses and follow-up examinations for life *or* the intraocular lens implant procedure as recommended as a possible option by Dr. Carrie Golden-Brenner at Petitioner's discretion.

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

9/22/14
Date

SEP 23 2014

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

15IWCC0750

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY BUCIO,
Petitioner,

vs.

DIVERSIFIED RECYCLING,
Respondent.

Case No.: 12 WC 13065

ADDENDUM TO ARBITRATION DECISION

FINDINGS OF FACT

The Petitioner was employed by Respondent for three years prior to November 6, 2011. His job title was laborer. Petitioner testified that prior to November 6, 2011 he never wore glasses or contact lenses. Petitioner received an OSHA license to drive a lift.

At approximately 9:00 a.m. on November 6, 2011, the Petitioner was working at Respondent's plant in Homewood, Illinois. He was assigned the task of fixing a conveyor by drilling holes into metal in order to install a plastic guard so that the recycling materials would not fall off the conveyor. Petitioner testified that although he was working indoors, it was cold and his safety glasses kept getting foggy so he removed them. Petitioner was working side by side with his supervisor, Ernesto Valencia.

Petitioner testified immediately after the metal shard struck his eye he noticed a dark spot in his field of vision. Petitioner attempted to wash his eye and apply eye drops. Petitioner's supervisor also suggested that he apply Vicks vapor rub on his face to cause the eye to tear up. Petitioner testified that he followed his supervisor's advice to no avail.

Petitioner testified that by the third day after the accident, his left eye was red and he was beginning to lose his vision.

Medical Treatment

Petitioner sought assistance at a family medical clinic called "Aunt Martha's" as his eye condition was getting worse. Petitioner testified that the Aunt Martha clinic was unable to assist him and referred him to the Midwest Eye Center.

Petitioner testified that after three days, he had lost vision in his left eye and the eye was red and irritated.

On February 7, 2012, Petitioner presented to the Midwest Eye Center where a history of "drilling without safety glasses and getting metal in his left eye" was noted. Petitioner was diagnosed as suffering from "ocular penetration" and referred the Petitioner to the UIC Eye Infirmary. (PX. 2).

On February 18, 2012, Petitioner presented to the UIC Eye Infirmary, whose records reflect Petitioner's complaints of pain, redness and lack of vision in the left eye. (PX. 3). Petitioner was scheduled for same day surgery noted to be a pars plana vitrectomy lensectomy, intra ocular foreign body removal and orbital exploration.

The surgery resulted in the removal of the foreign body metal measuring .3 cm.

On February 28, 2012, Dr. Chow at UIC noted that Petitioner is "waiting to get a contact lens to improve vision in his left eye. He is legally blind without the contact lens. However, he has perfect 20/20 vision [in the] right eye. He can return to work but needs safety goggles at all times. No high heights." (PX 3).

On March 26, 2012, records from UIC documents vision without correction for finger counting at 1 foot. Vision with a +16 lens was 20/60 + 2. Petitioner's status post surgery was noted as "doing well; inflammation improved."

Petitioner testified that after surgery, he was blind in the left eye.

Petitioner testified that he was provided with a disability slip and off work instructions from February 18, 2012, through February 28, 2012.

Petitioner continued to follow-up at the University of Illinois through March 26, 2012.

Petitioner was referred to the Illinois Eye Institute for fitting of a contact lens.

Petitioner testified that he is still treating at the Illinois Eye Institute and will be required to follow up every six months for life for the purpose of obtaining a new supply of contact lenses. (PX. 1).

Petitioner testified that he is blind in the left eye. Petitioner testified that he cannot see two fingers in front of his left eye from one foot away. Petitioner testified that with the contact lens, he can barely distinguish that a human being is standing seven feet in front of him.

Dr. Golden-Brenner Exam on behalf of Respondent

On December 16, 2013, Petitioner was examined at Respondent's request by Dr. Carrie Golden-Brenner. Dr. Golden-Brenner performed several tests on Petitioner. Based on the testing, it was the doctor's opinion that Petitioner has 20/20 vision in his right eye and corrected 20/20-2 vision for distance and 20/20 for nearby vision in his left eye. Petitioner was found to have decreased depth perception. Dr. Golden-Brenner explained in her report that Petitioner's decreased depth perception may improve over time with the contact lens. Examination with flourescin demonstrated no scarring which shows a well healed scar in the left eye. Dr. Golden-Brenner agreed Petitioner would require use of a contact lens to correct his vision due to the type of surgery performed secondary to the incident on November 6, 2011.

Dr. Golden-Brenner also prepared an impairment rating detailing the level of impairment experienced by Petitioner according to the AMA 6th edition guidelines. Dr. Golden-Brenner reported

an impairment rating of 0.4% based upon the AMA guidelines and reported Petitioner essentially has no functional disability when using his contact lens as a result of his November 6, 2011 incident.

CONCLUSIONS OF LAW

Medical Bills:

Respondent stipulated that they would hold Petitioner harmless from any bills incurred for reasonable and related treatment to the alleged injury pursuant to the Illinois Worker's Compensation Medical Fee Schedule or previously negotiated rate. (AX. 1).

The medical bills incurred by Petitioner are as follows:

Provider	Start Treatment	Stop Treatment	Charges
Midwest Eye Center	2/07/12	02/07/12	185.00
University of Illinois Hospital& Health Sciences System	02/18/12	02/22/12	22,496.44
University of Illinois at Chicago Physician Group	02/18/12	02/18/12	7,526.00
Illinois College of Optometry- previously Illinois Eye Institute	05/22/12	06/08/12	251.00
		TOTAL	**30,458.44**

TTD:

Petitioner was instructed to be off work from the surgery date of February 18, 2012, through February 28, 2012. (PX. 3). Respondent is ordered to pay to Petitioner TTD for 1 3/7 weeks at a rate of $286.00.

Nature and Extent:

The Arbitrator notes Dr. Golden-Brenner's impairment rating of 0.4% of an eye is only one of the five considerations taken into account when determining disability. Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

(i) The reported level of impairment pursuant to subsection (a) (e.g.; the AMA rating)
(ii) The occupation of the injured employee
(iii) The age of the employee at the time of the injury
(iv) The employee's future earning capacity
(v) Evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Petitioner was 45 years old at the time of his injury. The Arbitrator assigns this factor relatively little weight.

Petitioner is currently employed by Sterling Lumber as a laborer. The Arbitrator does give this factor some weight in her determination as Petitioner's occupation is physical in nature.

Petitioner testified he was making more money at the time of trial than he was when employed by Respondent. His current earning capacity has not diminished as a result of his injury which is a likely indication that his injury will have no bearing on his future earning capacity.

According to Dr. Golden-Brenner, Petitioner's impairment rating is 0.4% of an eye. The Arbitrator does accord Dr. Golden-Brenner's rating a great deal of weight in her deliberation.

The Arbitrator notes the following evidence of disability that is corroborated by the treating records:

1. Petitioner must visit an optometrist every year for life for the purpose of an eye exam and contact re-orders;
2. Petitioner was instructed by his doctor to wear the contact lens for no longer than 8-10 hours a day which means he must go for part of the day without the visual correction that the lens affords;
3. Petitioner must use lubricating drops in his left eye.

The Arbitrator accords a great deal of weight to the disability as evidenced by Petitioner's treating records and finds that Petitioner has suffered a significant, permanent disability.

After careful consideration of the five factors, the Arbitrator awards Petitioner 25% of a left eye or 40.5 weeks of PPD at a rate of $286.00.

Future Medical Care:

Petitioner testified that he is still treating at the Illinois Eye Institute and will be required to follow up every six months for life for the purpose of obtaining a new supply of contact lenses. (PX. 1).

Dr. Carrie Golden-Brenner opined that Petitioner may continue the use of the contact lenses. Dr. Golden-Brenner also noted that Petitioner may be a candidate for further surgery in the form of a secondary intraocular lens implant.

The Arbitrator orders the Respondent to pay for future in medical in the form of the costs of necessary contact lenses and follow-up examinations *or* the intraocular lens implant procedure as recommended as a possible option by Dr. Carrie Golden-Brenner at Petitioner's discretion.